

Environmental Health Rights and Concepts of Vulnerability of Immigration Detainees in Europe Before and Beyond COVID-19

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Abstract

The global COVID-19 health emergency has radically changed detention spaces, by heightening state and provider obligations to provide humane conditions and protect those detained against disease and subsequent ill-health. Using a socio-legal lens, this policy and practice note focuses broadly on the balance of European immigration detention regulations, and the actual conditions and treatment of immigrant detainees, putting an emphasis on developments before and after COVID-19. The special protections afforded to detainees assessed as vulnerable is unclear in the Global Compact for Safe, Orderly and Regular Migration. While cognisant of aspects of legal positivism by outlining relevant legal provisions and extant European Court of Human Rights (ECtHR) jurisprudence where conditions of detention have violated Article 3, a socio-legal argument is presented around state obligations to protect the health of all immigration detainees; the challenges in using simplistic/categorical definitions of vulnerability; and the imperatives to broaden considerations to include health vulnerability in the context of contagion and future pandemics. By analogy extant ECtHR jurisprudence on the rights of prisoners relating to right to health and disease mitigation (human immune-deficiency, tuberculosis) may offer additional protections. Broad consideration of environmental health factors in light of threats of disease in detention spaces warrant further consideration when establishing the threshold of the severity of conditions and when assessing detainee vulnerability (not limited to age, gender or health status). A public health rights-based argument can shape effective immigration detention policy reform by enhancing protective parameters based on broad definitions of health vulnerability within immigration detention spaces.

Key Words: Deportation; disease; environment; Europe; migrants;; standards.

1. Background

Since 2015, the flow of migrants has stimulated degrees of geo-political instability in Europe. At the time of writing in early 2022, deep political divisions have occurred across European Union (EU) member states, mostly concerning border controls, use of ‘pushbacks’ and ‘instrumentalization’¹ by some states and the general migrant-management lexicon across

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1 When a country ‘instigates irregular migratory flows’ into the EU ‘by actively encouraging or facilitating the movement’ of migrants to the bloc. See also ‘hybrid attacks’.

Europe (Corbet and Cook 2022). The fundamental problems of who should take responsibility and what countries should provide assistance with migrant arrivals continue to create problems (Corbet and Cook 2022). For those migrating into Europe, often from conflict areas, journeys are at best traumatic, often life threatening. There are many reports of illegal ‘pushbacks’ and arbitrary detention of migrants, with both measures increasingly used as a tool to keep migrants out of Europe (Apap 2016; Chehayeb and Marsi 2020). Many en route to Europe are detained on the North African coast and endure deplorable inhumane conditions of detention (Human Rights Watch 2019). In 2021, during the COVID-19 public health emergency, increased and legitimized use of offshore migrant containment measures in quarantine vessels were documented (Stierl and Dadusc 2021). In early 2022, a lawsuit by an expelled Iranian national was filed at the United Nations Human Rights Committee accusing Greece of cruel and degrading treatment, summary expulsion and ‘refoulement’² which is prohibited under the 1951 Geneva Convention on the Status of Refugees (Psaropoulos 2022). In the same month, twelve refugees froze to death near the Turkey-Greece border, as part of a larger group ‘pushed back’ by Greek border units who stripped them of their clothes and shoes and forced them outside (Al Jazeera 2022).

The World Health Organization declared COVID-19 a pandemic on 11 March 2020 (World Health Organization 2020a) and it recognized the unique vulnerabilities of detainees and the potential for severe harm and violation of human rights in detention settings (World Health Organization 2020b). The United Nations High Commissioner for Refugees (2020) emphasized the states’ duty ‘to treat all persons, including persons deprived of their liberty, with humanity and respect for their human dignity, and they must pay special attention to the adequacy of health conditions and health services in places of incarceration’. In Europe, the Committee for the Prevention of Torture (2020) recognized the extraordinary challenges posed by COVID-19 for European member states with regard to the operations of closed settings, including immigration detention facilities. Its statement recognized the absolute imperatives to protect against disease, mitigate transmission of disease and control COVID-19 outbreaks in immigration settings and stated that ‘any restrictive measure taken vis-à-vis persons deprived of their liberty to prevent the spread of Covid-19 should have a legal basis and be necessary, proportionate, respectful of human dignity and restricted in time’. The Committee is further quoted: ‘while it is legitimate and reasonable to suspend nonessential activities, the fundamental rights of detained persons [to maintain adequate personal hygiene, daily access to open air for at least one hour] during the pandemic must be fully respected, and States should continue to guarantee access for monitoring bodies to all places of detention, including places where persons are kept in quarantine’. Similar human rights obligations were reflected in the promulgation of technical guidance on COVID-19 responses in all closed settings (United Nations Office on Drugs and Crime 2020a, 2020b; World Health Organization 2020c, 2020d), which underscores the vulnerability of people deprived of their liberty to disease and which provided that conditions of detention should not contribute to the development, worsening or transmission of COVID-19 and other diseases in circulation, and that COVID-19 mitigation measures may not result in inhumane or degrading treatment of prisoners (unreasonable solitary confinement, denial of access legal representation).

The International Commission of Jurists has outlined the disproportionate impact of COVID-19 on the rights of migrants (and refugees) (International Commission of Jurists 2020). Europe’s migrant containment policies were reported to jeopardize public health measures to mitigate COVID-19, especially in congested immigration detention facilities and migrant camps lacking basic infrastructure, power, sanitation, ablution facilities and hygiene (Hargreaves et al. 2020; Médecins Sans Frontières 2020; Orcutt et al.

² The forcible return of refugees or asylum seekers to a country where they are liable to be subjected to persecution.

