GENDER AND THE JUDICIARY in the Western Balkans

THE AIRE CENTRE
Advice on Individual Rights in Europe

Gender Equality and Discrimination on the Grounds of Sex

A guide on the relevant jurisprudence of the European Court of Human Rights

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We are also grateful to **Ed Millett** and **Naomi Sirrs** for their contributions to the publication.

Print run: 200

This original English version has also been translated into Bosnian/Croatian/Montenegrin/Serbian, Albanian and Macedonian

Design by
Kliker Dizajn

Printed by
Kuća Štampe

UK Government

KONRAD ADENAUER STIFTUNG
RULE OF LAW · SOUTH EAST EUROPE

The preparation of this publication has been supported by the Konrad Adenauer Foundation - Rule of Law Programme SEE and the UK Government. Views presented in the publication do not necessarily reflect the official position of the Konrad Adenauer Foundation and UK Government.

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Preface

The advancement of equality of the sexes is a major goal in states across Europe. However, several societal factors in the Western Balkans mean the issue is of particular relevance to the region. Widespread violence against women, the prevalence of gender stereotyping, the underrepresentation of women in politics and high-status jobs, and the impact of Covid-19 on women who already suffer social disadvantage are just some of the factors which mean it is imperative that more action is taken to advance the position of women in the region.

Women enjoy equality under the law, but not in reality. Countries in the region have introduced numerous key legal, institutional, and political frameworks to improve gender equality. However, the implementation of gender equality measures, equal justice and the rule of law remains a serious challenge.

Domestic courts and legal professionals across the region have a vital role to play in responding to this challenge. They must effectively protect and enforce the rights and freedoms related to gender equality contained within the European Convention on Human Rights and other relevant international instruments. It is hoped that this Guide will provide an invaluable tool to further understanding of the rights and freedoms guaranteed to women under the Convention; assist lawyers to identify the grounds on which they might challenge discriminatory acts against women; and encourage domestic courts to consistently incorporate the reasoning of the Strasbourg Court into their judgments on these matters.

It is also recognised that furthering the understanding and implementation of the case law analysed within this Guide is not enough, alone, to significantly change the position of women in society. Promoting gender equality in the region requires comprehensive change across all levels and sections of society, including gender mainstreaming in schools, the media, politics and the judiciary.[1] It is vital to change attitudes towards the roles of men and women in society, as well as to change law and policy.

[1] The Council of Europe defines gender mainstreaming as: "The (re)organisation, improvement, development and evaluation of policy processes, so that a gender equality perspective is incorporated in all policies at all levels and at all stages, by the actors normally involved in policy-making." See: https://www.coe.int/en/web/genderequality/what-is-gender-mainstreaming

Often unnoticed and unconscious, gender bias and discrimination have damaging consequences for everyone, from legal professionals to men and women seeking to enforce their rights in court. Gender bias can manifest in courtrooms in the way cases are presented, how judges decide upon them, and even whether cases eventually end up in court.

In this regard, this publication forms part of the AIRE Centre's wider initiative on Gender and the Judiciary in the Western Balkans. This long-term initiative will involve, amongst other activities, gender awareness training amongst key stakeholders in the judicial system, comprehensive research to contribute to the advancement of legislation and practices, the distribution of more targeted publications on specific rights relating to gender, and the organisation of events to bring together representatives from the ECtHR with judges and professionals from courts across the region to encourage the sharing of best practice. Perhaps most importantly, the initiative will also entail the establishment of a regional network to bring together gender champions in the judiciary and create opportunities for mentorship, mutual support and the exchange of good practice amongst female and male judges in the region. It is hoped that the network will provide a focal point for raising gender issues and addressing them in a practical manner.

The gender network will formally be launched at the Gender Equality Forum for the Western Balkans taking place in Spring 2022, where judges and legal professionals from across the region will meet with ECtHR judges to discuss the case law described in this Guide and share best practice on overcoming any challenges to the implementation and protection of the rights described within this publication.

