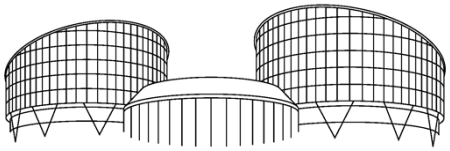

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIRST SECTION

CASE OF S.M. v. ITALY

(Application no. 16310/20)

JUDGMENT

Art 3 (substantive) • Sufficient measures to protect a vulnerable disabled detainee suffering from multiple HIV-related conditions from the risk of contracting COVID-19 • Adequate medical care • No evidence of any deterioration of the applicant's state of health state or that he did not receive treatment in prison • Authorities showed sufficient diligence in searching for alternative accommodation • Continued detention not amounting to inhuman or degrading treatment • Domestic authorities, faced with a global pandemic of a novel disease, acted with sufficient diligence in implementing measures for the prevention of COVID-19 • Domestic authorities under no obligation to grant the applicant house arrest and refusal to do so in case-circumstances not unreasonable
Art 35 § 1 • Exhaustion of domestic remedies • Present application filed while proceedings pending before the competent Supervisory Court • Applicant's uncertainty as to the possibility of having his case considered promptly in view of suspensions and delays affecting proceedings before that court at the outbreak of the COVID-19 pandemic and his decision to apply to the Court without waiting longer, justified

Prepared by the Registry. Does not bind the Court.

STRASBOURG

17 October 2024

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of S.M. v. Italy,

The European Court of Human Rights (First Section), sitting as a Chamber composed of:

Alena Poláčková,
Ivana Jelić,
Krzysztof Wojtyczek,
Lətif Hüseynov,
Péter Paczolay,
Erik Wennerström,
Raffaele Sabato*, judges*,

and Ilse Freiwirth, *Section Registrar,*

Having regard to:

the application (no. 16310/20) against the Italian Republic lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by an Italian national, Mr S.M. ("the applicant"), on 1 April 2020;

the decision to give notice to the Italian Government ("the Government") of the complaints raised under Articles 2 and 3 of the Convention and to declare the remainder of the application inadmissible;

the decision not to have the applicant's name disclosed;

the parties' observations;

Having deliberated in private on 10 September 2024,

Delivers the following judgment, which was adopted on that date:

INTRODUCTION

1. The case concerns the alleged incompatibility of the applicant's state of health with his continued detention in prison from 22 November 2019 until 29 July 2020, as well as the allegedly insufficient measures adopted to protect him from the risk of contracting COVID-19.

THE FACTS

2. The applicant was born in 1977 and lives in Varese. He was represented by Ms A. Mascia and Ms A. Calcaterra, lawyers practising respectively in Verona and Milan.

3. The Government were represented by their Agent, Mr L. D'Ascia.

4. The facts of the case may be summarised as follows.

5. According to information contained in two medical certificates from 2014 and 2016, the applicant suffered from HIV infection and a number of related diseases, including Kaposi sarcoma, HIV-related encephalopathy and chronic HCV-related hepatopathy, having previously also been diagnosed with pulmonary tuberculosis. He had a progressive neurological deterioration with a severe cognitive deficit, had impaired mobility and needed help to

perform daily tasks. He had been prescribed antiretroviral treatment since 2008. Initially the applicant's compliance with the regime had been poor, but he had subsequently followed it well, with a good immune response.

6. The applicant was convicted for several offences committed between 1998 and 2015, including theft, fraud, drug possession and trafficking, unauthorised possession of weapons, forgery and tax evasion. He was sentenced to over eleven years' imprisonment and had been detained since 2010. Nevertheless, on account of his multiple diseases and cognitive deficit, he had been granted several periods of house arrest.

7. On 15 January 2015 the Milan Court responsible for supervising the execution of sentences (*tribunale di sorveglianza* – "the Supervisory Court") granted him house arrest, to be implemented at a residential unit (*comunità*). However, the applicant left the unit without authorisation and that measure was suspended on 28 January and then revoked on 24 February, following which he was returned to prison.

8. On 14 May 2015 the Milan judge responsible for supervising the execution of sentences (*magistrato di sorveglianza* – "the Supervisory Judge") noted that, according to a medical certificate dated 11 May 2015, the applicant's state of health was incompatible with detention in prison owing to his multiple diseases. The Supervisory Judge therefore granted the applicant house arrest, to be implemented at his sister's place of residence.

9. On 18 March 2016 the Milan Supervisory Court confirmed the house arrest. It stated again that detention in prison was incompatible with the applicant's severe degenerative diseases, and that he should be granted an optional deferral of the penalty on the basis of Article 147 of the Criminal Code and section 47 *ter* of the Prison Administration Act (Law no. 354 of 26 July 1975).

10. On 17 February 2018 the Milan Supervisory Judge suspended the measure of house arrest, noting that the applicant was no longer staying at his sister's place of residence and that she had withdrawn her consent to host him. On 8 March 2018 the Milan Supervisory Court reinstated the measure of house arrest, to be implemented at the applicant's brother's place of residence. The judges relied, in particular, on a medical report of 28 February 2018, which stated that the applicant's general condition was moderate and he had a good immune response, but that the progression of the disease into AIDS and his cognitive and motor impairments were incompatible with detention.

11. In September 2019, during the course of an inspection, the police found the applicant to be unlawfully occupying an apartment and living in poor sanitary conditions. Since the applicant did not have any alternative place of residence, on 16 September 2019 the Supervisory Judge suspended the measure of house arrest. On 16 October 2019 the Milan Supervisory Court noted that the applicant's medical condition was still severe and reinstated

house arrest, to be implemented in a residential unit for people with disabilities.

12. In the following month, the applicant repeatedly escaped the residential unit and, on one occasion, he accosted a woman and a minor, kissing the latter on the cheek. As a result of that incident and other problematic behaviours, the residential unit withdrew its consent to accommodate him and on 22 November 2019 the measure of house arrest was suspended. On the same day, the applicant was redetained in Milan San Vittore Prison.

