

UDC 341.231.14:[614.2:616-036.21](4)

DOI: 10.18523/2617-2607.2021.8.92-96

Ivan Yatskevych

ORCID: <https://orcid.org/0000-0002-9734-067>

HUMAN RIGHTS AND COVID-19 PANDEMIC CHALLENGE: WHAT IS THE ECHR APPROACH?

The European Court of Human Rights has already addressed certain issues caused by or connected to COVID-19 pandemic situation and numerous restrictions introduced by states to counteract virus propagation. It is necessary to mention that there are many applications pending judgments or declared inadmissible. Herewith we are going to comment on recently decided cases on the topic of COVID-19 health crisis and human rights protection. Meanwhile, there are more cases expected to be decided as many applications are pending examination by the European Court in Strasbourg.

Keywords: human rights, public health, pandemic, vaccination, lockdown.

The issue of COVID-19 pandemic measures and means applied to cease development and propagation of this dangerous virus are supplemented by restriction of personal rights and freedoms covered by the European Convention of Human Rights. Thus, pursuing public interests and social wellbeing state authorities must undertake unpopular and sometimes risky decisions balancing between human rights restrictions and implementing necessary measures to counteract the situation of the pandemic. The more dramatic situation with infection is that the stricter measures are taken by governments the more citizens are unhappy or may be mistreated because of such limitations and restrictions.

As per ECtHR Factsheet (January 2022), “applications relating to the COVID-19 health crisis before the European Court of Human Rights raise questions under a number of provisions of the European Convention on Human Rights, in particular in terms of the right to life, the prohibition of torture and inhuman or degrading treatment, the right to liberty and security, the right to a fair trial, the right to respect for private and family life, freedom of religion, freedom of expression, freedom

of reunion, the protection of property and freedom of movement,”¹ but many applications have already been declared inadmissible. There are many applications pending governments’ reaction to court communications.

In the case *Feilazoo v. Malta*² decided by ECtHR (Chamber judgment, 11 March 2021), the applicant Joseph Feilazoo, Nigerian national was released from prison on the 14th of September 2019 and was immediately placed into immigration detention where he was held until the 13th of November 2020. Being isolated during imprisonment, the applicant had been placed into other living quarters where new arrivals had been kept in COVID-19 quarantine. Since there was no need for such quarantine for the applicant who spent seven weeks in isolation, there was no reason to keep him together with other people due to quarantine reasons. The Court was very concerned *inter alia* by the un rebutted allegations that the applicant had been housed with people in COVID-19 quarantine where there appeared to have been no medical reason to do so.

¹ ECHR, “COVID-19 Health Crisis,” January 2022, https://www.echr.coe.int/Documents/FS_Covid_ENG.pdf.

² *Feilazoo v. Malta*, No. 6865/19 (ECHR, 3 November 2021).

The Court found a violation of the applicant's Article 3 rights based on poor conditions of detention, including the unreasonable quarantine period. "Concerning the applicant's conditions of detention, the Court reiterated, in particular, that under the Convention, the State had to ensure that people were detained in conditions that respect the human dignity and that avoid unnecessary hardship,"³ according to the press release issued by the Registrar of the Court. Thus, placing the applicant, for several weeks, with other persons who could have posed a risk to his health (COVID-19), in the absence of any relevant consideration to that effect, could not be considered as a measure complying with basic sanitary requirements. Eventually, the Court unanimously found it to be a violation of Article 3.

The Court declared inadmissible several complaints under Article 5 (right to liberty and security), for instance, in another case against Malta, namely *Fenech v. Malta* (23 March 2021), as well as the applications in cases *Bah v. Netherlands* (22 June 2021) and *Tehes v. Romania* (20 May 2021). These cases are interesting due to their circumstances related to COVID-19 pandemic and the Court's approach to admissibility of applicants' statements regarding authorities' measures against the pandemic situation in relation to an applicant's relevant situation.