We are grateful to the UK Government and the Konrad Adenauer Foundation, for recognising the importance of our work and supporting us to produce this Guide. We hope that the distribution of this Guide, along with the establishment of the regional judicial network and wide-ranging activities planned going forward, will go some way to tackling the bias and discrimination against women which pervades many aspects of society in the Western Balkans, including the judiciary. Further, we hope our multi-faceted approach will help to advance a notion of equality for women which focuses not solely on freedom from coercion, discrimination and abuse, but which ensures that women are able to live their lives to their fullest potential with dignity, justice and inclusion guaranteed for women across the many aspects of their life discussed in this Guide.

Biljana Braithwaite
Western Balkans Programme Director, The AIRE Centre

Foreword by Judge Ivana Jelić – Gender and the Western Balkans

There is an urgent need for action to promote gender equality and to tackle bias and discrimination against women and girls in the Western Balkans. The status of women and girls in the countries of the region is, in countless respects, worse than that of men and boys. Women and girls account for most of the victims of domestic and other forms of gender-based violence, which is, for the most part, perpetrated by men. Research by the Organization for Security and Co-operation in Europe (OSCE) in 2019 has sounded an alarm as to the pervasiveness of violence against women in all the states in the region. For instance, as many as 70% of women have experienced some form of partner violence or non-partner violence since the age of 15, while 23% of women have experienced intimate partner physical and/or sexual violence.[2]

Lack of gender mainstreaming[3] in education leads to gender stereotyped curricula, while gender stereotypes contribute to an unfavourable position of women in the labour market. Women generally have higher levels of education but are less employed; the ones who are employed are more likely to carry out informal or temporary work and be less highly paid. The European Committee of Social Rights (ECSR) found a breach of the European Social Charter (ESC) regarding the right to equal pay and the right to equal opportunities in the workplace in 14 out of 15 countries, that apply the ESC's

[2] See https://www.osce.org/files/f/documents/9/2/413237_0.pdf "OSCE-led Survey on Violence Against Women: Main Report", Organization for Security and Co-operation in Europe, 6 March 2019.

[3] In 1998, the Council of Europe defined gender mainstreaming as: "*The (re)organisation, improvement, development and evaluation of policy processes, so that a gender equality perspective is incorporated in all policies at all levels and at all stages, by the actors normally involved in policy-making.*" In the context of education, this would mean that account should be taken of the different circumstances, needs and living conditions of men and women, when delivering and designing the content and format of educational programmes. See: https://www.coe.int/en/web/genderequality/what-is-gender-mainstreaming

collective complaints.[4] Women across the region are discriminated against in the labour market, in particular with regard to pregnancy and maternity, both during recruitment processes and when in the workplace. Many women are victims of sexual harassment and bullying.

Although all states in the region have introduced gender quotas (mostly in parliament), women are still sorely underrepresented in politics and decision-making bodies. Women's sexual and reproductive health and rights, particularly their right to an abortion, are often at risk. Women own much less property than men and still traditionally waive their right to inheritance in favour of their male family members, while property acquired during marriage or civil partnerships is mostly registered in the name of husbands/male partners. Media very frequently portray women as objects and sex-symbols, do not promote successful women and their achievements and rarely invite women to discuss important social topics. Tabloid and sensationalist coverage of violence against women prevails; the media often portray such events as "family tragedies", finding excuses for the offenders and shifting the blame for the violence on to the women.[5]

The Covid-19 pandemic has rendered the need for action in the region all the more pressing. The pandemic has highlighted and exacerbated existing inequalities in the region, given rise to new forms of discrimination against women and hindered their ability to enforce their rights and / or escape from situations of discrimination. Domestic violence cases against women and girls occur at an alarming rate in the region. For example, tragic events occurred particularly frequently in rural areas of Montenegro in 2021.[6]

[4] See https://search.coe.int/directorate_of_communications/Pages/result_details.aspx?ObjectId=09000016809ed61b "Right to equal pay: European Committee of Social Rights finds violations in 14 countries", Council of Europe, 29 July 2020.