13. On 23 December 2019 the Milan Supervisory Court confirmed the applicant's detention in prison, revoking the measure of house arrest. It noted, in particular, that the applicant's AIDS diagnosis was not supported by any documentation and that, according to the medical report of 28 February 2018, he had a good immune response. As such, the conditions for compulsory deferral of the penalty pursuant to Article 146 of the Criminal Code were not fulfilled. Additionally, the applicant had repeatedly breached the rules of house arrest and was still considered dangerous; nevertheless, such behaviour seemed to be largely a result of his cognitive deficit. The Supervisory Court invited the prison medical service to reassess the compatibility of the applicant's state of health with detention and, if necessary, to liaise with the healthcare services to find an alternative facility.

14. A medical certificate dated 10 January 2020 reconfirmed that the applicant had a clear cognitive deficit and limited autonomy in performing daily tasks, for which he had been assigned a carer to assist him. He was being monitored by a virologist and took antiretroviral treatment on a regular basis; several other specialist examinations had also been scheduled.

15. On 30 January 2020 the World Health Organization declared COVID–19 a public health emergency of international concern, and on 11 March it was declared a global pandemic. In the meantime, on 31 January the Italian Council of Ministers declared a national state of emergency and in February the first cases of COVID-19 were detected in the Lombardy region.

16. On 15 March 2020 the presidents of the Milan and Brescia Supervisory Courts sent a letter to the Italian Ministry of Justice, emphasising the severe overcrowding in regional prisons which prevented the adoption of adequate precautionary measures against COVID-19. They referred to riots which had recently taken place in some prisons, including San Vittore Prison, and the urgent need to reduce the prison population through the application of automatic measures which would not add to the already significant workload of the supervisory courts.

17. On 17 March 2020 the applicant sent an urgent request to the Milan Supervisory Judge, asking for his detention in prison to be replaced with house arrest owing to his state of health and to the risks posed by COVID-19. He relied on section 47 *ter* of Law no. 354/1975 or, alternatively, on section 123 of Decree-Law no. 18 of 2020.

18. On 23 March 2020 the Supervisory Judge rejected the request, noting that the applicant did not have a suitable place to stay and residential units were not accepting detainees owing to the health emergency. The applicant's release was not possible as, if released, he would end up on the street with no access to medical treatment. The Supervisory Judge asked the prison administration to find suitable accommodation for the applicant and referred the case to the Supervisory Court for consideration.

19. On 25 March 2020 the applicant lodged a request for an interim measure with the Court under Rule 39 of the Rules of Court, asking to be transferred to an appropriate facility. On 26 March 2020 the Court rejected the request.

20. On account of organisational difficulties and a lack of personnel, by orders of 25 and 27 March 2020, hearings scheduled before the Milan Supervisory Court for the beginning of April were postponed to an unspecified future date.

21. On 28 July 2020 the applicant made a new request to be placed under house arrest, stating that with the support of the prison medical service, accommodation had been found for him. The request was based on the applicant's severe physical and cognitive problems, which had repeatedly been found to be incompatible with detention, and on his constant need for assistance, which was allegedly provided by a carer in prison.

22. On 29 July 2020 the Supervisory Judge granted the applicant's request for house arrest and, on the same day, he was transferred to a residential unit in Varese.

23. On 20 July 2021 the applicant finished serving his sentence.

RELEVANT LEGAL FRAMEWORK AND PRACTICE

I. DOMESTIC LAW

A. Deferral and replacement of detention

24. Articles 146, 147 and 148 of the Criminal Code provide for the deferral of the execution of a sentence for health reasons. In particular, Article 146 (compulsory deferral) provides:

> "The execution of a sentence, other than the payment of a pecuniary obligation, shall be deferred: ...
>
> (3) in the case of a person suffering from AIDS or from severe immunodeficiency ... or from any other particularly serious illness as a result of which his or her state of health is incompatible with detention, when the illness is at such an advanced stage that, as certified by prison or external experts, it no longer responds to treatment."

25. Article 147 (optional deferral) provides:

> "The execution of a sentence may be deferred: ...

(2) where a penalty involving a restriction of personal liberty is to be enforced against a person suffering from a serious physical illness."

26. Section 47 *ter* of the Prison Administration Act (Law no. 354 of 26 July 1975) provides for the possibility of replacing detention in prison with detention under house arrest. In so far as relevant, it reads as follows:

"1. A sentence of imprisonment of up to four years ... may be served in one's own home, in another place of private residence or in a public care facility when the person concerned is:

...

(c) suffering from particularly serious health conditions that require constant contact with the local health services;

...

1-*ter*. When compulsory or optional deferral of the execution of the sentence may be ordered pursuant to Articles 146 and 147 of the Criminal Code, the supervisory court may order detention under house arrest even where that sentence exceeds the duration referred to in subsection 1 ...."

27. Requests for deferral and replacement of a sentence of imprisonment are sent, on both a provisional and an urgent basis, to the supervisory judge (*magistrato di sorveglianza*), whose decision is subject to review by the supervisory court (*tribunale di sorveglianza*). That court's decisions may be appealed against to the Court of Cassation.

B. COVID-19

28. In response to the COVID-19 health emergency, the Italian legislature adopted a number of provisional measures derogating from the ordinary prison regulations.

29. Section 2(8) and (9) of Decree-Law no. 11 of 8 March 2020 provided that all visits to detainees were to be replaced by telephone or video communication and that the supervisory courts could, on an exceptional basis, suspend the granting of special permits (*permessi premio*) and the application of the semi-custodial regime (*semilibertà*).

30. Additional implementing measures were set out in the Decree of the President of the Council of Ministers of 8 March 2020.

Section 2(1)(u) set out measures for the prevention of COVID-19 in prison, notably screening procedures on admission to prison, the isolation of symptomatic patients, the restriction of special permits or their modification in order to limit contact between the prison and the outside world, and the need to consider the possibility of house arrest.

Section 3(1)(b) advised all those suffering from multiple diseases or immunodeficiency to avoid leaving their homes as far as possible and, in any event, to avoid all places where it was not possible to ensure physical distancing of at least one metre.