In the case of *Fenech v. Malta*, the Court declared inadmissible the applicant's complaints under Article 5 of the Convention for suspended criminal proceedings because of national measures to counteract the propagation of the COVID-19. In particular, the Court noted that "the applicant had not referred to any failings, delays, or omissions on behalf of the authorities, apart from the time the proceedings had been suspended due to the emergency measures. That temporary suspension had been due to the exceptional circumstances surrounding a global pandemic which, as held by the Constitutional Court, justified such lawful measures in the interest of public health, as well as that of the applicant. It followed that it could not be said that the duty of special diligence had not been observed."⁴ In other words, the Court justified suspension of criminal proceedings with interest of public health, since the measures were lawful, temporary, and undertaken in the situation of the global pandemic of COVID-19.

³ "Judgment *Feilazoo v. Malta – Multiple Violations of Deportation Detainee's Rights. Deportation Detainee Housed with Covid-19 Quarantine Patients, and Multiple Other Violations*," Press Release Issued by the Registrar of the Court, 3 November 2021, <https://hudoc.echr.coe.int/fre#%7B%22itemid%22:%5B%2203-6960968-9367585%22%7D>.

⁴ ECHR, "COVID-19 Health Crisis."

The decision on the admissibility had also been adopted in the case *Bah v. Netherlands*. In this case the applicant complained that his rights under provisions of Article 5 §§ 1(f), 3 and 5 and Article 6 § 1 of the Convention had been violated because he had not been heard in person by the Regional Court about his immigration detention order. The impossibility to be heard in the immigration detention appeal in person or by tele- or videoconference had been caused by initial infrastructure problems in COVID-19 pandemic. Regarding restrictions and other measures undertaken by authorities of the respondent State, the Court noted, in particular, that, "Given therefore the difficult and unforeseen practical problems with which the State had been confronted during the first weeks of the COVID-19 pandemic, the fact that the applicant had benefited from adversarial proceedings during which he had been represented by and heard through his lawyer who had attended the hearing by telephone and with whom he had had regular contact, the importance of the applicant's other applicable fundamental rights and the general interest of public health, the examination of the detention order without securing his attendance at the hearing in person or by videoconference had not been incompatible with Article 5 § 4."⁵

Finally, in conclusion, the Court declared the application inadmissible and rejected it in accordance with Article 35 §§ 3(a) and 4 of the Convention, since the applicant was entitled "to take proceedings" within the meaning of Article 5 § 4 of the Convention and that in the circumstances of the present case those proceedings met the requirements of that provision.

As we can see, the Court refers to difficult and unforeseen practical problems of pandemic measures during the first weeks of COVID-19, as well as the need to protect general interest of public health as the important circumstance in judging the case. The reasonable and proportionate efforts of the authorities to manage the situation and provide necessary services, as well access to justice to

⁵ *Bah v. the Netherlands*, 35751/20, Legal Summary, <https://hudoc.echr.coe.int/eng?i=002-13357>. The Court ruled that "given the difficult and unforeseen practical problems with which the State was confronted during the first weeks of the Covid-19 pandemic, the fact that the applicant was represented by and heard through his lawyer with whom he had regular contact and who presented his views on his behalf, the importance of the applicant's other applicable fundamental rights and the general interest of public health – referred to in the Administrative Jurisdiction Division's judgment of 7 April 2020 (see paragraph 29 above) – it was not incompatible with Article 5 § 4 to assess the applicant's detention order without securing his attendance at the hearing in person or by videoconference. In this context it should be borne in mind that Article 5 § 4 does not impose the same stringent requirements on hearings as Article 6 under its civil or criminal head..." See: *Bah v. the Netherlands*, 35751/20 (ECHR, 22 June 2021), <https://hudoc.echr.coe.int/eng?i=001-211324>.

ensure judicial review over measure undertaken by the authorities, were found sufficient and adequate in that situation of pandemic COVID-19 lockdown.