[5] See for example: https://berlinprocess.info/wp-content/uploads/2018/04/CSF-PB-04-Gender-Issues-in-the-Western-Balkans.pdf "Gender Issues in the Western Balkans", by Ana Marjanović Rudan, Civil Society Forum Policy Brief No. 04, Civil Society Forum of the Western Balkan Summit Series, April 2018; https://kvinnatillkvinna.org/wp-content/uploads/2018/11/WRWB2018.pdf "Women's Rights in Western Balkans", by Stana Tadić, Violeta Anđelković and Sofija Vrbaški, The Kvinna till Kvinna Foundation, November 2018; Evie Browne "Gender norms in the Western Balkans", K4D Helpdesk Report, Institute of Development Studies Brighton, 2017.

[6] https://www.coe.int/en/web/podgorica/-/-how-to-protect-family-from-domestic-violence-human-rights-day-marked-in-montenegro, "How to protect family from domestic violence: Human Rights Day marked in Montenegro", Council of Europe, 10 December 2021.

The countries in the region have ratified two of the most important international treaties relevant to gender equality and women's rights: the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) and the Council of Europe Convention on preventing and combating violence against women and domestic violence (the Istanbul Convention).[7] The Istanbul Convention is the first international legally binding document of importance in the context of the widespread violence against women and domestic violence present in all the countries in the region that stems from gender stereotypes and bias and discrimination against women in Western Balkan societies. By ratifying this convention, these countries have assumed the obligation to bring their legislation into compliance with its provisions in order to facilitate prevention of and protection from violence against women and domestic violence. However, it is not sufficient to simply harmonise domestic legal frameworks with international and European legal standards, if those international standards are applied incorrectly, or insufficiently at a national level. In the context of the fight against gender inequality in the region, it is crucial that every part of society is gender-sensitised and that courts begin to make more gender-sensitive judgments.

Clearly, in reality women do not enjoy the same rights and protections that they do in law. Central to addressing violence against women and promoting equality is the need to tackle inherent gender biases in the region's judicial systems to enable women to effectively enforce the rights and protections they are entitled to under law. The consequences of gender stereotypes and bias in the justice system affect everyone, from legal professionals to women and men who seek to exercise their rights through the courts. The impact of such bias is seen in two distinct ways.

First, bias is articulated in terms of the composition of the judiciary, the number of female and male judges, non-judicial court staff, lay judges, etc., as

[7] CEDAW was ratified by Albania (1994), Bosnia and Hercegovina (1993), Croatia (1992), Serbia (2001), North Macedonia (1994) and Montenegro (2006), available at: https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV8&chapter=4&lang=en; the Istanbul Convention was ratified by Albania (2013), Bosnia and Herzegovina (2013), Croatia (2018), Serbia (2013), North Macedonia (2018) and Montenegro (2014), available at: https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/210/signatures. Owing to its status under UNSC Resolution 1244, Kosovo has not ratified these Conventions, but Article 22 of its Constitution lists CEDAW among the international human rights treaties that are directly applicable in Kosovo. Available at: http://kryeministri-ks.net/repository/docs/Constitution1Kosovo.pdf.

well as the number of women holding senior managerial positions. In actual fact, in numerous judiciaries of the Western Balkans, women make up the majority of judges, and the number of women in the judiciary, especially in first and second-instance courts, has been increasing in nearly all states in the region over the past 20 years. A majority of judges are women in first and second-instance courts in Bosnia and Herzegovina, Montenegro, North Macedonia, Serbia and Croatia, and a majority of Supreme Court judges are women in Bosnia and Herzegovina, Montenegro and Serbia.[8]

However, tackling the problems surrounding gender and the justice system, achieving equality for women and ending gender bias must go beyond simple matters of representation. Studies show that increased female representation alone has not greatly improved gender equality in the judiciary. Gender stereotypes and bias are still affecting court decisions to a greater or lesser extent, and thus the protection of women's rights, irrespective of the judge's gender.