31. Subsequent measures aimed at temporarily reducing the prison population were also implemented. In particular, sections 123 and 124 of Decree-Law no. 18 of 17 March 2020 established a simplified procedure for granting house arrest to detainees with less than eighteen months left to serve on their sentence, and granted a special licence to all detainees who were under the semi-custodial regime. Sections 28, 29 and 30 of Decree-Law no. 137 of 28 October 2020 confirmed those measures and further extended the possibility of obtaining special permits.

The possibility of house arrest provided for in sections 123 of Decree-Law no. 18/2020 and section 30 of Decree-Law no. 137/2020 did not apply to detainees who did not have a suitable place of residence.

II. RELEVANT INTERNATIONAL MATERIALS

32. A number of relevant international materials, including statements and guidelines relating to protection against and prevention of COVID-19 in prison, were set out in *Fenech v. Malta* (no. 19090/20, §§ 19-29, 1 March 2022).

33. The statement of the Council of Europe Commissioner for Human Rights made on 6 April 2020 entitled "COVID-19 pandemic: urgent steps are needed to protect the rights of prisoners in Europe" noted that detainees were among the most vulnerable to viral contagion as basic protective measures such as social distancing and hygiene rules could not easily be followed in prison. The Commissioner therefore urged States to make use of all available alternatives to detention whenever possible, particularly in situations of overcrowding and in respect of detainees with underlying health conditions. In addition, the human rights of those who remained in detention had to be ensured, taking into account the specific needs of the most vulnerable detainees, such as those with disabilities.

34. The statement of principles relating to the treatment of persons deprived of their liberty in the context of the COVID-19 pandemic issued on 20 March 2020 by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) set out a number of principles that should be applied in respect of persons deprived of their liberty. These included, among others, recourse to alternatives to deprivation of liberty, especially in situations of overcrowding, and the provision of medical care with special attention to the needs of vulnerable groups, such as persons with pre-existing medical conditions, including screening for COVID-19 and pathways to intensive care as required, as well as psychological support.

35. The COVID-19-related statement by the members of the Council for Penological Co-operation working group (PC-CP WG) of 17 April 2020 drew attention to a number of good practices adopted by the Council of Europe member States, such as accommodation in single cells on admission

to prison and before release, efforts to accommodate as few inmates as possible in shared cells, COVID-19 testing in case of need, provision of disinfectants and other sanitary equipment, use of masks and other protective equipment by prison staff, regular taking of body temperatures, additional support by psychologists and counselling, as well as emergency measures to reduce prison overcrowding.

36. The interim guidance document issued by the World Health Organization on 15 March 2020 entitled "Preparedness, prevention and control of COVID-19 in prisons and other places of detention" also set out detailed measures that should be adopted in prison, including awareness of prevention strategies among staff and detainees alike, hygiene precautions, physical distancing, cleaning and disinfection procedures, isolation and quarantine of people at risk.

37. The CPT Report on the periodic visit to Italy carried out from 28 March to 8 April 2022 (CPT/Inf (2023) 5) noted that the Italian prison administration had put in place quarantine measures for all those entering prison, limited contact with the outside world and the increased use of non-custodial measures; additionally, when vaccines had become available a large vaccination campaign had been conducted. The report also reported that, in February 2020, Italian prisons had an occupancy level of 121%. The measures adopted following the outbreak of the COVID-19 pandemic led to a 13% drop in the prison population in the following year.

THE LAW

I. THE GOVERNMENT'S PRELIMINARY OBJECTION

38. The Government argued that the application was inadmissible for non-exhaustion of domestic remedies. They submitted, in particular, that the decision issued by the Milan Supervisory Judge on 23 March 2020 had not been approved by the Supervisory Court and that the applicant should have waited for such approval before applying to the Court.

39. In their initial observations, the Government also argued that, if the applicant's complaints were to be read as concerning a problem of overcrowding, he should have availed himself of the compensatory remedy provided by section 35 *ter* of the Prison Administration Act. Following the applicant's subsequent clarifications on the scope of his complaint, the Government did not maintain this plea and did not provide any further detail.

40. The applicant argued that, at the time of his application, the Milan Supervisory Court had suspended hearings and the examination of cases owing to the COVID-19 pandemic, and that the situation had not yet changed when he had been transferred to a residential unit in July 2020. In addition, the Milan Supervisory Court had had, at that time, a particularly heavy

workload and there were long delays. Such suspensions and delays were, in the applicant's view, incompatible with the urgent nature of his complaints.

41. As to the remedy provided by section 35 *ter* of the Prison Administration Act, the applicant clarified that he did not intend to complain of overcrowding in itself, but of the risks to his life and health posed by COVID-19, which were aggravated by overcrowding and by the impossibility of ensuring physical distancing in prison. He maintained that, in respect of those complaints, he was not required to make use of a compensatory remedy.

42. The Court reiterates that the requirement for an applicant to exhaust domestic remedies is normally determined with reference to the date on which an application is lodged with it. However, the Court also accepts that the last stage of such remedies may be reached after the lodging of the application but before it determines the issue of admissibility (see, for instance, *Škorjanec v. Croatia*, no. 25536/14, § 44, 28 March 2017, and *Zalyan and Others v. Armenia*, nos. 36894/04 and 3521/07, § 238, 17 March 2016, with further references). Additionally, the Court has held that, when examining a complaint or a plea of non-exhaustion, it can take into account facts which occurred after the lodging of the application but are directly related to those covered by it (see *Shmorgunov and Others v. Ukraine*, nos. 15367/14 and 13 others, § 302, 21 January 2021, and *Y v. Bulgaria*, no. 41990/18, § 68, 20 February 2020).

43. In the present case, the applicant lodged the application on 1 April 2020, soon after the Supervisory Judge's decision of 23 March 2020 was given. It is undisputed that the judge had referred the case to the Supervisory Court for consideration and that, at the time, proceedings were still pending before the latter (see paragraph 18 above). Although no further information has been provided on subsequent developments in the proceedings before the Supervisory Court, it can be assumed that they became devoid of purpose after the applicant's transfer to a residential unit on 29 July 2020 (see paragraph 22 above).

44. The Court notes, first of all, that the applicant could not have taken any further action at the domestic level, as the case had already been referred to the Milan Supervisory Court and the decision of the Supervisory Judge could not be challenged otherwise. This was not contested by the Government, who only argued that the applicant should have waited longer before lodging his application with the Court, in order to give the domestic courts the opportunity to consider his complaint.