2020). These are high risk environments where social distancing is an impossibility, with high turnover of human traffic and insufficient disinfection measures. In 2020, when European borders closed and normal deportation procedures were hindered, most EU member states, with the exception of Spain and the Netherlands, held migrants in administrative detention for prolonged/indefinite durations resulting in severe overcrowding and difficult living conditions, with reports of increased use of solitary confinement and lack of access to recreation areas, and with visitation restrictions in many countries hindering access to legal representation and independent monitoring (Lebret 2020). More recently, apartheid like policies, and anti-immigrant sentiments in some European countries have influenced political decision making, with reports of detention facilities and receptions centres being closed, and the extension of quarantine measures beyond national restrictions, leading to severe overcrowding and containment of very vulnerable asylum seeking and pre-deportation populations in some countries (for example Cyprus, Greece, Malta) (Brandariz and Fernández-Bessa 2021). The EU did not allocate adequate funds to address the grave and worsening conditions in immigration detention, and none of the budgetary measures in 2020 directly addressed the health and safety of migrants during COVID-19 despite their challenges in protecting themselves from disease and unique health vulnerabilities (Lebret 2020). Most member states (with the exception of Latvia, Estonia and Romania who derogated from the European Convention on Human Rights: ECHR, and the International Covenant on Civil and Political Rights: ICCPR) did not formally derogate from their obligations under a declared state of emergency during COVID-19.

On 30 March 2020, the Human Rights Commissioner of the Council of Europe urged member states to release as many people as possible from detention centres for migrants due to facilities 'providing poor opportunities for social distancing and other measures to protect against Covid-19 infection' (ANSA 2020). On 7 April 2020, the United Nations Subcommittee on Prevention of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment issued its advice to states parties and national preventive mechanisms relating to the COVID-19 pandemic (Office of the High Commissioner for Human Rights 2020); and with regard to the Optional Protocol to the Convention Against Torture and other Cruel, Inhuman and Degrading Treatment or Punishment (United Nations 2003) advised states to 'review the use of immigration detention centres and closed refugee camps with a view to reducing their populations to the lowest possible level'. Mass release schemes were operationalized leading to reduced occupancy in immigration detention facilities in Spain, Belgium, Finland, France, United Kingdom and Sweden (International Commission of Jurists 2020; Refugee Rights Europe 2020).

The global COVID-19 health emergency has radically changed detention spaces, by heightening state and provider obligations to offer humane safe conditions and protect those detained against disease and subsequent ill-health. Using a socio-legal lens, this policy and practice note focuses broadly on the balance of European immigration detention regulations, and the actual conditions and treatment of immigrant detainees, putting an emphasis on developments before and after COVID-19. The special protections afforded to detainees assessed as vulnerable is unclear in the Global Compact for Safe, Orderly and Regular Migration. Relevant international and European legal instruments and provisions on conditions of detention are outlined and explained. An overview of European Court of Human Rights jurisprudence where poor standards of immigration detention fall within the scope of Article 3 of the ECHR is provided. The note then discusses the analogy of prison based jurisprudence, norms and standards relating to right to health and disease mitigation (human immune-deficiency: HIV; tuberculosis: TB) which may offer additional protections, and the requirements to reassess definitions and concepts of vulnerability of detainees, and health vulnerability in light of COVID-19 and threats of airborne disease in closed settings.

2. International and European legal instruments, norms and standards

Migrant health rights are intertwined with ‘the right not to be subjected to arbitrary deprivation of liberty’, and the right to be detained in humane conditions of detention which respect their human rights ‘in conditions compatible with respect for human dignity, with execution of the measure not exceeding unavoidable levels of suffering inherent in detention’ (European Committee for the Prevention of Torture 2017; European Court of Human Rights 2015).

Immigration detention as a form of administrative detention using onshore and off-shore containment of migrants is routinely employed by many European member states to facilitate deportation (Apap 2016; Majcher 2019; United Nations Office of the High Commissioner for Human Rights 2020). The Global Compact on Refugees (United Nations High Commissioner for Refugees 2018), Global Compact on Safe, Orderly and Regular Migration (United Nations 2018), and the EU ‘Return Directive’ (Council of the European Union 2008), however, provide that administrative immigration detention should be the exception and not the norm, and explicitly prohibit arbitrary detention. General Comment 35 of the Human Rights Committee (United Nations Human Rights Committee 2014) provides that ‘detention in the course of proceedings for the control of immigration is not per se arbitrary, but the detention must be justified as reasonable, necessary and proportionate in the light of the circumstances and reassessed as it extends in time’ (see *A. v. Australia*, 1993; *Jalloh v. Netherlands*, 1998; *Nystrom v. Australia*, 2011). In order to establish that detention is not arbitrary, states must provide such evidence under Article 9 of the ICCPR (United Nations 1966a). The ECHR only permits detention to prevent unauthorized entry to the country and pending deportation or extradition. Any deprivation of liberty is justified only for as long as deportation proceedings are in progress (see *Chahal v. the United Kingdom*, 1993). While the concept of proportionality is considered with regard to duration of detention, many challenges in determination exist regarding whether the duration of deportation proceedings are excessive at the Court level, under the ‘necessity and proportionality requirements’ of Article 5(1f) ECHR. The undisputed existence of these requirements cannot be assumed regarding Article 5(1)(f), as the ECtHR has decided several times that such requirements do not apply (in contrast to EU law).

