

Visiting Rights in Detention and Mental Health

Legal Implications of Empirical Studies on Family Visits in the Light of the European Convention on Human Rights

Monika Trajkovska / Evelyne Schmid *

People deprived of their liberty and affected by mental health problems are particularly vulnerable. According to many studies, visits by relatives are of particular importance for these persons. In this contribution, we assess the requirements of the European Convention on Human Rights (ECHR) from the perspective of these empirical studies when determining the frequency, duration and conditions of visits by relatives of a detained person with a mental health disorder. In practice, two phenomena can make it difficult to carry out such visits: On the one hand, the authorities of the detention centers limit visiting rights e.g. for security reasons. In other cases, a person deprived of liberty expresses a wish not to receive visits, but this wish may be influenced by a mental disorder that affects communication or sometimes even the capacity to discern. We examine the case law of the European Court of Human Rights (ECtHR) in the light of the empirical literature to suggest considerations for key actors.

I. Introduction	II
II. Access Rights for Relatives: Sources.....	III
III. Limiting Visiting Rights of Relatives.....	V
IV. A Reluctant Right? Implication of Medical Studies when a Person Deprived of Liberty Expresses a Wish to Forego Visits.....	IX
V. Perspectives.....	XII

This is the authors' translation of the article: [Les droits de visite en détention et la santé mentale : Implications juridiques des études empiriques concernant les visites par les proches à la lumière de la Convention européenne des droits de l'homme](#), sui generis 2022, p. 183 ff.

* Monika Trajkovska MLaw (mo_trajkovska@hotmail.com) and Prof. Evelyne Schmid, Professor of international law at the University of Lausanne (evelyne.schmid@unil.ch).

I. Introduction

- 1 In 2020, the World Health Organization (WHO) reported in its Global Mental Health Atlas that total spending on mental health care accounted for only 2.1% of public health funds worldwide¹. As we shall see, people deprived of their liberty have an increased need for appropriate health care and psycho-social conditions, and inadequate supervision can jeopardise the exercise of a variety of fundamental rights.
- 2 Mental health is directly linked to the possibilities of maintaining links with loved ones: fostering contact with the outside world can be a key way of coping with the burden of deprivation of liberty². The scientific research cited in this contribution shows a strong link between visits to prisoners, perceived social support and psychological well-being³, although attention should be paid to the indications that visits can sometimes also aggravate a prisoner's stress⁴.
- 3 This contribution is inspired by the case of Raphael Kiener and stems from work in international law at the University of Lausanne. Raphael Kiener was a young man with a severe mental disorder, including paranoid schizophrenia⁵. He killed himself by hanging in August 2019 at the specialised psychiatric institution of the

University Psychiatric Services in Bern⁶. According to the allegations of his relatives, they were not able to visit him as often as they would have liked and the staff of the institution considered their son's state of health to be too poor or he refused to see them⁷. This case motivated us to analyse what the ECHR⁸ implies for the frequency, duration and conditions of visits in a situation of heightened vulnerability and from the perspective of the empirical literature on visits.

- 4 The question addressed in this contribution is the following: What are the legal implications of these scientific studies (of psychiatry, psychology or criminology) for the implementation of access rights in accordance with international law? We will examine two situations in which the authorities have to decide whether, and if so how, visits are organised: the first concerns situations in which the authorities consider limiting visits (section III) and the second concerns the particular situation of a refusal of visits by the detainee himself or herself and the question of capacity of discernment (section IV). We will analyse how these empirical studies are relevant to the decision-making process that leads - or not - to visits of a person with a mental health problem in detention, as well as to the duration and conditions of these visits.

¹ WHO, [Mental health Atlas 2020](#), Geneva 2021, p. 4.

² see LINDSAY CHASSAY/KRISTEN KREMER, Association Between Social Support and Mental Health of Incarcerated Individuals, *Journal of Correctional Health Care* 2022, p. 47 ff.; for Switzerland: JAKOB HUMM, Tragfähige soziale Beziehungen als wichtige Elemente eines Reintegrationsprozesses, *NKrim/NCrim* 2022, p. 24 ff.; see also e.g. ALICE MILLS / HELEN CODD, Prisoners' Families and Offender Management: Mobilizing Social Capital, *Probation Journal* 2008, p. 9 ff.

³ ZHONG SHAOLING et al., [Risk Factors for Suicide in Prisons](#), *Lancet Public Health* 2021, p. 164 ff.

⁴ LEONEL C. GONÇALVES ET AL., [Prison Visitation and Mental Health in Detained Young Adults](#), *Criminology* 2020, p. 234 ff.

⁵ SUSAN BOSS, [Ein Gutachten und seine Folgen](#), *Wochezeitung (WOZ)* of 8 August 2020.

⁶ BOSS (fn. 5).

⁷ BOSS (fn. 5).

⁸ European Convention on Human Rights from 4 November 1950 ([ECHR](#)).