The second key impact of biased judicial thinking is the significant risk of gender stereotypes and biases influencing court decisions. Judges, prosecutors, lawyers, court experts and other participants in court proceedings hold specific gender stereotypes and biases that they may not necessarily be aware of. Gender bias can affect the way cases are presented, how judges decide upon them, and even

[8] See: http://www.instat.gov.al/media/7376/burra-dhe-gra-2020.pdf, "Women and Men in Albania 2020", INSTAT, 2020; See https://arsbih.gov.ba/wp-content/uploads/2020/02/Muškarci-i-žene-u-BIH_2020.pdf, "Women and Men in Bosnia and Herzegovina", Thematic Bulletin No. 3 Statistical Agency of Bosnia and Herzegovina, Sarajevo, 2020; See https://www.monstat.org/uploads/files/publikacije/Žene i muškarci u Crnoj Gori.pdf, "Women and Men in Montenegro", Statistical Office of Montenegro, Ministry of Human and Minority Rights of Montenegro, Podgorica, 2020, p. 64; See https://www.unece.org/fileadmin/DAM/Gender/Beijing_20/Republic_of_North_Macedonia.pdf, "Report of the Government of the Republic of North Macedonia on the application of the Beijing Declaration and Platform for Action (1995) and the results of the 2nd special session of the UN General Assembly (2000) – Beijing +25", Ministry for Labour and Social Policy, April 2019; See https://www.stat.gov.rs/en-us/oblasti/stanovnistvo/statistika-polova/, "Women and Men in the Republic of Serbia 2020", Statistical Office of the Republic of Serbia, Belgrade, 2021; See https://www.dzs.hr/eng/publication/men_and_women.htm., "Women and Men in Croatia 2020", Statistical Office of the Republic of Croatia, Zagreb, 2020; See https://rm.coe.int/comparative-assessment/1680939684, "Comparative assessment of the judicial system in Kosovo from 2014 to 2017: based on the methodology of the European Commission for the Efficiency of Justice for the evaluation of judicial systems", Council of Europe, February 2019.

whether cases eventually end up in court. For example, in gender-based violence cases, stereotyping can compromise the impartiality of judges' decisions; influence their understanding of the nature of the criminal offence; affect their views about witness credibility and legal capacity; and stop judges holding offenders legally accountable. They may also affect the way women are questioned and treated in the courts by both judges and lawyers.[9] More broadly, gender stereotypes directly impinge on the legal protection of women and their access to justice, rendering them less likely to seek to enforce their rights or bring complaints to the court as a result of a lack of faith in the system to produce an effective outcome or through fear of the treatment they will receive during proceedings. If these prejudices are reduced and removed, the justice systems of the region have the potential to become more effective, democratic and fair.

Along with combatting prejudice and gender stereotypes within the judiciary, it is also necessary for judges and legal practitioners in the region to comprehensively understand and implement the relevant international legal protections relating to the rights of women, including CEDAW, the Istanbul Convention, and the ECHR. Gender equality entails equal participation of women and men in all walks of public and private life. This is equally important for the realisation of the rule of law which entails participation in decision making processes, including the adoption of laws, by all groups of citizens, both majority and minority groups. However, women have traditionally been viewed as a politically non-dominant and economically inferior group, despite the fact that in many societies they are numerically greater. The provisions of the above-mentioned international instruments and the jurisprudence of the ECtHR enforce this principle and impose obligations on states in the region not only to protect women from abuse and discrimination, but also to enable women to live their lives to their fullest potential, by ensuring dignity, justice, representation and inclusion for women in every aspect of their lives.