The United Nations mandates for adequate conditions of detention respecting the rights and dignity of the detained (United Nations High Commissioner for Refugees 2012). State obligations to uphold the rights of those in their custody (including migrants) are explicit in the 1951 Refugee Convention (United Nations 1951) and its 1967 Protocol, the international human rights treaties including the ICCPR (United Nations 1966a), the International Covenant on Economic, Social and Cultural Rights (ICESCR) (United Nations 1966b) and the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (United Nations 1984). Article 10 ICCPR enshrines the fundamental principle applicable to detention, which states that ‘all persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person’ and which underscores the state responsibility to ensure that humane conditions are upheld. General Comment No. 36 of the Human Rights Committee further specifies that states parties to the ICCPR ‘must respect and protect the right to life of all individuals arrested or detained by them, even if held outside their territory’ and are obliged to ‘take special measures of protection towards persons in situation of vulnerability’, a category that includes ‘displaced persons, asylum seekers, refugees, and stateless persons’ (Article 6). There is further ‘a heightened duty to protect the right to life which also applies to individuals quartered in liberty-restricting State-run facilities, such as ... refugee camps and camps for internally displaced persons’ and ‘states parties may not rely on lack of financial resources or other logistical problems to reduce this responsibility’ (United Nations Human Rights

[Committee 2018](#)). While the ICCPR and the ICESCR both require the respect of human dignity towards persons deprived of their liberty, these instruments are not legally binding for EU member states, and instead the protection of dignity can be recognized through Article 1 of the Charter of Fundamental Rights which is legally binding for all EU member states.

General Comment No. 14 of the [United Nations Committee on Economic, Social and Cultural Rights \(2000\)](#) outlines that states parties are (at the very least) required to meet a threshold of a ‘core minimum’ of social and economic rights, including the right to health, and that people deprived of their liberty are entitled to the same ‘core minimum’ health rights as other citizens. The right to the highest attainable standard of physical and mental health in international human rights law ‘is a right of everyone, irrespective of citizenship or immigration status and wherever they may reside’. Articles 12(1) and (2) ICESCR are further relevant to the required measures to be taken by the state to ensure humane conditions, protect the health of those detained and their positive obligation to employ all measures to mitigate disease in closed settings. The [Parliamentary Assembly of the Council of Europe \(2008\)](#) has recognized that European member states should ensure that all settings used for immigration detention adhere to minimum standards of care (food, drinking water, clothing, bedding, sanitary products, access to outside air, heating, infrastructure, separate accommodation and sanitation of men, women and unaccompanied minors and so on) ([International Organization for Migration 2011](#)).

3. Immigration detention conditions and violations of Article 3 at the ECtHR

Since 2001, there have been a range of claims brought to the ECtHR and successful cases where conditions of detention form part of the case ([Council of Europe 2021](#); [European Court of Human Rights 2021a, 2021b, 2021c](#)). Judgements³ are presented as they relate to individual and environmental health rights; the duration, settings and conditions of immigration detention, detainee vulnerability assessment and arbitrary nature of detention (see [Table 1](#)). Cases from Greece, Turkey, Italy, Malta, France, Bulgaria, Russia and Hungary illustrate the range of detention settings used, many unsuitable for adult and minor detainees (airport facilities and airport transit zones, cells and basements of border police stations, hotspots and camps, detention centres, ships). Environmental conditions described by claimants and corroborated by the European Committee for the Prevention of Torture and various non-governmental organization assessments refer to: overcrowding with insufficient square metres of space for each detainee; a lack of sufficient natural daylight, ventilation, heating, and hot water; inadequate provision for sanitation, ablution and hygiene; the sharing of facilities by men and women, and the mixing of juveniles with adults; poor quality sleeping materials and bedding; the presence of contaminants in food preparation and consumption; the circulation of rodents, parasites, skin and gastro-intestinal diseases; and the denial by officials for detainees to access outdoor areas for fresh air and exercise. Some noted the denial of access to the outside world via telephone, and legal representation.

The ECtHR considered claims of inhumane and arbitrary detention in terms of the severity of environmental conditions in combination with identified vulnerability of the claimant warranting special conditions, their exposure to trauma and distress, particularly in the case of children, and other significant corroborating factors such as the duration of detention, experience of isolation and/or solitary confinement, whether claimants were awaiting deportation, or held while asylum processes were underway, and whether claimants were

3 It was beyond the scope of this socio-legal assessment to also include European Court of Justice (ECJ) jurisprudence, as the ECJ must offer at least the same level of protection as the jurisprudence of the ECtHR. It was also beyond the scope to also include dimensions of right to access healthcare when detained.

Table 1. European Court of Human Rights jurisprudence

Name of Case	Country	Claimant(s)/Vulnerability assessment if applicable	Conditions of Detention	Judgement
Dougoz v. Greece, 2001	Greece	Male Syrian national placed in police detention pending his expulsion to Syria.	Overcrowded and dirty cell with insufficient sanitation, absence of sleeping facilities, scarce hot water, no fresh air or natural daylight and no access to outdoor exercise. Inordinate length of detention	Violation of Article 3
Mubilanzila Mayeka and Kaniki Mitunga v. Belgium, 2006	Belgium	Unaccompanied five-year-old Congolese national detained for two months in a transit centre for adults at Brussels airport.	Transit centre designed for adults, with no one assigned to look after her. Child was significantly distressed with no professional support.	Violation of Article 3
Riad and Idiab v. Belgium, 2008	Belgium	Two male Palestinian nationals detained in the transit zone of Brussels airport following unlawful entry into Belgian territory for a period longer than 10 days.	Transit zone is intended for detention of individuals for very short duration (10 days maximum).	Violation of Article 3
S.D. v. Greece, 2009	Greece	A male Turkish national detained for two months in a holding facility (prefabricated cabin) at a border guard station after entering the country irregularly. Subsequently held in Patrou Rali and confined to his cell for six days.	Denied access to outdoor areas, denied telephone calls, and no access to blankets, clean sheets or hot water. Patrou Rali was reported by the European Committee for the Prevention of Torture and Inhuman or degrading Treatment or Punishment (CPT) as unacceptable following their visit in February 2007.	Violation of Article 3