- 5 The vulnerability of people deprived of their liberty is not in doubt and is confirmed by a higher prevalence of mental illness in prison than in the general population⁹. A worldwide study comparing data from more than 30,000 prisons shows that the environment of institutions can have a significant impact on mental health¹⁰. A study by the Swiss Centre of Competence in the Execution of Penal Sanctions reveals that the psychiatric care of persons deprived of liberty is a real challenge in Switzerland¹¹.
- 6 We will first deal in an introductory manner with the rights of access of relatives as considered by the ECHR. We focus on the requirements of the ECHR but will briefly refer to other European documents and to Swiss law, without claiming to evaluate Swiss practice. The first aim of the article is to explore the implications that we believe scientific studies should have on the review of the proportionality of restrictions on visits by relatives. Secondly, we will discuss the consideration of the results of these medical studies with regard to communication difficulties and the capacity of discernment of mentally ill prisoners who refuse a visit.
- 7 We will not deal with the right to visits by health personnel¹², lawyers or the right to family life more broadly. We limit ourselves to the rights of persons deprived of liberty to receive visits from their relatives and not the rights of relatives to maintain relations with the person in detention¹³. Furthermore, we refrain from distinguishing whether these are visits from persons with whom the detained person has "family relations" within the meaning of the ECHR or persons whose relations fall under the right to privacy, such as e.g. friends¹⁴. Nor will we discuss telephone contacts which may serve similar functions of contact with the outside world.

II. Access Rights for Relatives: Sources

- 8 We will see in this section that both international and domestic law provide that detained persons have, in principle, the right to receive visits. On the other hand, detention necessarily entails an interference with the detainees' private life, and a limitation of contacts with the outside

⁹ SEENA FAZEL et al., *Mental Health of Prisoners*, *The Lancet Psychiatry* 2016, p. 871; SEENA FAZEL / KATHARINA SEEWALD, *Severe Mental Illness in 33'588 Prisoners Worldwide*, *British Journal of Psychiatry* 2012, p. 364 ff.; SEENA FAZEL / JULIA CARTWRIGHT / ARABELLA NORMAN-NOTT / KEITH HAWTON, *Suicide in Prisoners*, *The Journal of Clinical Psychiatry* 2008, p. 1721; OLAV NIELSSEN / SHAVTAY MISRACHI, *Prevalence of Psychoses on Reception to Male Prisons in New South Wales*, *Australian & New Zealand Journal of Psychiatry* 2005, p. 453.

¹⁰ JO NURSE / PAUL WOODCOCK / JIM ORMSBY, *Influence of Environmental Factors on Mental Health Within Prisons*, *BMJ* 327/2003, p. 2.

¹¹ Centre suisse de compétence en matière d'exécution des sanctions pénales (CSCSP), *Manuel : prise en charge psychiatrique dans le cadre de la*

privation de liberté, 2022; see also BENJAMIN BRÄTTER, *Massnahmenvollzug an psychisch kranken Straftätern in der Schweiz: eine kritische Auslegeordnung*, *SZK* 2014, p. 36 ff.

¹² We refer to the CSCSP study (fn. 11).

¹³ Readers in Switzerland are invited to consult MARCEL AEBI et al., *Lebenspartner/innen, Kinder und Eltern als Angehörige von Inhaftierten im Justizvollzug (Lebenspartner/innen, Kinder und Eltern als Angehörige von Inhaftierten im Justizvollzug)*, Basel 2022; and DOMINIK LEHNER, *Angehörige und Justizvollzug – Vom Perspektivenwechsel zum Paradigmenwandel*, *NKrim/NCrim* 2022., p. 32.

¹⁴ If social relationships are not covered by the right to family life, the right to privacy may apply. See ECtHR judgment [GC] 25358/12 of 24 January 2017 (*Paradiso and Campanelli v. Italy*), § 165.

world is not in itself contrary to international or Swiss law¹⁵.

1. Sources in Regional Law

- ⁹ At the European level, too severe a restriction of visiting rights may result in inhuman and degrading treatment, or even torture, and the infringement is then examined in the light of [Article 3 ECHR](#)¹⁶. In less restrictive cases, the analysis is made under [Article 8 ECHR](#). This provision on privacy covers issues relating to visiting rights of persons deprived of their liberty¹⁷. [Rule 24.1 of the European Prison Rules](#), as well as documents of the Committee of Ministers of the Council of Europe, recommend that detained persons should be allowed visits "as far as possible"¹⁸.
- ¹⁰ In the authorities' analysis of the granting or organisation of visits, [Article 2 ECHR](#) may also play a role: In cases of a "real and imminent risk of suicide", [Article 2 ECHR](#) obliges the authorities to take measures to

protect the lives of the persons under its responsibility¹⁹. Measures to counter the risk of suicide are not limited to hospitalisation, surveillance and removal of dangerous objects²⁰. The Court refers to "measures which, from a reasonable point of view, would have mitigated this risk [of suicide]"²¹, and we are of the opinion that visits by relatives can, at least sometimes, play a role in minimising the risk of suicide, as is recognised for visits by psychiatrists²².

2. Sources in Swiss Law

- ¹¹ Swiss law, on the other hand, provides in [Article 75 of the Swiss Penal Code](#)²³ for the enforcement of sentences in a manner that respects the principles of resocialisation, while emphasising the need for an individualised enforcement plan²⁴. [Article 84 PC](#) deals specifically with the right of prisoners to have relations with the outside world, in particular with the family, and [Article 110 para. 1 and 2 CP](#) defines close relatives and family members²⁵. As

¹⁵ DAVID HARRIS / MICHAEL O'BOYLE / COLIN WARBRICK, *Law of the European Convention on Human Rights*, Oxford 2014, p. 585; ECtHR judgment [GC] [41418/04](#) of 30 June 2015 (*Khoroshenko v. Russia*), § 123; ECtHR judgment [41220/98](#) of 29 April 2003 (*Aliev v. Ukraine*), § 187.