In the case *Terhes v. Romania* the Court dealt with the application submitted by an elected member of the European Parliament in 2019, who had been caught by the lockdown introduced in Romania according to the Government's order from the 24th of March to the 14th of May 2020 to tackle the COVID-19 pandemic situation. The applicant claimed that the lockdown imposed in Romania, which the applicant had to follow, amounted to breaching his right to liberty as he was deprived of it as a result of the restrictions imposed. However, the Court declared the application inadmissible due to its incompatibility with the provisions of the Convention. The measures within the lockdown in Romania were not equated with the house arrest, as alleged by the applicant. "Moreover, the level of restrictions on the applicant's freedom of movement had not been such that the general lockdown ordered by the authorities could be deemed to constitute a deprivation of liberty. In the Court's view, the applicant could not therefore be said to have been deprived of his liberty within the meaning of Article 5 § 1 (right to liberty and security) of the Convention."⁶

The Court also noted that measures complained of were not individual but the general ones, applied to everyone through the adopted legislation in Romania. Those limitations lasted twenty-two days, and the applicant was obliged to stay at home, only being allowed to leave for the reasons expressly provided for in the legislation, and with the relevant exemption form. "The level of restrictions on the applicant's freedom of movement had not been such that the general lockdown ordered by the authorities could be deemed to constitute a deprivation of liberty. In the Court's view, the applicant could not therefore be said to have been deprived of his liberty within the meaning of Article 5 § 1 of the Convention."⁷ "The Court noted that the applicant had been free to leave his home for various reasons and could go to different places, at whatever time of day the situation required. He had not been subjected to individual surveillance measures by the authorities and did not claim to have been forced to live in a cramped space nor had he been deprived of all social contact."⁸

In the case *Terhes v. Romania*, the Court also noted that the applicant had not substantiated the

negative impact of the measure complained of on the personal situation he suffered from. The applicant "did not allege that he had been confined indoors for the entire duration of the state of emergency. More generally, the Court noted that he had not provided any specific information describing his actual experience of lockdown."⁹

Closing this short overview and commentary on the cases examined by the ECtHR regarding COVID-19 pandemic, we would like to refer to the *Zambrano v. France* case, which the Court declared inadmissible as well. Similar to the cases mentioned above, this application was declared inadmissible too for several reasons.

The applicant in this case is a university lecturer complaining about the "health pass" introduced in France in 2021. These measures on lifting the limitation of the lockdown were much criticized by French citizens and created the movement to protest against it. The lecturer addressed the visitors of his website with a call to lodge a sort of collective application, but his declared aim was "to trigger "congestion, excessive workload and a backlog" at the Court, to "paralyze its operations" or even to "force the Court's entrance door" "in order to derail the system." The applicant complained about Laws nos. 2021-6891 and 2021-10402, which, in his opinion, were essentially intended to compel individuals to consent to vaccination. He also alleged that, by creating and imposing a health pass system, these laws amounted to a discriminatory interference with the right to respect for private life."¹⁰ Regarding eighteen thousands of repetitive standard applications submitted to the Court as part of the approach initiated by Mr Zambrano, the Court noted that they did not fulfill all of the conditions laid down in Rule 47 § 1 (contents of an individual application) of its Rules of Court.¹¹ Such an approach of the applicant in this case was found contrary to the purpose of the right of an individual application under Article 34 of the Convention. So, such an attempt to lodge complaints with the Court was contrary to the spirit of the Convention and constituted an abuse of the right of an individual petition which belongs to inadmissibility criteria.

Mr Zambrano also alleged, under Articles 8 (right to respect for private life) and 14 (prohibition of discrimination) of the Convention and Article 1 of Protocol No. 12 (general prohibition of discrimination), that by creating and imposing a

⁶ ECHR, "COVID-19 Health Crisis." The Factsheet Covid-19 health crisis.