Table 1. Continued

Name of Case	Country	Claimant(s)/Vulnerability assessment if applicable	Conditions of Detention	Judgement
A.A. v. Greece, 2010	Greece	A male Palestinian national detained by Greek police and placed for three months in Samos detention centre pending deportation to Lebanon.	Squalid and overcrowded conditions at the Samos detention centre described as: people eating and sleeping on a dirty floor, rubbish in corridors, windows barred, combined shower and toilet with no hot water shared by men and women, inadequate food prepared in unhygienic conditions, circulation of lice and skin diseases; defective sewer system, nauseating smells, sporadic access to outdoor areas, denial of telephone calls. Conditions corroborated by international organizations and Greek NGOs.	Violation of Article 3
Abdolkhani and Karimnia v. Turkey, 2009	Turkey	Two male Iranian nationals detained in the basement of the Hasköy police headquarters for three months.	Assuming that the Turkish Government's estimate of 42 detainees in the facility was accurate, holding that many people in 70m ² , even for a duration as short as one day constituted severe overcrowding.	Violation of Article 3
Kanagaratnam and Others v. Belgium, 2011	Belgium	A Sri Lankan mother with three children was detained in a closed immigration detention centre for adults.	Placing the children in a closed centre designed for adult illegal aliens in conditions which were ill-suited to their extreme vulnerability as minors.	Violation of Article 5 (1)
M.S.S. v. Belgium and Greece, 2011	Belgium and Greece	A male Afghan national entered the European Union via Greece. He subsequently arrived in Belgium, where he applied for asylum. By virtue of the 'Dublin II' Regulation 1 he was transferred back to Greece and detained at Athens airport.	Held in a small space with 20 other detainees, restricted food and access to toilets, sleeping on dirty mattresses or the bare floor and denied access to outdoor areas.	Violation of Article 3 Violation of Article 13

Table 1. Continued

Name of Case	Country	Claimant(s)/Vulnerability assessment if applicable	Conditions of Detention	Judgement
R.U. v. Greece, 2011	Greece	A male Turkish asylum seeker of Kurdish origin detained in the Soufli and Petrou Ralli detention centres.	Conditions of detention was the same and concerned the same period as the one examined by the Court in the case of S.D. v. Greece, 2009.	Violation of Article 3 Violation of Article 13
Rahimi v. Greece, 2011	Greece	A male Afghan minor held in the Pagani detention centre for two days on the island of Lesbos and subsequently released with a view to his expulsion.	Uncertainty whether the applicant had been placed together with adults. Deplorable conditions of detention regarding infrastructure, accommodation and hygiene. Minor on account of his age and personal circumstances was in a significantly vulnerable position, not duly considered by officials.	Violation of Article 3
Popov v. France, 2012	France	A married couple, Kazakhstan nationals accompanied by their two small children, detained at Rouen-Oissel administrative detention centre for two weeks, which was authorized to accommodate families.	Unsafe furniture and automatic doors, no play areas for children and insufficient child protection principles (insecurity and hostile atmosphere). Two weeks' detention, while not in itself excessive, is unacceptable for children living in an environment ill-suited to their age and despite not being separated from their parents heightens their vulnerability, trauma and distress.	Violation of Article 3 [with respect to the detention conditions of the children, not the parents.]
Mahmundi and Others v. Greece, 2012	Greece	An Afghan family, including a pregnant woman with four minors were detained in Lesbos.	Overcrowded cells, lack of medical examination including of pregnant women, mixing of juveniles with adults, and denial of access to outdoor activities for children. No specific supervision of the family despite their particular status as minors and a pregnant woman. Greek non-governmental organizations observed that there had been no improvement in the situation in the Pagani centre in spite of their alarming findings in the past.	Violation of Article 3 Violation of Article 13 Violation of Article 5(4).

Table 1. Continued

Name of Case	Country	Claimant(s)/Vulnerability assessment if applicable	Conditions of Detention	Judgement
Aden Ahmed v. Malta, 2013	Malta	A Somali national woman detained in Lyster Barracks Detention Centre for 14 and a half months.	Exposure to cold conditions, lack of female staff in the detention centre, denial of access to open air and exercise for periods of up to three months, inadequate food. Particular vulnerability due to her fragile health (previous miscarriage, separation from young child) and personal emotional circumstances.	Violation of Article 3
A.E. v. Greece, 2013	Greece	A male Iranian national held in the premises of the Feres border police for four months.	Severe lack of space and overcrowded conditions. According to the UN Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, on the date of his visit in October 2010 there were 123 inmates in a space for 28, while according to ProAsyl in December 2010, there were 110 inmates in one dormitory. The CPT noted in January 2011, that each detainee had approximately 1m ² or less in some dorms.	Violation of Article 3
Horshill v. Greece, 2013	Greece	A male foreign national was held pre-deportation in two police stations successively for 15 days post asylum application.	Cells did not have adjoining showers, denial of access to the outdoors for exercise. One of the cells was in the basement of the police station and devoid of natural light.	Violation of Article 3
Mohamad v. Greece, 2014	Greece	A male unaccompanied minor held pre-deportation at the Soufli border post.	Detained in an adult centre which was not suitable for unaccompanied minors.	Violation of Article 3 Violation of Article 5(1) Violation of Article 13
Asalya v. Turkey, 2014	Turkey	A male Palestinian national, paraplegic and wheelchair bound, held pre-deportation in Kumkapı Foreigners' Admission and Accommodation Centre.	Inadequate facilities for a wheelchair bound detainee. No bed to sleep in, no lifts and squat toilets. Reliance on the help of strangers. No evidence of any positive intention by officials to humiliate or debase the applicant.	Violation of Article 3