It is high time for the region to truly address gender equality in a comprehensive manner, to combat sexism, violence and discrimination effectively, as well as to undertake indispensable steps towards the required awareness raising. It is hoped,

[9] Simone Cusack, "Eliminating judicial stereotyping: Equal access to justice for women in gender-based violence cases", Final paper submitted to the Office of the High Commissioner for Human Rights, 9 June 2014; Lynn Hecht Schafran, "Credibility in Courts: Why there is a Gender Gap", The Judges Journal, vol. 34, winter 1995; Majda Halilović, Callum Watson, Heather Huhtanen and Mylene Socquet Juglard (eds.), "Gender Bias and the Law: legal frameworks and practice from Bosnia & Herzegovina and beyond", AI / DCAF, Sarajevo, 2017.

therefore, that this Guide will serve both as a useful tool to judges, practitioners and NGOs in the region when working on cases related to gender equality and discrimination, and also as a prompt to initiate conversations and spark much needed action in the region to combat gender bias in the judiciary, and beyond.

Ivana Jelić
Judge of the European Court of Human Rights

Table of Acronyms

Acronym	Definitions
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
CJEU	The Court of Justice of the European Union
CoE	Council of Europe
ECAT	Council of Europe Convention on Action against Trafficking in Human Beings
ECSR	European Committee of Social Rights
ESC	European Social Charter
EU	European Union
EU Charter	EU Charter of Fundamental Rights
Directive 2011/36/EU	Directive 2011/36/EU of the European Parliament and of the Council of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims
GBV	Gender-based violence
GREVIO	Group of Experts on Action against Violence against Women and Domestic Violence – an independent expert body responsible for monitoring the implementation of the Istanbul Convention
OSCE	Organization for Security and Co-operation in Europe
State / Member State	Contracting State Parties to the European Convention on Human Rights
TEU	Treaty on European Union
TFEU	Treaty on the Functioning of the European Union
The Convention / ECHR	European Convention on Human Rights

Acronym	Definitions
The Court / ECtHR	The European Court of Human Rights
The Gender Equality Directive (recast)	Directive 2006/54/EC
The Istanbul Convention	The Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence. Entered into force 1 August 2014

Notes on Citations, Footnotes and Case Summaries

For European Court of Human Rights cases, references will give the name in italics, the date of the decision or the judgment, and the application number. It will also be noted where cases that are mentioned in the text are summarised in Part 2 of this Guide.

References to Articles and Protocols

All references to Articles and Protocols are to Articles and Protocols of the ECHR, unless otherwise stated.

Introduction

When it comes to discrimination on grounds of sex, the European Court of Human Rights has repeatedly stated that the advancement of gender equality is today a major goal in the member States of the Council of Europe, and that, in principle, "very weighty reasons" would have to be put forward before difference in treatment on grounds of sex could be regarded compatible with the Convention.[10]

The Court's jurisprudence on gender discrimination, which draws on a range of international legal instruments alongside the European Convention on Human Rights (the "ECHR" or the "Convention"), is a crucial source of contemporary judicial sentiment and theory on the issue of gender equality. The Court's rulings in recent years have shown that gender equality is an evolving issue, as public opinion within member States' societies around the roles of women – in the home, at work, in public life – develops. Moreover, the jurisprudence of the Court demonstrates a nuanced approach to what is a complex, fast-moving and multi-faceted issue. For example, at times the Court has deemed it appropriate to allow difference in treatment on grounds of sex in order to cure historical inequalities – a proactive approach to achieving equality. Equally, in other instances the Court has recognised that gender inequality is inherently two-sided and can harm men just as much as women.

a) About this Guide

Part I of this Guide provides a high-level synthesis of the jurisprudence of the Court on the issue of gender equality and discrimination on grounds of sex.