45. In this connection, the Court takes note of the applicant's complaints about the suspensions and delays that characterised the activity of the Milan Supervisory Court at the outbreak of the COVID-19 pandemic. While it does not appear that proceedings concerning requests for release were formally suspended, a number of hearings had been postponed to unspecified dates and the Milan Supervisory Court appeared to be facing organisational problems (see paragraphs 16 and 20 above). In that connection, the Government merely

noted that in previous years the Milan Supervisory Court had given decisions within a reasonable time, without providing any additional information on the activity of that court as of spring 2020.

46. In such circumstances, the applicant's uncertainty as to the possibility of having his case considered promptly by the Milan Supervisory Court, as well as his decision to lodge the application with the Court immediately, appear to be justified.

47. Furthermore, subsequent events confirmed the applicant's allegations concerning the delays affecting proceedings before the Supervisory Court. In fact, over four months later – when, in July 2020, the applicant was granted house arrest by a new decision of the Supervisory Judge – the Milan Supervisory Court had not yet given its decision.

48. In the light of those very specific circumstances, the Court does not consider that the applicant should be reproached for not having waited longer before lodging his application with it. At present, in any event, it does not appear that any proceedings are still ongoing.

49. As to the second part of the non-exhaustion plea, the Court notes – following the applicant's clarification of the scope of his complaints – that the Government have not argued that section 35 *ter* of the Prison Administration Act also applies in respect of issues other than overcrowding (see paragraph 39 above), and the Court cannot examine this issue of its own motion.

50. The Court therefore dismisses the Government's preliminary objection.

II. ALLEGED VIOLATION OF ARTICLES 2 AND 3 OF THE CONVENTION

51. Relying on Article 2 of the Convention, the applicant complained that the domestic authorities had not taken sufficient steps to protect him from the risk of contracting COVID-19 while in detention. Additionally, the applicant complained that his continued detention, despite his multiple diseases and the risk of contracting COVID-19, was in breach of Article 3 of the Convention. The relevant provisions read as follow:

Article 2

"1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law."

Article 3

"No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

A. Legal characterisation of the complaints

52. Under Article 2 of the Convention the applicant argued, in particular, that his life had been in imminent danger since, as a result of his underlying health problems and in particular his HIV, were he to contract COVID-19 he would most likely die.

53. The Government argued that Italian prisons had put precautionary measures in place (such as testing people who came into contact with the applicant, as well as masks, safe distancing and sanitising measures). The situation in Milan San Vittore Prison had not been critical at the time, and as a consequence the applicant had not been exposed to a higher risk than people on the outside.

54. The Court has established that there may be a positive obligation on a State under the first sentence of Article 2 § 1 to protect the life of an individual from the risk of life-endangering illness. At the same time, if no death has occurred as a result of actions attributable to the State or its agents, then such actions will be analysed from the angle of Article 2 only in exceptional circumstances (see *Mitkus v. Latvia*, no. 7259/03, § 62, 2 October 2012).

55. In *Fenech v. Malta* (no. 19090/20, §§ 104-08, 1 March 2022), the Court found that the applicant could not claim to be the victim of a violation of Article 2 of the Convention as a result of his exposure to COVID-19. That conclusion was mainly based on the fact that, more than a year and a half after the start of the pandemic, the applicant had not contracted the disease, and that it had not been sufficiently established that his underlying condition, namely the lack of a kidney, meant that he would certainly or quite likely die if he were to be infected.

56. In the present case, the Court cannot rule out the possibility that, on account of the nature of the applicant's underlying health condition (HIV with multiple correlated diseases), he was at an increased risk of developing a severe form of COVID-19. Nevetheless, the Court cannot speculate as to whether the applicant's health condition would have made it certain or quite likely for him to die in case of an infection with COVID-19. Moreover, the Court attaches importance to the fact that, during his detention, the applicant did not contract that disease.

57. In such circumstances, the Court considers that the facts complained of by the applicant do not call for a separate examination under Article 2 of the Convention, but would be more appropriately examined under Article 3 instead (see *Mitkus*, cited above, § 62).

B. Admissibility

58. In his observations, filed on 23 February 2023, the applicant complained of the lack of adequate medical treatment in prison and of the fact

that, following the beginning of the COVID-19 pandemic, the provision of assistance by a carer had been suspended for several months.

59. The Government argued that these allegations constituted a new complaint, which had been submitted out of time.

60. The Court notes that, in his initial application, the applicant complained of a breach of Article 3 of the Convention in respect, on the one hand, of an insufficient protection against the risk of contracting COVID-19 and, on the other hand, of the incompatibility of his overall state of health with detention in prison. This last part of the complaint was mainly based on the considerable stress and anxiety generated by detention in prison for a disabled person suffering from multiple diseases, as well as on humanitarian considerations; the applicant did not state, at the time, that the alleged incompatibility derived from insufficient treatment or assistance.

61. In any event, the Court considers that it is unnecessary to establish whether, in his observations, the applicant was seeking to clarify or elaborate upon the complaints he had initially raised or whether he was raising new complaints (see *Radomilja and Others v. Croatia* [GC], nos. 37685/10 and 22768/12, §§ 121-22, 20 March 2018), as in any event his allegations in this respect are not sufficiently substantiated.

62. While the Court acknowledges that information about medical care in prison falls within the knowledge of the domestic authorities and that applicants might experience difficulties in obtaining evidence, they are required to submit at least a detailed account of the facts complained of (see *Miranda Magro v. Portugal*, no. 30138/21, § 74, 9 January 2024; *Martzaklis and Others v. Greece*, no. 20378/13, § 66, 9 July 2015; and *Štrucl and Others v. Slovenia*, nos. 5903/10 and 2 others, §§ 65-66, 20 October 2011, with further references).

63. In the present case, the applicant complained, in general terms, that the domestic authorities had not put in place a comprehensive and appropriate therapeutic care plan, without indicating which types of treatment he needed and had been denied by the domestic authorities.