Table 1. Continued

Name of Case	Country	Claimant(s)/Vulnerability assessment if applicable	Conditions of Detention	Judgement
C.D. and Others v. Greece, 2014	Greece	12 asylum seekers held in pre-deportation detention at the Venna detention centre for varying durations.	Lack of hygiene, insufficient living space and no access to outdoor exercise. The CPT, the UN Special Rapporteur against Torture and the UN Special Rapporteur on the Human Rights of Migrants concluded that detention conditions at Venna were inadequate, and the centre was closed in December 2012.	Violation of Article 3 Violation of Article 5(4)
Mahamed Jama v. Malta, 2015	Malta	A Somali woman held in immigration detention at Lyster Barracks for eight months.	Overcrowding, unspecified duration of restricted access to outdoor yard. No concern regarding hygiene. On 4 July 2013 the CPT report showed improvements had been put in place. No violation of Article 3 [cumulative effect of the detention conditions <i>did not</i> reach the threshold] or of Article 5(1) concerning detention pending her asylum claim].	Violation of Article 5 (1) [with respect to the detention following the decision on her asylum claim]
Khlaifia and Others v. Italy, 2016	Italy	Three Tunisian nationals transferred to a reception centre in Lampedusa, and subsequently detained in ships moored in Palermo.	Lampedusa was overcrowded, inadequate space to sleep, unacceptable sanitation, constant police surveillance and no contact with the outside world. Palermo ships moored at the dock. Confined to overcrowded areas in the restaurant halls, with limited access to the toilets and no information provided by the authorities.	Violation of Article 5 (4) Violation of Article 5 (1), (2) and (4) Violation of Article 3 in conjunction with Article 13
Abdi Mahamud v. Malta, 2016	Malta	A Somali woman was held in prolonged immigration detention by police.	Overcrowding, insufficient methods for counteracting temperature changes, limited access to open air, lack of privacy, and lack of female staff. During this detention she developed a number of physical and psychological conditions and applied for release on medical grounds. The judge partially dissented, finding insufficient evidence of violation of Article 3. He stated that her claim for health vulnerability was not exacerbated by the severity of detention conditions and that she did not qualify for the categories of vulnerability requiring closer scrutiny (i.e. pregnant or breastfeeding).	Violation of Article 3 Violation of Article 5 (1) Violation of Article 5 (4)

Table 1. Continued

Name of Case	Country	Claimant(s)/Vulnerability assessment if applicable	Conditions of Detention	Judgement
Kaak and Others v. Greece 2019	Greece	49 Syrian, Afghan and Palestinian nationals detained in the Vial hotspot/centre and Souda camp	Overcrowding, insufficient food, and inadequate medical provision. Detention conditions could not ensure the safety of women and children who constituted particularly vulnerable categories of persons. No violation of Article 3 [detention conditions <i>did not</i> reach the threshold].	Violation of Article 5 (4)
G.B. and Others v. Turkey, 2019	Turkey	A Russian mother with three young children held in detention pending deportation in the Kumkapı and Gaziantep centres	Overcrowding, lack of hygiene, lack of access to open air, exposure to the cigarette smoke of other detainees, lack of suitable food for children.	Violation of Article 3 Violation of Article 3 in conjunction with Article 13. Violation of Article 5(1) Violation of Article 5(4)
Z.A. and Others v. Russia, 2019	Russia	Four males of Iraqi, Somalian and Syrian nationality were held for a time in the transit zone of Moscow's Sheremetyevo airport while the authorities dealt with their asylum applications.	Poor conditions of detention in the transit zone, sleeping on mattresses in the boarding area of the transit zone, a busy and constantly lit area, with no access to washing or cooking and living on emergency rations provided by the UNHCR.	Violations of Article 3 Violations of Article 5(1) and 5(1)(f)
Ilias and Ahmed v. Hungary, 2019	Hungary	Two male Bangladesh nationals detained at a Hungarian border transit zone for 23 days before being removed to Serbia after their asylum applications were rejected.	Conditions of detention in the transit zone. No violation of Article 3 [detention conditions <i>did not</i> reach the threshold].	Violation of Article 3 [with respect to failure to assess risks of not having proper access to asylum proceedings in Serbia or chain-refoulement by being sent to Greece where conditions were in violation of Article 3].

Table 1. Continued

Name of Case	Country	Claimant(s)/Vulnerability assessment if applicable	Conditions of Detention	Judgement
Sh.D. and Others v. Greece, Austria, Croatia, Hungary, North Macedonia, Serbia and Slovenia, 2019	Greece	Five unaccompanied migrant minors from Afghanistan detained in Greek police stations (Polykastro, Igoumenitsa Port, Filiata) and Idomeni camp.	Conditions in various police stations and the Idomeni camp not suitable for children due to their age and respective vulnerabilities.	Violation of Article 3. Violation of Article 5(1)
Feilazoo v. Malta, 2021	Malta	A Nigerian national was held in pre-deportation in the Safi Barracks, a closed detention centre for immigrants.	Complaints about inadequate medical treatment, overcrowding, lengthy placement in a container with excessive isolation and without access to natural light, air and outdoor exercise (75 days), and post isolation the subsequent placement with new arrivals in Covid-19 quarantine. The ECtHR had already expressed concerns about the Safi Barracks detention facility. Although accommodation in a container might not necessarily violate Article 3, in combination with the lengthy isolation, limited light, ventilation and access to outdoor exercise increased the severity of the violation. The placement with new arrivals in COVID-19 quarantine was unnecessary and posed a risk to the applicant's health, and could not be considered as complying with basic sanitary requirements.	Violation of Article 3 Violation of Article 5(1) Violation of Article 34
Hafeez v. the United Kingdom, 2020 Communicated case	United Kingdom	Extradition proceedings of 60-year-old man arrested in the United Kingdom on an extradition request by the United States of America (US), with co-morbid ill health (diabetes and asthma) considered risk factors for severe effects of an infection with the SARS-CoV-2 virus.	The health risks associated with asthma and diabetes are considered with regard to the risk posed by incarceration in US prisons, experiencing significant outbreaks of COVID-19, and a possible breach of Article 3 ECHR	Granted Rule 39 relief [with respect to a federal sentence of life without parole and on the basis of evidence of inhuman and degrading prison conditions in New York at the Metropolitan Correctional Centre (MCC) and Metropolitan Detention Centre (MDC) under the Coronavirus pandemic]