⁷ ECHR, "The Lockdown Ordered by the Authorities to Tackle the COVID-19 Pandemic Not to Be Equated with House Arrest," Press Release Issued by the Registrar of the Court, 20 May 2021, <https://hudoc.echr.coe.int/eng-press?i=003-7024603-9478039>.

⁸ Ibid.

⁹ ECHR, "COVID-19 Health Crisis."

¹⁰ European Court of Human Rights.

¹¹ ECHR, "Decision Zambrano v. France – Application Which Was Challenging the French "Health Pass", no. 295, 7 October 2021, <https://hudoc.echr.coe.int/eng-press?i=003-7145978-9686694>.

health pass system, these laws amounted to a discriminatory interference with the right to respect for private life, which was not “in accordance with the law,” in that it was not foreseeable, did not pursue a legitimate public-interest purpose and, lastly, although the States’ margin of appreciation was strict, was not necessary in a democratic society.¹²

The applicant in *Zambrano v. France* case did not submit any evidence that he worked in one of the specific occupations subject to compulsory vaccination under Law no. 2021-1040 of 5 August 2021, as well as Mr Zambrano had not shown that, as an individual who did not wish to be vaccinated, he was being subjected to duress. As a result, the applicant failed to prove discrimination on the ground of vaccination in relation to the “health pass” as he did not provide “information about his personal situation or details explaining how the contested laws were liable to directly affect his individual right to respect for his private life.”¹³

It is worth referring to Committee Opinion regarding COVID passes or certificates and protection of fundamental rights and legal implications, dated 19 June 2021.¹⁴ “The committee recalls that, in the middle of a deadly pandemic, the primary duty of member States and the number one public health goal (to safeguard the right to life, on

which the enjoyment of all other human rights depends) is effective infection control. The committee thus considers that “Covid passes” should only be used to exempt their holders from restrictions intended to prevent the spread of the SARS-CoV-2 virus when there is a clear and well-established scientific evidence that a proof of vaccination, past infection or negative test results are effective tools of infection control, namely lower the risk of transmission of the SARS-CoV-2 virus to an acceptable level from a public health point of view.”¹⁵

Based on cases cited above and the opinion of the Committee on Social Affairs, Health and Sustainable Development, human rights protection in the situation of COVID-19 pandemic is strongly dependent on a State’s effective and appropriate measures undertaken to tackle propagation of deadly virus. Nevertheless, individual rights should be observed and protected, bearing in mind the public health protection goals, safeguarding the right to life on which the enjoyment of all other human rights depends. Meanwhile, the undertaken measures such as lockdown or other restrictions must follow legitimate aims, be proportionate and necessary in a democratic society. The Court’s attitude towards allegations of a general negative impact of measures exercised by the authorities to counter spread of COVID-19 is quite persistent and defined – an applicant should clearly prove a negative impact of such restrictions on his or her personal rights under the Convention. It should also substantiate a real infringement of the Convention rights.

¹² ECHR, ‘Decision Zambrano v. France – Application Which Was Challenging the French “Health Pass”’.

¹³ Ibid.

¹⁴ Committee on Social Affairs, Health and Sustainable Development, “Covid Passports or Certificates: Protection of Fundamental Rights and Legal Implications,” Committee Opinion. Doc. 15323. 19 June 2021, <https://pace.coe.int/en/files/29301/html>.

¹⁵ Ibid.

Bibliography

Bah v. the Netherlands. No. 35751/20. ECHR. 22 June 2021.

Committee on Social Affairs, Health and Sustainable Development. “Covid Passes or Certificates: Protection of Fundamental Rights and Legal Implications.” Committee Opinion. Doc. 15323. 19 June 2021. <https://pace.coe.int/en/files/29301/html>.

ECHR. “COVID-19 Health Crisis.” January 2022. https://www.echr.coe.int/Documents/FS_Covid_ENG.pdf.