64. As regards the provision of assistance, the applicant initially acknowledged that he was assisted by a carer and did not complain, either before the domestic authorities or before the Court, that the carer was insufficiently qualified. In his subsequent observations, the applicant argued that the assistance given by the carer had been suspended owing to the pandemic, without indicating when or for how long. Additionally, the Court cannot help but notice that, when the applicant applied to the Milan Supervisory Court on 28 July 2020, he confirmed that he was assisted by a carer (see paragraph 21 above).

65. The Court therefore notes that, in this respect, the applicant has failed to provide a sufficiently detailed account of the facts complained of. In such circumstances, the Court finds that the allegations concerning a lack of treatment and assistance are insufficiently substantiated (see *Krivolapov*

v. Ukraine, no. 5406/07, § 78, 2 October 2018, and *Štrucl and Others*, cited above, §§ 67-68).

66. It therefore declares this part of the complaint inadmissible as manifestly ill-founded under Article 35 §§ 3 and 4 of the Convention.

67. The Court notes that the remaining part of the complaint is neither manifestly ill-founded nor inadmissible on any other grounds listed in Article 35 of the Convention. It must therefore be declared admissible.

C. Merits

1. The parties' submissions

(a) The applicant

68. The applicant argued that his continued detention in San Vittore Prison, especially following the outbreak of the COVID-19 pandemic, was incompatible with his underlying health conditions.

69. He pointed out, first of all, that he was suffering from a number of serious health conditions, which the supervisory courts had repeatedly found to be incompatible with detention in prison.

70. He further argued that those conditions, and in particular his immunodeficiency and prior pulmonary tuberculosis, had made him particularly vulnerable to contracting COVID-19, resulting in serious consequences or even death. The prison context had not permitted the adoption of adequate preventive measures, especially since San Vittore Prison had been severely overcrowded (the applicant stated that, in March 2020, there had been 945 detainees for 480 available places), and he had therefore been significantly more exposed to the risk of contracting COVID-19 than people outside prison. In that connection, he also noted that he had been placed in a cell with two other inmates.

71. Finally, the applicant argued that he had been kept in detention only because he had lacked a suitable place of residence for house arrest, and that it had been the authorities' responsibility to find him suitable alternative accommodation, as the Milan Supervisory Judge had found on 23 March 2020. In that connection, the applicant noted that the Ministry of Justice had taken steps in favour of detainees who might benefit from alternative measures to detention but did not have suitable accommodation, but the applicant had not been granted any such measures. Additionally, while he had been in prison, he had not even been transferred to a prison medical centre or to a mental health unit. It was ultimately his lawyer who (with the support of the prison medical service) had found an available placement for him in a residential unit in July 2020.

72. Overall, the applicant argued that his continued detention, in spite of his multiple conditions and the risk of his contracting COVID-19, was a source of a significant emotional and psychological distress.

(b) The Government

73. The Government argued that the applicant's complaint was extremely general and that he had not pointed to any specific element in support of his claims.

74. They stated that the applicant had been placed in the prison's infirmary and had been assisted by a carer.

75. As to the risk of his contracting COVID-19, the Government argued that it was a known fact that Italian prisons had implemented precautionary measures such as masks, safe distancing and sanitising procedures; and that the detainees who had come into contact with the applicant had been tested. Additionally, the situation in San Vittore Prison had not been critical at that time. There was therefore no reason to believe that, in prison, the applicant had been exposed to a higher risk than the outside population.

76. Finally, the Government emphasised that there was no obligation to release a detainee suffering from health issues, and that the domestic authorities had duly examined the applicant's situation, taking into account the fact that he had repeatedly breached the conditions of his house arrest and had no alternative place of residence.

2. The Court's assessment

(a) General principles

77. The general principles concerning the obligation to preserve the health and well-being of prisoners, in particular through the provision of the required medical care, have been summarised in *Rooman v. Belgium* ([GC], no. 18052/11, §§ 144-48, 31 January 2019) and, more recently, in *Tarricone v. Italy* (no. 4312/13, §§ 71-80, 8 February 2024). Specifically, when examining whether the detention of a person who is ill is compatible with Article 3 of the Convention, the Court will take into account: (a) the prisoner's health condition and the effect on the latter of the manner of execution of his or her imprisonment, (b) the quality of care provided, and (c) whether or not the applicant should continue to be detained in view of his or her state of health (see also *Potoroc v. Romania*, no. 37772/17, § 63, 2 June 2020).

78. The Court reiterates that, in addition to providing adequate medical care, the domestic authorities have a positive obligation to put in place effective methods of prevention and detection of contagious diseases in prison. First and foremost is the State's obligation to screen detainees early, upon arrival in prison, to identify carriers of a virus or contagious disease, isolate them and treat them effectively. All the more so since prison authorities cannot ignore the infectious state of their inmates and, in so doing, expose others to the real risk of contracting serious illnesses (see, for instance, *Fenech*, cited above, § 127, and *Fűlöp v. Romania*, no. 18999/04, § 38, 24 July 2012).

79. In a number of cases concerning the transmission of infectious diseases in prison, the Court has addressed the inadequacy of the authorities' prevention efforts. In particular, the Court has criticised the lack of effective screening procedures upon arrival in prison (see, for example, *Machina v. the Republic of Moldova*, no. 69086/14, § 38, 17 January 2023, and *Cătălin Eugen Micu v. Romania*, no. 55104/13, § 56, 5 January 2016). Additionally, it has found violations in cases where the spread of infectious diseases has been made worse by severe overcrowding and poor sanitary conditions (see *Fűlöp*, cited above, §§ 42-47; *Ghavtadze v. Georgia*, no. 23204/07, §§ 86-89, 3 March 2009; and *Staykov v. Bulgaria*, no. 49438/99, §§ 79-81, 12 October 2006).

80. In *Fenech* the Court addressed, for the first time, the issue of whether the domestic authorities had put in place effective methods for protecting detainees against COVID-19. In that case, the Court considered that the domestic authorities had an obligation to put in place measures aimed at avoiding infection, limiting the spread once it reached the prison, and providing adequate medical care in the case of contamination. Preventive measures had to be proportionate to the risk at issue; however, they should not place an excessive burden on the authorities in view of the practical demands of imprisonment, especially in the context of a global pandemic of a novel disease (see *Fenech*, cited above, § 129). Taking into account a number of measures implemented in Maltese prisons in that case, the Court concluded that the authorities had complied with their positive obligation to put in place adequate and proportionate measures in order to prevent and limit the spread of the disease (ibid., §§ 130-40).