¹⁶ DIRK VAN ZYL SMIT, *Principles of European Prison Law and Policy*, Oxford 2009, p. 213, see ECtHR judgment [48787/99](#) of 8 July 2004 (*Ilascu and others v. Moldova and Russia*), § 432.

¹⁷ ECtHR judgment [GC] [39630/09](#) of 13 December 2012 (*El Masri v. the former Yugoslav Republic of Macedonia*), §§ 248 ff.; JIM MURDOCH, [The treatment of prisoners: European standards](#), Council of Europe 2004, p. 239; VAN ZYL SMIT (n. 16), p. 228.

¹⁸ Recommendation [Rec\(2006\)2](#) of the Committee of Ministers to member States on the European Prison Rules (revised) (EPR), adopted on 11 January 2006, and revised on 1 July 2020, [Rule 24.1](#); Recommendation [Rec\(2003\)23](#) of the Committee of Ministers to member States on the rules for the management by prison administrations of life

sentence and other long-term prisoners, adopted on 9 October 2003, § 22.

¹⁹ ECtHR judgment [27229/95](#) of 3 April 2001 (*Keenan v. United Kingdom*), § 89.

²⁰ See also ECtHR judgment [5608/05](#) of 16 October 2008 (*Renolde v. France*), § 99 ff. (where the Court analyses the lack of monitoring of the actual intake of medication).

²¹ ECtHR judgment [23405/16](#) of 30 June 2020 (*S.F. v. Switzerland*), § 75.

²² ECtHR judgment [23405/16](#) of 30 June 2020 (*S.F. v. Switzerland*), § 136 s. (the Court does not conclude that the failure to summon an emergency psychiatrist alone led to a violation of Article 2 but the Court's reasoning leaves no doubt that visits by psychiatrists may be a reasonable measure to reduce the risk).

²³ Swiss Penal Code of 21 December 1937 (PC; [SR 311.0](#)).

²⁴ BAPTISTE VIREDAZ / ANDRÉ VALLOTON, in: Moreillon/Macaluso/Queloz/Dongois (edit.), *Commentaire romand, Code pénal I*, 2nd ed., Basel 2021, art. 75, p. 1220 N 6 (cit. CR CP I).

²⁵ CR CP I-VIREDAZ/VALLOTON, art. 75 CP, p. 1220.

for friends, acquaintances or professional relations, according to the jurisprudence of the Federal Court, their visits should also be "favoured"²⁶. We refer to the Swiss literature²⁷.

- ¹² However, a reading of the reports drawn up by the European Committee for the Prevention of Torture (CPT) between 1991 and 2022 shows that the visiting system is problematic in some cantons and conditions vary; some prisons provide a visiting regime with the possibility of meals²⁸ or contact through a separation device²⁹, while some people had no visits for weeks on end³⁰. In a fact sheet on detention in maximum security units, the National Commission for the Prevention of Torture (CNPT) insisted in 2020 that "[t]here should be ongoing, targeted measures to encourage opportunities for social contact"³¹.

²⁶ CR CP I-VIREDAZ/VALLOTON, art. 84, p. 1293 N 1; see *BGE 145 I 318* c. 2.3.

²⁷ For an overview, THOMAS NOLL, *Optimierung der Untersuchungshaft im Kanton Zürich*, RSC 2019, p. 41; JÖRG KÜNZLI / NULA FREI, *Ansätze zu einer völkerrechts- und verfassungskonformen Ausgestaltung der Untersuchungshaft*, RSC 2017, p. 5 ff.; JÖRG KÜNZLI / NULA FREI / MARIA SCHULTHEISS, *Untersuchungshaft-Menschenrechtliche Standards und ihre Umsetzung in der Schweiz*, CSDH, Bern 2015, p. 40 ff.; PASCAL RONC fait le lien explicite entre la resocialisation et les visites familiales : PASCAL RONC, *Grundlagen/Das Konzept der Resozialisierung in der Europäischen Menschenrechtskonvention*, in: Coninx/Ege/Mausbach (edit.), *Prävention und freiheitliche Rechtsordnung*, Zurich 2017, p. 48 f.; in Italian, DANIEL FINK, *Ufficio di statistica*, Giubiasco 2021, p. 108 ff.

²⁸ Report to the Swiss Federal Council on the visit to Switzerland carried out by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from

III. Limiting Visiting Rights of Relatives

- ¹³ One of the difficulties that arises in relation to access by relatives is the limitation of this right by the authorities. In cases that do not fall under [Article 3 ECHR](#), the review of the frequency, duration and conditions of visits will be carried out under [Article 8 ECHR](#). The grounds on which the authorities may rely to justify their interference and the conditions to be met are set out in § 23².