The synthesis is divided by thematic topic, including discrimination on grounds of sex in relation to: gender-based violence, respect for private and family life, employment, Roma women, refugees and asylum-seekers, etc. The Guide also covers gender stereotyping in legal judgments and discrimination in the course of judicial proceedings. In this regard, Robert Spano, current president of the Court, has spoken out about the need for diversity in the make-up of the judicial bench,

[10] *Konstantin Markin v. Russia*, Grand Chamber judgment of 22 March 2012, no. 30078/06, §127 (included as a summary in this publication); *Abdulaziz, Cabales and Balkandali v. the United Kingdom*, judgment of 28 May 1985, no. 9474/81, §78.

both in respect of the European Court of Human Rights itself, and in respect of the domestic courts of member States:

> *"Diversity on the judicial bench matters for three main reasons: to ensure the legitimacy of the judiciary in the eyes of the public, and especially the trust of our applicants; to improve the quality of judgments through the benefit of a broader range of judicial perspectives, drawn from the widest possible pool of talent and finally, to ensure that judges are selected through fair selection processes, which do not inadvertently disadvantage or advantage certain demographic groups."*[11]

Where relevant, the Guide also touches on related grounds of discrimination, such as disability, sexual orientation, ethnicity, and transgender rights, but only insofar as these issues intersect with discrimination against women. This reflects the intersectional nature of discrimination, whereby the various manifestations of unequal treatment that a person suffers are compounded by virtue of the overlap between them. The authors of the Guide recognise that addressing discrimination from the perspective of a single 'ground' (such as gender, sexual orientation, etc) often fails to capture or adequately tackle the various manifestations of unequal treatment that people may face in their daily lives. However, a full consideration and discussion of these other aspects of the Court's jurisprudence, such as transgender rights for example, is beyond the scope of the present Guide.[12]

Part I of this Guide also includes an overview of the impact of the Covid-19 pandemic on women's rights in the Western Balkans, although this is of course an evolving issue and one that has so far received limited specific consideration by the Court.

Part II of this Guide summarises a number of key cases amongst the Court's jurisprudence on gender discrimination, which are referenced in the discussion in Part I.

[11] See https://www.echr.coe.int/Documents/Speech_20210604_Spano_Seminar_Gender_Equality_Baden_Baden_ENG.pdf "Seminar on Gender Equality in the Western Balkans: The Principle of Non-Discrimination on the Grounds of Sex in the Court's Case-Law", Speech by Robert Spano, the AIRE Centre's Seminar on Gender Equality in the Western Balkans, 4 June 2021.

[12] Please note that the purpose of the Guide, and the AIRE Centre's 'Gender and the Judiciary' programme as a whole, is to help regional judiciaries to promote and progress genuine equality. If stakeholders feel that a subsequent publication, focused more closely on issues excluded from this Guide would be a useful resource, the AIRE Centre would be delighted to consider and discuss the matter further.

It is hoped that the synthesis and case summaries contained in this Guide will prove useful to members of the judiciary and policymakers in the region, when considering cases or policy decisions relating to gender-discrimination.

b) Terminology

The Court has tended to use the terms 'gender' and 'sex' interchangeably. For example, while Article 14 of the Convention prevents discrimination on grounds of sex, the Court has spoken of the 'advancement of gender equality' as one of the key goals of member States.[13] Accordingly, for the purposes of this Guide the terms should be considered to be inter-changeable.

The term 'gender equality' has been considered in the past by the CoE. For example, the CoE has called for specific action in areas such as: language and communications; internet and social media; media, advertising and other communication methods; the workplace; the public sector; the justice sector; education institutions; culture and sport; and the private sphere. It has encouraged member States to pass legislation that condemns sexism and criminalises sexist hate speech. It has also required countries to monitor the implementation of anti-sexist policies at the national level and report back periodically to the CoE.[14]

To this conception of gender equality can be usefully added the 'four-dimensional' conception of substantive equality outlined by academic Sandra Fredman. The framework conceives of four distinct elements to achieving substantive equality: (i) a distributive dimension, that seeks to redress disadvantage to a particular group, such as women; (ii) a recognition dimension, that addresses stigma, stereotyping, prejudice and violence towards a particular group; (iii) a participative dimension, that seeks to facilitate the voice and participation of a particular group; and (iv) a transformative dimension, that seeks to accommodate the differences of a particular group, including through making structural changes.[15]

Each of these elements feature to some extent in the case law discussed in this Guide.