Table 1. Continued

Name of Case	Country	Claimant(s)/Vulnerability assessment if applicable	Conditions of Detention	Judgement
Krstić v. Serbia, 2021 Communicated case	Serbia	Extradition proceedings of the nine applicants from Serbia to the United States (Texas).	If extradited, they would be subjected to severe conditions of detention, particularly taking into account the number of Covid-19-infected people in Texas and among the inmates.	The Court gave notice of the applications to the Serbian Government and put questions to the parties under, in particular, Article 3 (prohibition of inhuman or degrading treatment) of the Convention. Declared applications inadmissible

able to challenge their detention. In many of the presented cases, there was insufficient information provided to the detainee, an inability to make a complaint, and, in some, the denial of access to legal representation.

There are observed complexities in ECtHR decision-making when considering the vulnerability aspects of special groups of migrants (women, pregnant women, juveniles, children, those with medical conditions and the disabled), when held in immigration detention, and when establishing the requisite threshold of severity of the environmental conditions of detention as per Article 3 (prohibition of torture, inhuman or degrading treatment or punishment). In addition to establishing a rights violation qualifying for Article 3 based on conditions of detention, some judgements achieved the threshold of a violation of Article 3 due to vulnerability assessment based on gender, age and disability. In some cases, the children in 'de facto detention' qualified for a violation of Article 3, but not their parents accompanying them. While not the specific focus of this policy and practice note, others succeeded in proving an additional violation of Article 5 (1), (2) and (4) (right to liberty and security) via arbitrary detention and Article 13 (right to an effective remedy), regarding the inability to challenge the lawfulness of their detention. A few included the breaches of Articles 8 (right to respect for private and family life) and 34 (right of individual application).

Between March 2020 and November 2021, the ECtHR received 370 interim measures requests related to the COVID-19 health crisis, originating from those detained in prisons, in reception centres and immigration detention settings. The majority were lodged against Italy, France, Greece and Turkey, Spain and the United Kingdom ([European Court of Human Rights 2021d](#)). Many were individual applications. While requests under Rule 39 of the Rules of the Court usually concern deportations or extraditions, many referred to interim measures to remove detainees from places of detention and to indicate measures to protect their health and protect them from contracting COVID-19. Rule 39 (interim measures) was applied in line with the usual criteria, generally in the case of very vulnerable persons (unaccompanied minors or persons with serious medical conditions, pregnant women). Most were rejected.

Three recent cases highlight the additional layer of complexity that COVID-19 contributes to the Court decision-making around humane standards of detention, environmental determinants of health, vulnerability and risk to health of those detained in the context of public health emergencies such as COVID-19 contagion. Two crucial factors emerged which centred on the potential risk of harm (and death) to a detainee with underlying co-morbidities (and vulnerability to severe or fatal COVID-19 disease), and the renewed importance of considering combinations of environmental factors such as space, ventilation, segregation, medical isolation, arbitrary solitary confinement and access to outdoor exercise. [Feilazoo v. Malta, 2021](#), in particular, is a ground-breaking case, where the ECtHR was asked to make decisions regarding the placement of a Nigerian national in immigration detention with new arrivals in COVID-19 quarantine, the conditions and lawfulness of his detention and right to petition. Under Article 3, the ECtHR reinforced principles regarding the establishment of the severity of detention conditions to qualify for a violation of Article 3 (the State must ensure that a person is detained in conditions which are compatible with respect for human dignity and that the manner and method of the execution of the measure do not subject the individual to distress or hardship of an intensity exceeding the unavoidable level of suffering inherent in detention (para 81)). It also considered the applicant's placement in isolation in a container for an excessive length of time with lack of access to light, ventilation and outdoor exercise; subsequent placement following the period of isolation with new arrivals in COVID-19 quarantine; and inadequate provision of medical treatment. Important complementary environmental factors crucial to the mitigation of airborne disease were considered in determining severity threshold of Article 3 (duration of detention in specific conditions, hygiene and sanitation, personal space, isolation and access to the outdoors for open air and exercise). It emphasized that while detainees have

a right to a certain level of medical treatment, this obligation is limited, and that there is no state obligation to guarantee equivalent medical treatment to that available in the best establishments outside the facility (para 86) (similar to [Pentiacova and Others v. Moldova, 2005](#)). It also did not find a breach of Article 3 regarding overcrowding and did not hold the state accountable.

Feilazoo v. Malta is crucial in terms of spotlighting how immigration detention settings represent so called ‘congregate settings’ and are operating directly contra government public health guidance, notwithstanding the detainees’ health vulnerabilities and identification as ‘persons at risk’. While it recognizes the impact of overcrowding and high risk of transmission of COVID-19 disease in congested immigration settings with poor ventilation and disinfection measures, the judgement regrettably falls short of addressing the unique vulnerabilities of those detained in immigration detention during communicable disease outbreaks such as COVID-19. It fails to underscore the special responsibility of the state for people deprived of their liberty during public health crises, given their unique reliance on the state. The Court did not provide clear guidance on state obligations regarding the adequate conditions and standards of immigration detention during the public health crisis, despite the broad range of UN technical guidance published since 2020 around the human rights and treatment of detainees during COVID-19. A contemporary ‘COVID-19 proof’ definition of adequate and humane environmental standards of immigration detention was not developed. Furthermore, the Court did not establish the obligation for contracting states to separate detainees (and prisoners) under quarantine from the wider population in detention as a disease mitigation measure.

Two additional cases ([Hafeez v. the United Kingdom, 2020](#); [Krstić v. Serbia, 2021](#)) refer to the potential risks for detainees if extradited from Europe to the United States where prisons have experienced worrying COVID-19 outbreaks ([Marquez et al. 2021](#)), with subsequent risk of violating Article 3 on arrival.