81. In particular, in *Fenech* (cited above, §§ 131-34) the Court noted that the prison authorities had put in place a contingency plan in collaboration with the national health authorities. Although the Government had regrettably failed to explain in detail to what extent the contingency plan had been put in place, the Court noted that the applicant had accepted that some measures had indeed been taken. The Court considered that the following measures had been adequate in order to prevent and limit the spread of the virus: lockdown of the prison in question for several months following the outbreak of COVID-19 internationally; the provision of protective equipment to staff and the implementation of temperature checks on them; general measures such as disinfection and mask wearing; the possibility of physical distancing and access to open air; and the screening of new detainees, who were subjected to a quarantine period.

(b) Application of the principles to the present case

(i) Compatibility of the applicant's state of health with detention

(α) The applicant's state of health

82. As regards the first element of the Court's examination, the applicant suffered from HIV and a number of related conditions. It is unclear whether his HIV had already developed into AIDS. Although there was medical evidence which seemed to suggest that to be the case, the Milan Supervisory Court had called that finding into question (see paragraphs 10 and 13 above). Neither of the parties provided any additional clarification in this respect.

83. Regardless of that issue, it remains undisputed that the applicant suffered from multiple HIV-related conditions, and that, mainly as a result of his severe cognitive deficit, he had very limited autonomy and required assistance to perform daily tasks (see paragraph 5 above).

84. Additionally, given the applicant's various conditions, it appears that he was at least somewhat immunocompromised, and he had in the past suffered from pulmonary tuberculosis. On that basis, the Court finds it sufficiently established that he was more vulnerable than other detainees to the dangers posed by COVID-19. There is, however, no indication that he contracted that illness while in prison.

85. Finally, while the applicant argued that the conditions of his detention in an overcrowded prison increased his risk of contracting COVID-19, he did not complain about the material conditions of his detention as such, nor did he argue that they had caused his health to deteriorate.

(β) Quality of care

86. The applicant initially complained of the incompatibility of his state of health with detention, without suggesting that he had lacked medical treatment or assistance in prison. As to his subsequent allegations in this respect, the Court has already found that they are unsubstantiated and therefore declared that part of the complaint inadmissible as manifestly ill-founded (see paragraphs 62-66 above).

87. Additionally, the medical certificate of 10 January 2020 shows that the applicant had been monitored by a virologist, received antiretroviral treatment and had several specialist examinations scheduled (see paragraph 14 above). Lastly, there is no indication that the applicant's state of health deteriorated during his detention.

88. In such circumstances, the Court finds that there is nothing in the case-file which suggests that the medical care provided to the applicant was inadequate.

(γ) Continued detention

89. The main part of the applicant's complaint concerns the alleged incompatibility of his state of health with detention.

90. The Court reiterates that the Convention does not lay down any "general obligation" to release a prisoner for health reasons, even if he or she is suffering from a disease which is particularly difficult to treat. Nevertheless, the Court cannot rule out the possibility that in particularly serious cases situations may arise where the proper administration of criminal justice requires remedies in the form of humanitarian measures (see, for example, *Cosovan v. the Republic of Moldova*, no. 13472/18, § 78, 22 March 2022, and *Dorneanu v. Romania*, no. 55089/13, § 80, 28 November 2017). In some cases, the Court has examined the issue of the compatibility of an applicant's state of health with detention in the light of the possibility of providing treatment in prison (see, for example, *Helhal v. France*, no. 10401/12, §§ 54-55, 19 February 2015, and *Cara-Damiani v. Italy*, no. 2447/05, § 75, 7 February 2012).

91. In the present case, the applicant relied on a number of decisions of the domestic authorities which, relying on previous medical reports, had acknowledged the incompatibility of his state of health with detention in prison (see paragraphs 8-10 above). Those medical reports have not been made available to the Court, which is therefore unable to determine whether they were based on the impossibility of providing adequate treatment and assistance in prison or rather on humanitarian considerations.

92. Subsequently, by its decision of 23 December 2019, the Milan Supervisory Court found that the applicant's state of health was not so serious as to require his release. In particular, referring to a report of 28 February 2018, the domestic court found that the applicant was following antiretroviral treatment and had a good immune response, so that he could, for the time being, remain in prison (see paragraph 13 above).

93. The Court does not see any reason to call that finding into question. Indeed, the documents submitted by the parties – although very few in number – do not show that the applicant's state of health had deteriorated to such an extent as to necessitate his release, and the Court has already found that there is no indication that the medical treatment required by the applicant was unavailable in prison or that he was not provided with it (see paragraphs 86-88 above). Additionally, according to the Government's submissions (see paragraph 74 above), which were not contested by the applicant, he was placed in the prison's infirmary, and there is no indication that the conditions of his detention in the infirmary were unsuitable for a detainee with disabilities (see, *mutatis mutandis*, *Sergey Denisov v. Russia*, no. 21566/13, § 64, 8 October 2015).

94. Finally, in July 2020, thanks to the support of the prison medical service, a placement in a residential unit was found, and the applicant was transferred there.

95. It is regrettable that, despite the recommendations of the domestic courts (see paragraph 13 above), no thorough reassessment of the compatibility of the applicant's state of health with detention took place. However, taking into account the fact that the applicant's continued detention did not result in an aggravation of his state of health, that there is no evidence to suggest that he was unable to receive treatment in prison and that the domestic authorities showed sufficient diligence in searching for alternative accommodation, the Court does not consider that the applicant's continued detention amounted to inhuman or degrading treatment.

96. Therefore, the Court finds that there has been no violation of Article 3 of the Convention in respect of the compatibility of the applicant's state of health with detention.