1. Limiting Visits: The Usual Criteria for Limitations

- ¹⁴ According to the second paragraph of [Article 8 ECHR](#), a restriction of access rights must have a legal basis, pursue a legitimate aim and be necessary in a democratic society, i.e. it must be proportionate to the legitimate aim pursued.
- ¹⁵ Firstly, the ECtHR has clarified that the legal basis test does not only refer to the fact that a restriction must be in conformity with domestic law, but also to the

11 to 23 February 1996 [in French], *CPT/Inf(97) 7*, p. 46.

²⁹ Report to the Swiss Federal Council on the visit to Switzerland by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 10 to 20 October 2011 [in French], *CPT/Inf(2012) 26*, p. 48, § 88; Report to the Swiss Federal Council on the visit to Switzerland by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 22 March to 1 April 2021 [in French], *CPT/Inf(2022) 9*, pp. 47 ff, § 107 ff.

³⁰ Report to the Swiss Federal Council on the visit to Switzerland by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) from 13 to 24 April 2015 [in French], *CPT/Inf(2016) 18*, p. 37, § 68.

³¹ CNPT, *La détention dans les quartiers de haute sécurité*, June 2020, p. 4

³² VAN ZYL SMIT (n. 16), p. 217.

quality of the law concerned³³. The quality of law is lacking when domestic law does not specify with sufficient clarity the scope of the discretion conferred on the authority³⁴.

¹⁶ Secondly, the authorities must pursue a legitimate aim when imposing restrictions on the exercise of access rights. This may be the case, for example, on grounds of public safety and the prevention of criminal offences, the protection of health or where there is a fear that the individual may impede the ongoing investigation through information exchanged during visits³⁵.

¹⁷ Thirdly, any restriction must be 'necessary in a democratic society'³⁶. In the following sub-section, we examine the analysis of the proportionality test from the perspective of the ECtHR case law and the empirical literature.

2. The Operationalisation of Proportionate Restrictions

¹⁸ When the ECtHR examines the proportionality of restrictive measures taken by the authorities, it must do so in accordance with the principle of subsidiarity³⁷. In other words, the protection of the rights enshrined in the ECHR is primarily the responsibility of the State parties, which are considered best placed to judge

the necessity of a restriction³⁸. The margin of appreciation means that there is no one course of action applicable to every situation, but rather the analysis depends largely on the casuistry³⁹. It is a weighing of interests that balances a person's interests in receiving the least inhibited visits against the other interests involved⁴⁰. We distinguish three justifications:

a) Adequacy Between the Measure and the Legitimate Aim: the State of Health of the Person Deprived of Liberty

¹⁹ In the case of Raphael Kiener, according to the parents, some visits did not take place because the staff of the institute considered their son's state of health too poor⁴¹. While the protection of health is a legitimate aim, even a very poor state of health of the individual does not automatically justify the restriction of visits, because - in any proportionality analysis - one still has to consider the adequacy of the measure in relation to the objective sought, i.e. whether the denial of a visit has a potential neutral, positive or negative effect on that state of health. If the authorities restrict visits to protect the health of the person themselves, they must justify that there are serious reasons to believe that the health condition at that moment is better protected without the visit, despite the prevalence of studies

³³ ECtHR judgment 78146/01 of 12 June 2008 (Vlasov v. Russia), § 125

³⁴ ECtHR judgment 70468/17 of 18 February 2020 (Kungurov v. Russia), §§ 18 ff.; ECtHR judgment 43149/10 of 13 February 2018 (Andrey Smirnov v. Russia), § 42.

³⁵ HARRIS/O'BOYLE/WABRICK (n. 15), p. 585 ff., see ECtHR judgment 25498/94 of 28 September 2000 (Messina v. Italy no. 2), §§ 59 ff.

³⁶ Art. 8 § 2 ECHR.

³⁷ Art. 1 of Protocol No. 15 amending the ECHR of 24 June 2013

³⁸ STIJN SMET, When Human Rights Clash in 'the Age of Subsidiarity', in: Petr (edit.), Human Rights Between Law and Politics 2017, p. 56.

³⁹ SÉBASTIEN VAN DROOGHENBROECK, La proportionnalité dans le droit de la CEDH, Brussels 2001, p. 136 ff.

⁴⁰ ANDREA BAECHTOLD / JONAS WEBER / UELI HOSSETTLER, Strafvollzug - Straf- und Massnahmenvollzug an Erwachsenen in der Schweiz, Bern 2016, p. 180 ff.

⁴¹ BOSS (fn. 5).

that tend to identify positive effects of visits⁴².

b) Adequacy of the Measure for the Legitimate Purpose: During the Investigation or During the Risk of Flight?

²⁰ In order to be able to assess the relationship between the measure and the legitimate aim of security and prevention of crime, the Court emphasises that a distinction must be made between restrictions on visits during the investigation - where the legitimate aim of the investigation can often be more easily accepted - and the situation after a conviction⁴³. Restrictions on the basis of the legitimate aim of prevention of crime are also more easily accepted when it comes to preventing attempts to escape or crime, such as the circulation of unauthorised objects⁴⁴.

c) Adequacy Between the Measure And the Legitimate Aim: Depending on the Social Relations

²¹ In pre-trial detention or where subsequent proceedings are ongoing, a further distinction is required - that between different social relationships. In *Messina v. Italy (no. 2)*, the Court highlights the

nuances of the proportionality analysis as to the specific social relations to be maintained with visits; in the legitimate aim of breaking the social links between the detainee and the criminal milieu, the authorities took into account the specific nature of the phenomenon of mafia-type organised crime. Given that Mr Messina had links with the Mafia, only certain family visits were allowed, which the Court accepted⁴⁵. Similarly, the ECtHR held that there was no violation of [Article 8 ECHR](#) for visits by a wife limited to once a month and lasting ten to twenty minutes, since in the case in question the purpose of crime prevention justified it⁴⁶. Allegations that contact would exert a bad influence on the detainee are therefore not sufficient⁴⁷.