4. Analogies of ECtHR jurisprudence on protection of the rights of prisoners

Extant ECtHR jurisprudence on the rights of prisoners to humane standards of detention in the context of right to health and prevention of disease and state duty to uphold sanitation measures may offer additional protections. Principles regarding the fundamental rights of prisoners could apply to those detained in other settings, including immigration detention ([European Court of Human Rights 2021e](#)). The UN Special Rapporteur on the Human Rights of Migrants has however emphasized that ‘Migration-related detention centres should not bear similarities to prison-like conditions’ ([International Organization for Migration 2011](#)).

The non-binding Nelson Mandela Rules ([United Nations 2016](#)) while generally applicable to prisons and the rights of prisoners remain pertinent to the human and health rights of immigration detainees, including the right to health and humane conditions in immigration detention. Rule 13 which concerns environmental health standards of detention states: ‘all accommodation shall meet all requirements of health, due regard being paid to climatic conditions and particularly to cubic content of air, minimum floor space, lighting, heating and ventilation’. A range of additional Mandela Rules apply to protection from infrastructure deficits, mitigation of bio-hazards (for example communicable disease) and state duty to respect the unique detainee vulnerabilities to ill-health when deprived of their liberty; and state obligation to ensure that routine independent inspections are facilitated to assess the adequacy of clean water, sanitation, hygiene, ventilation, light, food and physical conditions (Rules 24, 25, 27, 30, 31, 32, 35).

State failure to ensure sufficient protection of detainees’ rights violates human rights and is potentially exacerbated by COVID-19 restrictions imposed during state public health

restrictions (Pont et al. 2021). With regard to the threat posed by COVID-19 in prisons, there are several pending cases at the ECtHR which concern the state obligation to protect people in prison from COVID-19 given their vulnerability and spanning individual and environmental health rights when detained. Of note is that under Article 8 there is no authority in case law that places any obligation on a contracting state to pursue any particular preventive health policy in prison. Cases regard the lack of disease mitigation measures in prisons (see *Vlamis and Others v. Greece* and four other applications: nos. 29689/20, 30240/20, 30418/20 and 30574/20); overcrowding in prisons leading to COVID infection (*Rus v. Romania*); multi-morbidity of prisoners as a COVID-19 vulnerability factor (*Riela v. Italy*; *Faia v. Italy*); and the unique risks to COVID-19 encountered by HIV positive prisoners (*Maratsis and Others v. Greece*; *Vasilakis and Others v. Greece*).

With regard to leveraging COVID-19 to support immigration management reform and investment by states to uphold the rights of all detained whether during process of asylum or deportation, key analogies can be drawn from previous case law on the rights of prisoners in general and in the context of communicable disease (generally referring to TB, HIV and viral Hepatitis) as a public health concern in prisons (see *Catalin Eugen Micu v. Romania*, 2016; *Khokhlich v. Ukraine*, 2003). Common denominators in successful cases from prisoners applicable to immigration detention settings centre on the lack of personal space and movement of those detained, and frequently amount to violations of Article 3. There have been challenges however in determining sufficient personal space (under Article 3), in terms of quantifying a specific number of square metres that should be allocated to a detainee in order to comply with the Convention (*European Court of Human Rights* 2021d). The judgement of *Muršić v. Croatia*, 2016, confirmed the standard predominant in ECtHR case law of three square metres. of floor surface per detainee in multioccupancy accommodation as the relevant minimum standard under Article 3 of the Convention. Circulation of COVID-19 and other airborne diseases such as tuberculosis in combination with the inability to socially distance, overcrowding, flow of new entries and lack of ventilation further complicate matters as they heighten the environmental threat of contagion. Crucial additional factors considered by the ECtHR regarding health rights in prisons include the duration of detention, access to outdoor exercise, access to private toilets, natural light and fresh air, ventilation, adequacy of room temperature, general compliance with basic sanitary and hygiene requirements, and the health status of the detainee under Article 3 (see *Muršić v. Croatia*, 2016; *Samaras and Others v. Greece*, 2012; *Varga and Others v. Hungary*, 2015). All are relevant to the context of immigration detention. Hygiene and sanitation in particular are crucial components of an environmental health response (for example the presence of fleas, bedbugs, lice, rodents), and are identified in the ECtHR jurisprudence as underpinning the right of a prisoner to a humane environment of detention (see *Ananyev and Others v. Russia*, 2012; *Neshkov and Others v. Bulgaria*, 2015).

There are several cases of interest which regard prisoner exposure to disease (HIV, Hepatitis C, TB) in prison. However, when deciding on the extent to which the state bears a duty to mitigate such diseases in prison and treat those detainees who become unwell, details are vague, and irrespective of whether the individual becomes infected during detention, rely on appropriate testing on committal and routine treatment regimens, safety considerations regarding ‘real’ transmission risk (for example sexual transmission of HIV), and placement of individuals with infected prisoners (see *Korobov and Others v. Russia*, 2006; *Testa v. Croatia*, 2007; *Kotsaftis v. Greece*, 2008; *Aleksanyan v. Russia*, 2008; *Poghossian v. Georgia*, 2009; *Ghavitadze v. Georgia*, 2009 and related cases; *Artyomov v. Russia*, 2010; *Fedosejevs v. Latvia*, 2013; *Cătălin Eugen Micu v. Romania*, 2016). For example in the case of *Sakkopoulos v. Greece* in 2004, no violation of Article 3 was upheld as authorities had taken measures to protect the detainee’s health and it was decided that the deterioration of his state was not imputable to them. Disease mitigation measures are considered on a case by case basis, but ultimately should be ‘compatible with the human dignity’ of a

detainee, and take into account ‘the practical demands of imprisonment’ (see [Blokhin v. Russia, 2016](#); [Aleksanyan v. Russia, 2008](#); [Patranin v. Russia, 2015](#)).