[13] *Konstantin Markin v. Russia*, Grand Chamber judgment of 22 March 2012, no. 30078/06, §127 (included as a summary in this publication).

[14] See https://rm.coe.int/cm-rec-2019-1-on-preventing-and-combating-sexism/168094d894 "Preventing and Combating Sexism", Recommendation CM/Rec(2019)1, Council of Europe, adopted 27 March 2019.

[15] Sandra Fredman, "Emerging from the Shadows: Substantive Equality and Article 14 of the European Convention on Human Rights", Human Rights Law Review, Volume 16, Issue 2, June 2016, pp. 273-301.

Part I – Overview of the relevant legislative standards and ECHR jurisprudence

(1) Legislative Standards

The jurisprudence of the Court on discrimination is primarily based on the European Convention on Human Rights, its Protocols, and other CoE legal instruments. However, the Court's jurisprudence also takes account of aspects of European Union legislation and other international legal instruments. A summary of some of the key, relevant instruments in this area follows here, along with an exploration of some of the key concepts of non-discrimination law, such as direct and indirect discrimination.

a) The European Convention on Human Rights

There are a number of key pieces of legislation promulgated by the CoE concerning non-discrimination, chief among which is the ECHR.[16]

Article 14, European Convention on Human Rights

Article 14 of the Convention, which prohibits discrimination, states:

> *"The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."*

[16] Generally, under the ECHR, protection is guaranteed to all those within the jurisdiction of a Member State, whether they are citizens or not, and even beyond the natural territory to those areas under the effective control of the state (such as occupied territories). However, ECHR jurisprudence shows that a state may consider nationals and non-nationals to be in distinct situations, and consequently treat them differently under certain circumstances.

The list of prohibited grounds of discrimination in Article 14 is not exhaustive: while it does not explicitly include other relevant grounds such as sexual orientation, disability and age, these have been deemed by the Court to fall under the Article's "other status" wording. Accordingly, the Court is free to add to the list of prohibited grounds.

Article 14 ECHR only prohibits discrimination and guarantees equality in '*the enjoyment of … [the] rights and freedoms*' set out in the Convention. Accordingly, the Court is only competent to examine complaints of discrimination under Article 14 where they fall within the ambit of one of the other rights protected by the Convention i.e. Article 14 has no independent existence. In practice, this means the Court only examines an Article 14 application in conjunction with another substantive Convention provision or where it is engaged via another provision.[17]

However, the application of Article 14 does not presuppose a breach of one or more of the other Convention Articles. For Article 14 to become applicable in a given case, it is sufficient that the facts of a case fall *within the ambit* of another substantive provision of the Convention or its Protocols.[18] The ambit principle allows for a wider application of Article 14 by freeing applicants from having to establish a breach of another right. This means that a measure which in itself is in conformity with the requirements of the Article enshrining the right or freedom in question may however infringe that same Article when read in conjunction with Article 14, because it is of a discriminatory nature.

The prohibition of discrimination enshrined in Article 14 also applies to the enjoyment of rights which the State has voluntarily decided to provide, beyond the scope of its obligations under the Convention, so long as such rights fall within the general scope of a Convention Article.[19]

[17] *Marckx v. Belgium*, judgment of 13 June 1978, no. 6833/74, § 32.

[18] This was established in *Belgian Linguistic Case (No. 2)*, judgment of 23 July 1968, no. 2126/64, and confirmed in *Thlimmenos v. Greece*, Grand Chamber judgment of 6 April 2000, no. 34369/97. See also *Sommerfeld v. Germany*, Grand Chamber judgment of 8 July 2003, no. 31871/96.

[19] *E.B. v. France*, Grand Chamber judgment of 22 January 2008, no.43546/02, where the Court found that whilst there was no substantive right for a person to adopt a child under Article 8, French domestic legislation expressly granted single persons the right to apply for authorisation to adopt. This right was held to be broadly within the ambit of Article 8. Consequently, the State, which had gone beyond its obligations under Article 8 in creating such a right, could not, in the application of that right, take discriminatory measures within the meaning of Article 14.