(ii) Protection against the risk of contracting COVID-19

97. The applicant further complained that the domestic authorities had not adequately protected him against COVID-19.

98. In that connection, the Government pointed out that precautionary measures such as masks, safe distancing and sanitising procedures had been put in place, and that the detainees who had come into contact with the applicant had been tested for the virus (see paragraph 75 above); additionally, although this was not explicitly relied upon by the Government, the Court will take into account the emergency legislation adopted by the Italian authorities at the time (see paragraphs 28-31 above).

99. The Court notes, first of all, that whenever it has found a violation of Article 3 on account of the domestic authorities' failure to put in place effective methods for the prevention and detection of contagious diseases in prison, the applicants had actually contracted the disease in question (see paragraph 79 above). In the present case, the applicant did not contract COVID-19.

100. However, the Court also takes into consideration, for the purposes of establishing whether detainees have been subjected to inhuman or degrading treatment, the fact that they were exposed to considerable anxiety and fear (see, for example, *Epure v. Romania*, no. 73731/17, § 80, 11 May 2021; *Bagdonavičius v. Lithuania*, no. 41252/12, § 77, 19 April 2016; and *Khudobin v. Russia*, no. 59696/00, §§ 95-96, ECHR 2006-XII (extracts)).

101. In the present case, the Court considers that, given the nature and effects of COVID-19 and the fact that it can be easily transmitted, the applicant's fears for his health should he contract the virus were not insignificant (see *Fenech*, cited above, § 129). Such fears must have been further increased by his particular vulnerability due to his underlying health conditions (see paragraph 84 above). Nevertheless, the Court does not lose sight of the fact that, at the time in question, such fears were shared by a vast majority of the population, within or outside prison.

102. The Court will therefore examine whether, taking into account all the circumstances of the case, the applicant was exposed to a significantly higher risk of contracting COVID-19 in prison than the population outside. For that purpose, it will examine in particular if and to what extent the domestic authorities enacted measures aimed at preventing or limiting the spread of COVID-19 in prison, taking into account the applicant's particular vulnerability.

103. Such measures should have been proportionate to the risk at issue; however, they should not have posed an excessive burden on the authorities in view of the practical demands of imprisonment, especially since the authorities were confronted with a novel situation such as a global pandemic to which they had to react in a timely manner (see *Fenech*, cited above, §§ 129-30).

104. The Court notes that, by the decrees adopted in March and April 2020, the Italian authorities set out a number of practical measures that should be put in place in order to prevent the spread of COVID-19 in prison and sought to incentivise the application of alternative non-custodial measures (see paragraphs 29-31 above).

105. The guidelines issued by the World Health Organization on 15 March 2020 set out a number of preventive measures, such as awareness of prevention strategies among staff and detainees alike, hygiene precautions, physical distancing, cleaning and disinfection procedures, isolation and quarantine of people at risk. A number of other statements issued by international bodies in the following months also recognised that basic protective measures such as social distancing and hygiene rules could not easily be implemented in prison, and encouraged recourse to alternative measures (see paragraphs 33-36 above).

106. Additionally, the CPT's findings – albeit not relied on by the parties – provide some further information about the measures put in place by the domestic authorities at the latest by the time of the visit which took place in March 2022, which entailed, in particular, quarantine for all persons entering prison, limited contact with the outside world and increased use of non-custodial measures (see paragraph 37 above).

107. The Court finds it regrettable that the Government have not provided more detailed information or evidence on the implementation of precautionary measures (see paragraph 98 above) in San Vittore Prison. Nevertheless, it notes that – with the sole exception of physical distancing – the applicant has not specifically contested the Government's arguments, nor has he suggested any additional measures that should have been adopted by the domestic authorities.

108. As to the issue of prison overcrowding, which, according to the applicant, increased the risk of infection, the Court notes that the domestic authorities put in place a number of measures aimed at reducing the prison population (see, in particular, paragraphs 29-31 above). According to the CPT

report, those measures led to a 13% drop in the prison population in the year following the outbreak of COVID-19 (see paragraph 37 above).

109. As to his sharing the cell with two other inmates, the Court has already recognised that, given the practical demands of imprisonment and the novelty of the situation, it may not be possible to make arrangements for each vulnerable individual to be moved to safer quarters (see *Fenech*, cited above, § 137).

110. Therefore, taking into account the fact that the domestic authorities were faced with a global pandemic of a novel disease, the Court finds that they acted with sufficient diligence in implementing measures for the prevention of COVID-19.

111. Finally, as to the applicant's main argument that he should have been provided with alternative accommodation, the Court does not find that the domestic authorities were under an obligation to grant him house arrest. Although domestic and international instruments called for increased recourse to alternative measures, no general obligation to release every detainee suffering from underlying health conditions can be derived from such a recommendation.

112. In the present case, the applicant's situation was examined on 23 March 2020 by a supervisory judge, who rejected his request for house arrest on the grounds that he did not have a suitable place of residence, that, as a result of the outbreak of COVID-19, residential units were not accepting new patients, and that staying in prison, where he could receive medical treatment, was for the time being in the applicant's best interests (see paragraph 18 above). The Court finds that such conclusions are not unreasonable.

113. Lastly, the Court notes that, even if the applicant had contracted COVID-19 in detention, there is no indication that treatment would not have been available (see *Fenech*, cited above, § 141).

114. In those circumstances, the Court does not find that the authorities failed to secure the applicant's health, or that he was subjected to distress or hardship of an intensity exceeding the unavoidable level of suffering inherent in detention.

115. In light of the foregoing considerations, the Court finds that there has been no violation of Article 3 of the Convention in respect of the protection of the applicant from the risk of contracting COVID-19.

FOR THESE REASONS, THE COURT

1. *Declares*, unanimously, the part of the complaint raised under Article 3 of the Convention concerning the alleged lack of medical treatment and assistance inadmissible, and the remainder of the complaint admissible;

2. *Holds*, unanimously, that there has been no violation of Article 3 of the Convention in respect of the compatibility of the applicant's state of health with detention;

3. *Holds*, by five votes to two, that there has been no violation of Article 3 of the Convention in respect of the protection of the applicant from the risk of contracting COVID-19.

Done in English, and notified in writing on 17 October 2024, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Ilse Freiwirth Registrar	Alena Poláčková President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the joint partly dissenting separate opinion of Judges Jelić and Hüseynov is annexed to this judgment.