²² In many other cases, relatives have no connection with crime. In any case, as soon as the authorities apply an identical regime to all persons detained in an institution in pursuit of a security objective⁴⁸, proportionality is not given as the dangerousness of the persons and their social relations vary⁴⁹. For example, the Court has held that family visits limited to once every six months and then once every three months for four hours were contrary to the Convention where the restriction was applied automatically without weighing the interests⁵⁰.

⁴² See introduction and references. But see also the cited study by GONÇALVES et al. (fn. 4) on the potentially negative effects of visits.

⁴³ ECtHR judgment [GC] [41418/04](#) of 30 June 2015 (*Khoroshenko v. Russia*), § 124.

⁴⁴ STEFAN TRECHSEL / PETER AEBERSOLD, *Praxiskommentar, Schweizerisches Strafgesetzbuch, Erstes Buch: Allgemeine Bestimmungen art. 1-110 StGB*, 4th ed., Zurich 2021, p. 557.

⁴⁵ ECtHR judgment [25498/94](#) of 28 September 2000 (*Messina v. Italy no. 2*), §§ 59 ff.

⁴⁶ ECtHR judgment [41220/98](#) of 29 April 2003 (*Aliev v. Ukraine*), § 187.

⁴⁷ MARTINO IMPERATORI in: Niggli/Wiprächtiger

(edit.), *Basler Kommentar, Strafrecht*, 4th ed., Basel 2019, Art. 84 PC, p. 2068 N 23 (cit. BSK PC-AUTHOR).

⁴⁸ If the objective is to protect against contagious diseases (such as Covid19), the situation is different (individual dangerousness vs. general risk of spreading a disease).

⁴⁹ NOLL (fn. 27), p. 44, who discusses (and asserts) the practicability of a differentiated regime.

⁵⁰ ECtHR judgment [39758/05](#) of 23 February 2012 (*Trosin v. Ukraine*), §§ 39 ff.; ECtHR judgment [GC] [11138/10](#) of 23 February 2016 (*Mozer v. Republic of Moldova and Russia*), §§ 193 ff.

²³ In summary, the authorities must identify a legitimate aim in order to restrict visits and this legitimate aim must exist for the relations with all relatives affected by the restrictive measures and for the duration of the measure and the measure must be adequate and necessary to achieve this aim.

3. The Implications of Proportionality on the Conditions of Visits and the Consideration of Vulnerability Factors

²⁴ In many cases, proportionality means that the authorities do not have the right to refuse visits, but can legitimately monitor or control the conditions of visits. As for the conditions of visits, they are often arranged in a way that does not leave much room for privacy, visits are often monitored by cameras or staff⁵¹. Indeed, visits are often experienced as an unpleasant experience by relatives⁵², and persons deprived of their liberty – which can reduce the positive effects of visits⁵³. The experience of body searches (abusive or not) can result in relatives being discouraged from visiting⁵⁴. In one situation assessed by the ECtHR where physical contact was prohibited, a glass partition was justified on grounds of security and crime prevention⁵⁵. However, in the absence of risk of collusion, escape, recidivism or concrete threat, the Court concluded that such restrictions, coupled with the lack of long-

term visits and the refusal of visits to take place in a private room, were not necessary in a democratic society⁵⁶. Authorities must be able to justify each restrictive element of the conditions of visits, as the balancing of interests requires precisely that they take into account not only the risks of less inhibited visits, but also the interests of the mental well-being of the individual. A glass partition or the choice (or technical maintenance) of a microphone⁵⁷ are therefore not details, but are part of the conditions of visits and have an impact on human rights.

²⁵ To conclude this section, we stress that the margin of appreciation of the authorities cannot be properly determined without taking into account the vulnerability of the person concerned. In other words, visits should not be restricted by the authorities without a prior examination of an individual's psychological state and an ex ante assessment of the potential risks and benefits of visits for the concrete case. Without taking into account individual vulnerability factors, an assessment of the restriction of visits is incomplete and risks violating the ECHR.

²⁶ We now turn to an analysis of the second situation that can lead to the absence of a visit: the refusal by the person deprived of liberty.

⁵¹ VAN ZYL SMIT (fn. 16), p. 240; MARIE HUTTON, *Visiting Time: a Tale of Two Prisons*, *Probation Journal* 2016, p. 350.

⁵² HUTTON (fn. 51), p. 348.

⁵³ MEGHAN M. MITCHELL / KALLEE SPOONER / DI JIA / YAN ZHANG, *The Effect of Prison Visitation on Reentry Success*, *Journal of Criminal Justice* 2016, p. 74 ff.; VAN ZYL SMIT (n. 16), p. 240.