ECHR. “Decision Zambrano v. France – Application Which Was Challenging the French ‘Health Pass.’” No. 295. 7 October 2021. <https://hudoc.echr.coe.int/eng-press?i=003-7145978-9686694>.

ECHR. “Judgment Feilazoo v. Malta – Multiple Violations of Deportation Detainee’s Rights. Deportation Detainee Housed with Covid-19 Quarantine Patients, and Multiple Other Violations.” Press Release Issued by the Registrar of the Court. 3 November 2021. [https://hudoc.echr.coe.int/fre#%22item%22:\[%22003-6960968-9367585%22\]](https://hudoc.echr.coe.int/fre#%22item%22:[%22003-6960968-9367585%22]).

ECHR. “The Lockdown Ordered by the Authorities to Tackle the COVID-19 Pandemic Not to Be Equated with House Arrest.” Press Release Issued by the Registrar of the Court. 20 May 2021. <https://hudoc.echr.coe.int/eng-press?i=003-7024603-9478039>.

Feilazoo v. Malta. No. 6865/19. ECHR. 3 November 2021.

Яцкевич І. І.

ПРАВА ЛЮДИНИ І ПАНДЕМІЯ COVID-19: ЯКИЙ ПІДХІД ОБРАВ ЄСПЛ?

Огляд практики Європейського суду з прав людини охоплює низку рішень Суду за скаргами, пов’язаними із ситуацією протидії COVID-19 у Європі. Звичайно, цей огляд не претендує на вичерпність та не охоплює усіх відповідних рішень Суду, проте дає змогу простежити та зрозуміти загальний підхід Суду до проблем, викликаних заходами протидії пандемії COVID-19, до яких вдалися уряди держав. Європейський суд з прав людини розглянув відповідні скарги щодо кризи охорони

здоров'я у зв'язку з пандемією, у яких ставилося питання про порушення цілої низки положень Конвенції про захист прав людини і основоположних свобод. Переважно мова йде про порушення права на життя, про заборону катувань та нелюдського поводження, права на свободу та справедливий суд, права на повагу до приватного і сімейного життя, про свободу віросповідання, свободу слова, об'єднання, а також захист права власності та свободи пересування. Багато заявок уже відхилено, а багато ще очікують відповіді урядів держав на запити Суду.

Огляд стосується не лише рішень Суду, а й містить посилання на правову позицію Комітету з соціальних питань, охорони здоров'я та сталого розвитку Парламентської асамблеї Ради Європи щодо перепусток чи сертифікатів про вакцинацію та захисту основоположних прав і правових наслідків від їх запровадження (19 червня 2021 р.). Зокрема, Комітет наголосив на ефективному контролі поширення інфекції як першочерговому обов'язку держав-членів та головній меті забезпечення громадського здоров'я.

На підставі наведеної практики Суду та правової позиції Комітету зроблено висновок про те, що захист прав людини у ситуації пандемії COVID-19 дуже сильно залежить від ефективних та відповідних заходів, ужитих державами з метою протидії поширенню смертоносного вірусу. Утім, особисті права мають бути захищеними та дотриманими, з урахуванням забезпечення громадського здоров'я, гарантуючи право на життя, від якого залежить можливість реалізації усіх інших прав. Водночас ужиті заходи, зокрема локдаун та інші обмеження, повинні мати легітимну мету, бути пропорційними та необхідними в демократичному суспільстві. Підхід Суду до звинувачень у загальному негативному впливі запроваджених владою обмежень з метою протидії поширенню COVID-19 є достатньо однозначним та визначеним: заявник повинен довести негативний вплив подібних обмежень на його/її особисті права, а також потрібно довести реальне порушення прав людини, захищених Конвенцією.

Ключові слова: права людини, громадське здоров'я, пандемія, вакцинація, локдаун.

Матеріал надійшов 11.02.2022



Creative Commons Attribution 4.0 International License (CC BY 4.0)