5. Concluding remarks: (re)defining concepts of vulnerability, health protection and detention conditions

There is significant public health and human rights urgency for states to uphold their positive obligation to provide humane detention conditions in Europe ([European Commission 2020](#)). States have positive obligations to ensure that environmental conditions of detention and care of detainees respect human dignity and must not put the health of those detained at risk ([International Commission of Jurists 2020](#)). Despite the non-binding resolutions of the Council of Europe and normative standards of detention as outlined in the Reception Condition and Return Directives ([Council of the European Union 2008; 2013](#)) and other (aforementioned) instruments, detained migrants continue to encounter and navigate a range of human rights violations, environmental stressors and substantial risks to physical, mental and sexual health when detained in Europe ([Lebano et al. 2020](#); [World Health Organization 2018; 2020a](#)). Poor environmental standards of immigration detention coupled with distress and trauma worsen the general good health of migrants on intake, and contribute to substantial mental ill-health ([Lungu-Byrne et al. 2020](#); [Van Hout 2021](#); [Van Hout et al. 2020](#)). This has not improved in recent times.

The [United Nations Office of the High Commissioner for Human Rights \(2020\)](#) emphasizes that ‘Arbitrary detention can never be justified, whether it be for any reason related to national emergency, maintaining public security or health’ (see also [United Nations Working Group on Arbitrary Detention 2018](#)). Tensions between state obligation to provide humane standards of detention, and the balance of key human rights challenges encountered in immigration detention settings are evident, both historically and during the COVID-19 health emergency. Government COVID-19 restrictions have added a layer of complexity and have potentially fuelled scapegoating and discrimination against migrants and exacerbated a broad range of human rights violations. For instance, detention may be lawful for public health reasons such as the prevention of the spread of communicable disease under Article. 5 (1.e) ([International Commission of Jurists 2020](#)).

The presented Court judgements against Greece, Turkey, Italy, Malta, France, Bulgaria, Russia and Hungary illustrate over time that poor environmental standards of conditions of immigration detention can fall within the scope of Article 3 of the Convention based on both environmental and administrative factors. To date, notwithstanding the COVID-19 public health emergency, a range of immigration detention settings continue to be used (airport transit zones, police stations, specialized facilities, camps, ships), and are generally unsuitable (presenting threat to health and well-being) for adult and minor detainees. There are inherent complexities with regard to establishing the threshold of severity of detention conditions and that of vulnerability of the detainee, whereby safeguards against arbitrary detention apply to those identified as vulnerable (for example the elderly, disabled, those with chronic ill-health, women, juveniles and children) ([European Committee for the Prevention of Torture 2017](#); [European Court of Human Rights 2021a; 2021b; 2021c](#)). A broader consideration of environmental health factors is warranted by courts and providers, and processes must be cognisant of the human rights policy and practice obligations of immigration detention as a functioning societal institution.

The concept of vulnerability is central in European refugee and asylum law and policy ([Freedman 2018](#)). There are imperatives to reassess definitions and concepts of vulnerability in light of COVID-19 and threats of airborne disease in immigration detention settings. The special conditions of detention and care to be provided to those migrant detainees assessed as vulnerable remain unclear in the Global Compact for Safe, Orderly and Regular Migration ([Special Rapporteur on the Human Rights of Migrants 2002; 2012](#)).

While they may be viewed as a positive protective measure to those who are deemed vulnerable, definitions remain simplistic and of a categorical nature (for example gender) without sufficient consideration of the contextual and structural causes of vulnerability which have an impact on the agency and autonomy of those affected (Freedman, 2018). Definitions of vulnerability also vary, ranging from the supplementation of anti-discrimination approaches not primarily concerned with exclusion and inequality, to those focusing on the nature, functioning and dynamics of institutions in society (Fineman 2019). COVID-19 raises yet another concept of vulnerability of those deprived of their liberty, in terms of protection against disease and health vulnerability to more severe forms of ill-health. There are calls to redefine vulnerability in the era of COVID-19 cognisant of the evolving and dynamic nature of vulnerable individuals or marginalized groups in response to policies that might create or reinforce vulnerability. The inability of immigration detainees to practice social distancing and apply basic public health measures, and their potential for chronic-ill health are evident (Van Hout et al. 2021; 2022). The employment of concept mapping providing a broad conceptualization of vulnerability for the health effects of the COVID-19 pandemic and the associated measures is recommended. This can additionally inform practice-based interventions (van der Ven et al. 2021). Acknowledging the lived experiences of vulnerable groups as defined by epistemic injustice is paramount (Ahmad et al. 2020).

Hence, aside from the political discourse in Europe around migrant management and border control, the COVID-19 public health emergency offers a unique opportunity for civil society and human rights organizations to advocate for change and leverage for immigration detention reform, particularly with regard to improving infrastructure and environmental conditions of detention. Despite the European Fundamental Rights Agency reporting on the purposes and conditions of immigration detention with respect to public order, public health and national security (Fundamental Rights Agency 2010), there is little 'live' data regarding immigration detention rates or the routine monitoring of standards in the diverse settings of detention used in Europe (Global Detention Project 2015). Oversight mechanisms of immigration detention vary across Europe (Bhui 2016; Van Hout 2021), despite the guidelines on the detention of asylum-seekers (United Nations High Commissioner for Refugees 2012) and in the broader sense the updated European Prison Rules (Council of Europe 2020), and statement on standards of immigration detention (European Committee for the Prevention of Torture, 2017). Further decongestion measures in immigration settings, routine independent monitoring of general and environmental health standards, and the consideration of non-custodial community measures are recommended, alongside state inclusion of immigration detention settings in COVID-19 vaccination roll outs and public health surveillance and other actions.

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