⁵⁴ ECtHR judgment [9635/13](#) of 1 June 2017 (*Dejneq v. Poland*), § 67; NANCY LOUCKS, *Just Visiting?*, *Prison Reform Trust and the Federation of*

Prisoners' Families Support Groups 2002, p. 1.

⁵⁵ ECtHR judgment [12066/02](#) of 19 June 2007 (*Ciorap v. Moldova*), §115; see also ECtHR judgment [50901/99](#) of 4 February 2003 (*van der Ven v. the Netherlands*), §§ 66 ff.

⁵⁶ ECtHR judgment [12066/02](#) of 19 June 2007 (*Ciorap v. Moldova*), §105 ff.

⁵⁷ Raphael Kiener's family could not visit without a glass partition and had difficulties with the technical equipment. BOSS (fn. 5).

IV. A Reluctant Right? Implication of Medical Studies when a Person Deprived of Liberty Expresses a Wish to Forego Visits

²⁷ Persons deprived of their liberty are free to exercise their visiting rights or not. There is no interference within the meaning of [Article 8 ECHR](#) if they do not make use of it, and non-use respects the principle of autonomy as to the choices he or she makes. However, there are cases in which we can question the effect of mental illness on the expressed wishes and sometimes the capacity of an individual to exercise access, particularly in the presence of suicidal thoughts. Can we doubt the wishes of an individual when he or she suffers from a mental illness that impairs his or her mental faculties and ability to reason? Could the presumed interest of the individual, as identified by the medical teams concerned, take precedence over the exercise of his or her autonomy by imposing or encouraging visits when the person expresses that he or she does not want them, but it appears that this would make it possible to avoid the deterioration of a mental state or to prevent suicide? The question is obviously more than delicate, given the importance of autonomy and the risk that failure to respect an expressed wish may lead to a loss of trust and a deterioration of the relationship between the individual and the staff of the institution.

1. Medical and Psychological Knowledge on the Link Between Deprivation of Liberty and Communication Difficulties

²⁸ In the following, we present results of studies that show a strong link between deprivation of liberty and communication difficulties of people with (some) mental illnesses. A study by MASCHI et al. describes inmates "feeling of helplessness" in the face of the system of prison laws and rules⁵⁸. Another study finds that incarceration reduces the means to cope with the stresses of the new environment and highlights the influence of social support in relation to the effects of stressful events⁵⁹. It finds that one of the most difficult consequences felt by prisoners is a sense of loneliness⁶⁰. Another study cross-checked data from 2007 to 2020 to analyse the risk factors associated with the more than 35,000 cases of suicide in prison⁶¹. It found that 47% of those who died by suicide were not visited⁶². This is largely consistent with previous findings that focus on perceived or received social support⁶³.

²⁹ The key point that leads us to link these studies to the question of assessing an expressed wish not to receive visits is that people with suicidal tendencies often have difficulty communicating their distress and are withdrawn rather than seeking concrete help⁶⁴. This is referred to as

⁵⁸ TINA MASCHI / DEBORAH VIOLA / LINDSAY KOSKINEN, Trauma, Stress, and Coping Among Older Adults in Prison: Towards a Human Rights and Intergenerational Family Justice Action Agenda, *Traumatology* 2015, p. 195.

⁵⁹ KELLY E. MOORE / SHANIA SIEBERT / GARRETT BROWN / JULIA FELTON / JENNIFER E. JOHNSON, [Stressful life events among incarcerated women and men: Association with depression, loneliness, hopelessness, and suicidality](#), *Health & justice* 2021/1, p. 2.

⁶⁰ JOSHUA C. COCHRAN / DANIEL P. MEARS, Social Isolation and Inmate Behavior, *Journal of Criminal Justice* 2013, p. 254.

⁶¹ ZHONG et al. (fn. 3), p. 166.

⁶² ZHONG et al. (fn. 3), p. 170.

⁶³ EVAN M. KLEIMAN / JOHN H. RISKIND / KAREN E. SCHAEFER, Social Support and Positive Events as Suicide Resiliency Factors, *Archives of Suicide Research* 2014, p. 144.

⁶⁴ YVES DONZALLAZ, *Partie 21-La médecine carcérale-Chap. 7 - Chap. 8*, in: Donzallaz (edit.), *Traité de*

"help denial"⁶⁵, with suicidal thoughts being "avoidance factors"⁶⁶. If prison is seen as a place of 'decommunication'⁶⁷, where individuals are excluded from the rest of society reflecting a lack of social support that exacerbates vulnerability to stress, their ability to communicate their needs may be significantly diminished⁶⁸.

- ³⁰ The ECtHR is aware that imprisonment can lead to or aggravate psychological disorders in imprisoned persons⁶⁹. This vulnerability is accentuated by the fact that they often have to rely on the authorities to exercise their right of access and to assert their needs. Indeed, studies show that there is a certain mistrust of prison and medical staff⁷⁰. Thus, illness can be a significant communication barrier. In this context, when the psychological vulnerability of an individual deprived of liberty is established, it seems to us that the assessment of the person's situation must be particularly careful and must include an examination of the capacity of discernment as regards a concrete decision to receive visits.