JOINT PARTLY DISSENTING OPINION OF JUDGES JELIĆ AND HÜSEYNOV

1. This case mainly concerns the compatibility of the applicant's state of health (HIV-infected person, with numerous related diseases, as explained in paragraph 5 of the judgment) with his continued detention in prison for a period of about eight months, as well as the measures put in place by the domestic authorities to protect him from the risk of contracting COVID-19.

2. While we concur with the finding of no violation of Article 3 of the Convention in respect of the compatibility of the applicant's state of health with his continued detention, we respectfully disagree with the majority's finding that there has been no violation of Article 3 of the Convention in respect of the measures to protect the applicant from the risk of contracting COVID-19.

3. In the light of its case-law relating to healthcare in prison, the main task of the Court in the present case was to examine whether and to what extent the domestic authorities adopted measures aimed at preventing or limiting the spread of COVID-19 in prison, taking into account the applicant's particular vulnerability (see paragraph 102 of the judgment). In accomplishing this task, the Court has to rely on the parties' submissions and, specifically – given the particular context of deprivation of liberty – on the information and evidence provided by the Government.

4. In contrast to the majority, we are of the opinion that in the present case the Government have failed to convincingly demonstrate that all necessary measures were taken in Milan San Vittore Prison to prevent or limit the spread of COVID-19 and to protect the particularly vulnerable applicant prisoner with pre-existing health conditions from the risk of contracting the coronavirus disease.

5. The Government merely stated that it was common knowledge that Italian prisons had implemented precautionary measures such as masks, safe distancing and sanitising procedures, without, however, providing any additional information or evidence. For example, they provided no information about any protocols or good practices adopted by the San Vittore Prison authorities (contrast *Fenech v. Malta*, no. 19090/20, §§ 131-38, 1 March 2022). Nor did the Government furnish any specific information on the spread of COVID-19 in San Vittore Prison, stating, in general terms, that the situation had not been critical at the time.

6. In their reasoning, the majority refer to the legislative measures adopted at the national level aimed at the prevention of COVID-19 in prison (see paragraph 104 of the judgment). With all due respect, this argument can hardly be considered sufficient and persuasive, in the absence of specific information from the Government on whether and to what extent those measures were implemented in the prison facility in question. Similarly, we do not deem sufficiently relevant the majority's reliance on the findings of

the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment (CPT) during its 2022 visit to Italy (see paragraph 116 of the judgment), as those findings do not relate to San Vittore Prison.

7. In this connection, we are unable to accept the majority's argument that the applicant had not "suggested any additional [precautionary] measures that should have been adopted by the domestic authorities". We do not think that it was incumbent on the applicant to indicate what specific measures could or should have been taken to prevent the spread of COVID-19 in the prison. This statement is thus at odds with the Court's case-law relating to the distribution of the burden of proof in the context of Article 3.

8. While the applicant argued that San Vittore Prison had been significantly overcrowded, that he had had to share his cell with two other detainees and that in such circumstances it had been impossible to implement physical-distancing measures – a circumstance which had also been highlighted by the presidents of the Milan and Brescia Supervisory Courts (see paragraph 16 of the judgment) – the Government did not address this issue at all. They did not explain, in particular, how physical-distancing measures, which had also been advised by the World Health Organization (see paragraph 36 of the judgment) could have been implemented despite the overcrowding or, in the alternative, what measures had been put in place to compensate for the impossibility of ensuring sufficient distancing (contrast *Fenech*, cited above, § 133).

9. Referring to *Fenech* (ibid., § 137), the majority submit that, given the practical demands of imprisonment and the novelty of the situation, it may not be possible to make arrangements for each vulnerable individual to be moved to safer quarters in the prison. We agree with this general statement. However, in the same paragraph of the *Fenech* judgment referred to by the majority, the Court goes on to say that "[w]hile refined allocation procedures should be considered allowing prisoners at highest risk (such as those having cardiovascular disease, diabetes, chronic respiratory disease, or cancer) to be separated from others – the applicant [who had only one kidney] *has not made out a case that he fell within the category of the most vulnerable*" (emphasis added). In the instant case, in contrast to that in *Fenech*, the applicant did demonstrate that he was particularly vulnerable (see paragraph 5 of the judgment) and this fact was not contested by the Government.

10. Additionally, although the domestic authorities had acknowledged that people suffering from multiple diseases or immunodeficiency were at higher risk, there is no indication that any specific measures were adopted in respect of detainees who, like the applicant, were particularly vulnerable. The only information provided in this respect was that detainees who had come into contact with the applicant had been tested, an argument which is, however, not supported by any evidence.

11. We deem it appropriate to refer to a recent Committee case (see *Faia v. Italy* (dec.) [Committee], no. 17222/20, 29 August 2023), in which a

similar complaint was raised by a disabled man serving a sentence of life imprisonment at Parma Prison in Italy and suffering from various serious health problems. In that case, the Court found the complaint manifestly ill-founded based on the information provided by the Government, according to which the national authorities had adopted sufficient measures to protect the applicant from the risks posed by the COVID-19 pandemic. In particular, the Court noted that Parma Prison had followed a protocol for the prevention of COVID-19 which provided for a quarantine period for new arrivals, the isolation of symptomatic prisoners, the provision of protective equipment to all prison personnel, and the provision of masks and sanitising gel to prisoners. Furthermore, as to the applicant's specific situation, he had been placed in a single cell, his tests had always been negative, and he had received two doses of vaccine on 29 April and 27 May 2021 (ibid., § 20).

12. In the light of the above, we are not able, contrary to the majority, to discern "sufficient diligence" (see paragraph 110 of the judgment) on the part of the domestic authorities in implementing measures for the prevention of COVID-19 and protecting the applicant from the risk of contracting COVID-19. As emphasised above, this conclusion is not supported by the Government's submissions and other materials in the case file.

13. In the absence of any evidence, much less a detailed description, of the preventive measures put in place in San Vittore Prison, we respectfully consider that the Government have failed to comply with their positive obligation under Article 3 of the Convention to protect the applicant from being exposed to the risk of contracting COVID-19.