
Prisoners' rights – right to private life – smoking in prison – European Court of Human Rights - margin of appreciation

Vainak and others v Estonia, Decision of the European Court, 4 November 2025; Applications Nos. 17982/21 and 3 others)

Introduction

In *Vainak and others*, the European Court of Human Rights upheld three prisoners' claims that the total smoking ban imposed in Estonian prisons was a disproportionate interference with their rights under Article 8 of the European Convention – the right to private life. The decision impacts on the enforcement (and restriction) of prisoners' rights generally, but has a particular relevance to those European states, including the United Kingdom, who have imposed a (near total) ban on smoking, and who may now have to re-visit their policies in this area.

The facts and decision in *Vainak*

The applicants are all long-term smokers and were prisoners at the time when the smoking ban entered into force in Estonia in 2017. They challenged the ban in the domestic courts, but in 2019 the Supreme Court of Estonia declared that the ban was constitutional, finding that it was necessary for the protection of non-smokers' health and prison security. The Supreme Court also considered that less restrictive means – such as special smoking rooms, separating smokers and non-smokers or allowing smoking only outdoors – would not be as effective as a complete ban, and that treatment and counselling for withdrawal symptoms was provided if a prisoner gave up smoking. Before the European Court, the prisoners relied on Article 3 (prohibition of inhuman or degrading treatment) and Article 8 (right to respect for private and family life), complaining about the adverse withdrawal symptoms they had suffered because of the ban – including weight gain, sleeping problems, and depression and anxiety.

The European Court held that there had been a violation of Article 8 as concerned three of the applicants (one prisoner's claim was declared inadmissible under Article 35 ECHR for failure to use effective domestic remedies), but that there had been no violation of Article 3 on the facts.

With respect to Article 8, the Court relied on the notion of 'personal autonomy' and 'the possibility to make choices' about one's own life and health, noting that in a context of already limited personal autonomy, the freedom for prisoners to decide – in this case whether to smoke – was even more precious for them. It then found that the state, in deciding to bring in the ban, failed to assess the impact on the personal autonomy of prisoners who smoked. Thus, such a far-reaching and absolute ban had not been justified by the limiting provisions under Article 8(2), which allow interferences provided they are necessary in a democratic society for achieving a legitimate aim (in this case the health and other rights of others). Thus, the state had exceeded Estonia's considerable margin of appreciation (the area of discretion allowed to member states in balancing various rights and interests).

By a majority of 5-4, the Court accepted that the choice to smoke and the question of providing treatment to counter withdrawal symptoms came under the scope of Article 8. It then held that the ban had interfered with prisoners' right to respect for private life, accepting that that interference served a legitimate aim and was intended to protect others from passive smoking. However, it noted that the ban had not benefitted from direct parliamentary review and debate, and that the domestic analysis had focused on health protection, prison security and the possibility of counselling and treatment, thus failing to consider at all personal autonomy and prisoners' freedom of choice in matters concerning their own body and health.

Noting that smoking tobacco was still legal for persons at liberty, and that there was no consensus among the member States on the need to ban smoking in prison settings, the Court found that the States' margin of appreciation to regulate smoking in prisons, while considerable, was not without limits. Thus, such a far-reaching and absolute ban with no assessment of the impact on the personal autonomy of prisoners who smoked had not been justified and exceeded Estonia's freedom to decide on such matters. There had, therefore, been a violation of Article 8.

However, the Court declared the claims under Article 3 as inadmissible (manifestly ill-founded). In the Court's view, although giving up smoking had caused the applicants some stress or anguish, it had not attained the minimum level of severity for Article 3 to come into play – causing substantial physical or mental harm or debasement and humiliation (*Ireland v United Kingdom* (1978) 2 EHRR 25). Further, there was no evidence that the prisoners had complained in the domestic courts about the lack of appropriate treatment and counselling provided at the prison.

Commentary: impact on prisoners' rights and prisons

Before delivering judgment, the European Court noted that it had already ruled on cases concerning smoking in prisons from the opposite angle (passive smoking). In those cases, the Court had to consider whether exposing non-smoking prisoners to secondary smoking was a breach of Article 3 and 8 of the Convention. The ruling in this case was, therefore, important in terms of prisoners' rights to private life and not to be subjected to inhuman and degrading treatment; but equally important on the authorities' duty to safeguard the rights of others and the amount of discretion a human rights court should give to them in that balancing act.

As seen in this case, the prisoner's argument was that banning smoking in prisons violated their right to enjoy their private life, and not to be subject to inhuman or degrading treatment caused by withdrawal symptoms. On the other hand, smoking bans, or at least the refusal to impose or enforce them, can impact on the health and human rights of other prisoners. Thus, a prisoner's health might impose a positive duty on the state under Article 2 of the Convention to protect the right to life of prisoners affected by a smoking environment; or – under Article 3 – to ensure that they are not subject to inhuman or degrading treatment caused by passive smoking. Further, a smoking environment in prisons can impact on the non-smoking prisoner's private life, under Article 8.

The decision in this case raises a number of important issues on prisoners' claims under the Convention and the role of the Court in reviewing the state's laws and practices in line with the rights laid down by the Convention. Thus, the Court normally provides each state with a wide margin of appreciation (discretion) in such cases, showing a reluctance to interfere unless the defendant state's law is clearly out of line with fundamental principles and other states' practice. Here, however, the Court warns us that that discretion is not unlimited, and that the state must at least consider the inherent rights and liberty of prisoners before deciding to restrict those rights. This approach is similar to the one taken by the Strasbourg Court with respect to prisoner voting rights (*Hirst v United Kingdom* (2006) 42 EHRR 41) – that each state is allowed its own prisoner voting regulations, but all policies should not be absolute (blanket bans) or fail to take into account relevant circumstances, including the inherent and democratic right to vote. The difference between those claims, however, is that with the right to vote, we are talking about a right which is clearly laid down in the Convention (Article 3 of the First Protocol), and which is fundamental to democracy; whilst it is debatable whether the right to private life includes every life choice, such as smoking. Indeed, there was a powerful dissenting speech on this issue: that there was no right to smoke under Article 8, either for those at liberty or in prison.

The Court in this case were also critical of the state's decision to introduce the ban by ministerial power rather than through Parliament. In the UK, current policies on prisoner voting rights, and, indeed, smoking in prisons, were taken by administrative action (rather than by Parliament), and

the present case suggests that parliamentary consideration is more consistent with the Convention than governmental administrative measures. This appears to be a bold decision of the Court, where previously they have not insisted on direct parliamentary intervention, provided the measure is supported by the law and the Constitution (*Scoppola v. Italy (No. 3)* (Grand Chamber), Application No.126/05), 22 May 2012).

Conclusion

If the decision of the Court in this case stands – it will be appealed to the Grand Chamber of the Court – then many states will need to revisit smoking bans in prisons (and other places of detention) to ensure that they achieve a better balance between public safety and health on the one hand, and the rights of prisoners to autonomy over their individual health and life style. At the very least, human rights law (and the decision in this case) insists that those *seriously* affected by the smoking ban – either as smokers or those affected by passive smoking - are provided with suitable treatment and protection to cope with those consequences. It will be interesting to see, therefore, how states respond to this ruling.

The decision also raises more general concerns about the European Court's role in interpreting Convention rights, and when it is permissible to gainsay the efforts of the domestic authorities to decide those issues. The decision of the Grand Chamber in this case will be eagerly awaited: not only by prisoners and the prison authorities, but by all Member States of the Council of Europe who are concerned about the European Court's power to question its policies where they have attempted to balance the rights and interests of all parties.

Steve Foster, Honorary Fellow, Coventry University