2. Capacity of Discernment and Mental Illness

- ³¹ Capacity of discernment is the ability to act reasonably ([Article 16 CC](#)⁷¹) and is presumed, which means that its absence must be proven by the person claiming it; discernment also involves an intellectual element that allows one to appreciate a situation and a voluntary element that allows one to act accordingly⁷². There are no different thresholds of discernment, capacity is either present or absent⁷³. The case law of the Federal Court refers to a degree of "very great likelihood" to question the capacity of an individual to discern⁷⁴. Capacity of discernment is relative in the sense that it is assessed in a concrete way in each situation and is not determined in the abstract⁷⁵. The presence of a mental illness may constitute a cause that can deprive a person of his or her "ability to act reasonably" ([Article 16 CC](#)), but an illness does not in any way allow one to conclude systematically that there is an absence of capacity to discern (this would obviously be contrary to [Article 12 § 2 of the Convention on the Rights of Persons with Disabilities](#))⁷⁶. There must be a serious alteration of the faculties of the mind⁷⁷ notably by mental disorders that have a profound impact on the

droit médical -Volume III, 2021, p. 4229 ff. N 700.

⁶⁵ JOEL HARVEY / ALISON LIEBLING, [Suicide et tentatives de suicide en prison](#), Criminologie 2001, p. 72.

⁶⁶ HARVEY/LIEBLING (fn 66), p. 72.

⁶⁷ HARVEY/LIEBLING (fn 66), p. 73.

⁶⁸ HARVEY/LIEBLING (fn 66), p. 75, for the concept of prison ostracism.

⁶⁹ ECtHR judgment [8327/03](#) of 21 October 2008 (Kilavuz v. Turkey), § 89.

⁷⁰ JONATHAN MITCHELL / GARY LATCHFORD, Prisoner Perspectives on Mental Health Problems and Help-Seeking, *The Journal of Forensic Psychiatry & Psychology* 2010, p. 782.

⁷¹ Swiss Civil Code of 10 December 1907 (CC; [SR 210](#)).

⁷² DOMINIQUE MANAI, in: Pichonnaz/Foëx (edit.), *Commentaire romand, Code civil I*, 1st ed., Basel 2012, Art. 12, p. 159 (cit. CR CC I-AUTHOR); [BGE 117 II 231 c. 2](#).

⁷³ CR CC I-MANAI, Art. 12, p. 161 N 14.

⁷⁴ [BGE 117 II 231 c. 2](#) letter b; mere doubts are not sufficient, see Federal Court judgment [6B_869/2010](#) of 16 September 2011, c. 4.3.

⁷⁵ CR CC I-MANAI, Art. 12, p. 159 N 4; [BGE 90 II 9 c. 3](#).

⁷⁶ [Art. 12\(2\) Convention on the Rights of Persons with Disabilities](#) of 13 December 2006.

⁷⁷ YVES DONZALLAZ, *Partie 15 - La capacité de discernement - Chap. 2 - Chap. 4*, in: Donzallaz (edit.), *Traité de droit médical - Volume III*, 2021, p. 3372 N 700.

individual⁷⁸. The issue is made all the more difficult by the fact that these indicators vary from one individual to another and according to the case in question, but studies nevertheless show that people suffering from depression, dementia or schizophrenia sometimes have significant deficiencies in their ability to understand and reason⁷⁹. In cases where these deficits are such that the capacity to discern is lacking with regard to a specific decision about a visit, the question arises whether visits can even be imposed or whether they should be encouraged. Since the threshold for concluding that capacity for discernment is lacking is - rightly - high, it will regularly be concluded⁸⁰ that capacity for discernment is present, but at the same time that there are difficulties in communication related to the mental health condition. In both constellations – capacity of discernment or not – it seems useful to us to consider that visits are part of the conditions of psychological care in an institution. We now turn to the implications of this consideration.

3. Conceptualising Visits as 'Medical Treatment'?

³² In view of this, it would be sensible to view visits by relatives as part of the right to adequate medical and psychiatric treatment - and thus linked to the right to health, privacy or even life. In this way, visits would no longer be seen as merely a right made available whose non-use is not questioned, but rather as a means of preventing the deterioration of an

individual's mental state and suicide. The autonomy of a person deprived of liberty who expresses a wish not to receive visits must be taken seriously, but so must the possibility of a difficulty in communication or, in the extreme case, a lack of capacity for discernment. In other words, the right to life, health and privacy requires, in our view, that staff take into account the possibility that visitation is being refused for reasons related to illness. This perspective does not argue for substituting the will of a sick person deprived of liberty, but it does invite medical and administrative prison staff to assess with great consideration the impact that vulnerability factors may have on the person in question. We propose that it is necessary to carry out a careful examination of the capacity of discernment and more generally of the person's needs and wishes, where it is known that the person concerned suffers from mental illness and his or her ability to communicate may be impaired in the context of deprivation of liberty.

4. Visits without Consent?

³³ To our knowledge, the literature has not yet addressed the question of whether visits can even be imposed, as medical treatment can sometimes be administered without consent⁸¹, especially when the person has a mental disorder that prevents him or her from making a reasonable decision about the need for treatment⁸². At present, the imposition of visits does not seem to us to be accepted for

⁷⁸ BGE 117 II 231 c. 2.

⁷⁹ DONZALLAZ (fn 77), p. 3374 f., JOCHEN VOLLMAN / ARMIN BAUER / HEIDI DANKER-HOPE / HANFRIED HELMCHEN, Competence of Mentally Ill Patients, *Psychological Medicine* 2003, p. 1466.

⁸⁰ ASSM, La capacité de discernement dans la pratique médicale, 2019, p. 15.

⁸¹ Art. 434 CC.

⁸² THOMAS GEISER / MARIO ETZENSBERGER in: Geiser/Fountoulakis (edit.), *Basler Kommentar, Zivilgesetzbuch I*, 7th ed., Basel 2022, Art. 434 f. CC, p. 2768 N 8 ff, p. 2769 N 18.

lack of a sufficiently solid legal basis⁸³. One could imagine the introduction of a legal provision for situations in which the person deprived of liberty suffering from a diagnosed mental illness is not able to grasp the importance of a visit from his or her relatives at a critical moment for him or her and where at that moment, the staff in charge - with the consent of the relatives - and after an assessment of the situation, could consider organizing a visit against his or her consent. Future studies will hopefully further investigate the appropriateness of introducing such a provision on this sensitive issue.

³⁴ To conclude this section, we summarise that the studies presented in this contribution should, in our opinion, lead staff to sometimes question discernment by taking into account the particular vulnerability of people.

³⁵ Assessing a wish not to be visited poses difficult ethical and professional challenges and an increased risk of paternalism. These are issues that require time and human resources to allow for reflection, consultation with several people involved and above all several conversations with the person concerned, concrete

support and encouragement to maintain contact⁸⁴, and perhaps sometimes the use of creative attempts⁸⁵. The imposition of visits does not seem to us to be permissible for lack of a legal basis, which makes the encouragement of visits all the more important⁸⁶.

V. Perspectives

³⁶ The care of persons deprived of their liberty suffering from mental illness is a considerable challenge. The deterioration of an individual's mental state in detention is obviously not dependent on a single factor, but given the results of scientific studies, visits by relatives must be one of the factors that are examined not only from the perspective of privacy, the right to health and humane treatment, but also from the perspective of the right to life.

³⁷ The practice of European states shows significant variations and it is not surprising that these are also found in Switzerland⁸⁷. If access rights in Switzerland are managed at the local level, it is to be hoped that improvements can be made at the same level and without the need for complex legislative changes. The principle of subsidiarity being, where action would be more

⁸³ In our view, the general police clause in [Article 36 § 1 of the Federal Constitution](#) (Federal Constitution of the Swiss Confederation of 18 April 1999 [Cst.; [SR 101](#)]) is not sufficient (even if the ECtHR has accepted it for forced feeding, see ECtHR admissibility decision [73175/10](#) of 26 March 2013 (Rappaz v. Switzerland), § 75-77).

⁸⁴ JÖRG KÜNZLI / NULA FREI / ALEXANDER SPRING, [Einzelhaft in Hochsicherheitsabteilungen Menschenrechtliche Standards und ihre Umsetzung in der Schweiz](#), Bern 2014, p. 50.

⁸⁵ We have both never worked in a detention institution, but we think that the experiences made during the pandemic could be useful in this respect. Experts could better assess than we could whether a virtual visit could possibly lower inhibition thresholds with hesitant people. Would

technology allow the provision of attempts at a virtual tour that the person concerned can grasp or not grasp in a safe environment, even if the person lacks enthusiasm at first?

⁸⁶ It remains to be seen whether the general police clause in [Art. 36 Cst. para. 1](#) would allow the authorities to intervene in an emergency without an explicit legal basis to impose a visit. We find it difficult to imagine that such an argument could be justified. As the behaviour of detainees is often complex and the difficulties in organising visits relatively predictable and repetitive, invoking the general police clause seems inadequate (see ECtHR judgment [12675/05](#) of 8 October 2009 [Gsell v. Switzerland], § 55 ff.).

⁸⁷ BSK PC-IMPERATORI, Art. 84 PC, p. 2063 N 10 s.

effective would be in raising the awareness of prison authorities who are in direct contact with the persons concerned. This implies that they must be able to detect signs of vulnerability. The ECtHR states that where the authorities are aware that an individual deprived of liberty is unwell, they must ensure that his or her health improves and does not deteriorate, rather than simply treating the symptoms⁸⁸.

³⁸ However, the difficulty that psychiatric care can present to the authorities should not be minimised. It is imperative that adequate temporary and human resources are sought and made available by the state so that it has a framework within which careful assessment of visiting rights can take place. As the CNPT suggests, even for high security wards, "[v]isiting of relatives should be allowed at least once a week and should not always take place in a room with a glass partition"⁸⁹.

³⁹ In this contribution, we have noted the interrelationship between visits by relatives, an individual's vulnerability and the importance of taking this vulnerability into account when considering whether or not a visit is actually necessary and if so, under what conditions. Both when a detainee expresses a wish not to receive visits from relatives and when such visits are denied or otherwise restricted, the authorities must take into account the links between psychological vulnerability and the potential benefits of more frequent and freer social contact. In view of the scientific literature, an analysis that only considers the risks of visits or is satisfied with an initial wish to forego visits cannot meet the legal requirements.

⁸⁸ ECHR judgment [GC] [47152/06](#) of 23 March 2016 (Blokhin v. Russia), § 137.

⁸⁹ CNPT (fn. 31), p. 5.