In practice, applicants often allege a violation of a substantive right, and in addition, a violation of a substantive right in conjunction with Article 14. However, where the Court finds a violation of the substantive right, it does not always go on to consider the complaint of discrimination, for example, where it considers that this would involve an examination of essentially the same complaint.[20] The level of jurisprudence concerning non-discrimination under Article 14 is therefore fairly limited in comparison to other areas of the Court's jurisprudence. However, this does not mean that discrimination is not a relevant issue for the Court.[21]

Wherever an applicant to the Court raises an Article 14 allegation of discrimination in the context of an alleged violation of another substantive right, the Court *may* consider the complaint, provided the discrimination alleged falls within one of the list of grounds for discrimination set out in Article 14 (sex, race, language, and so on). This marks a significant distinction from European Union non-discrimination law (see section 1(e) (EU Legislation) of this Guide), in that the ECHR provides protection from discrimination over issues that EU non-discrimination law does not regulate.

See also *Khamtokhu and Aksenchik v. Russia*, Grand Chamber judgment of 24 January 2017, no. 60367/08 961/11, §58 (included as a summary in this publication), where the applicants did not allege a violation of their right to liberty under Article 5 based on the sentence of life imprisonment imposed upon them. Instead, they complained that they had been treated less favourably than women convicted of similar or comparable crimes, in violation of Article 14 taken in conjunction with Article 5 of the Convention. The Court reiterated that matters of appropriate sentencing fall in principle outside the scope of the Convention and that Article 5 § 1 (a) of the Convention does not guarantee a right to automatic parole. However, the Court also recognised that measures relating to the execution or adjustment of a sentence affect the right to liberty under Article 5 § 1 and that an issue may arise under that provision taken together with Article 14 if a sentencing policy affects individuals in a discriminatory manner. It was sufficient that the national legislation on sentencing fell "*within the ambit*" of Article 5 for Article 14 taken in conjunction with that provision, to be applicable.

[20] See for example *J.L. v. Italy*, judgment of 27 May 2021, no. 5671/16 (included as a summary in this publication).

[21] ECtHR Judge Siofra O'Leary, noted in her remarks before the AIRE Centre's Seminar on gender equality in the Western Balkans on 4 June 2021 that the result of the Court's approach is "missed opportunities to develop and consolidate coherent case-law under Article 14 in relation to certain forms of discrimination or in certain types of cases where gender bias and stereotyping may be at the root of the complaints examined under the substantive provisions."

Protocol 12, European Convention on Human Rights

Protocol 12, Article 1 states:

> *"The enjoyment of any right set forth by law shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.*
>
> *No one shall be discriminated against by any public authority on any ground such as those mentioned in paragraph 1."*

Protocol No. 12 to the ECHR, which entered into force in 2005, prohibits discrimination in relation to the 'enjoyment of any right set forth by law' and 'by any public authority'. It is therefore wider in scope than Article 14, which prohibits discrimination only in relation to rights guaranteed by the ECHR itself.

Following the ratification of Protocol No. 12 by Western Balkan states, applicants in the region can now complain to the ECtHR and seek protection from discrimination in respect of any right guaranteed by domestic/national law and in respect of any acts by a public authority.[22]

The commentary in the Explanatory Report of Protocol No. 12 states that Article 1 of Protocol No. 12 relates to discrimination:

- in the enjoyment of any right specifically granted to an individual under national law;
- in the enjoyment of a right which may be inferred from a clear obligation of a public authority under national law, that is, where a public authority is under an obligation under national law to behave in a particular manner;
- by a public authority in the exercise of discretionary power (for example, granting certain subsidies); and

[22] Protocol 12 was ratified by Albania (2004), Bosnia and Herzegovina (2003), Croatia (2003), Montenegro (2004), North Macedonia (2004) and Serbia (2004). Notable absences include the UK and France, which have not signed the Protocol, and Germany, which has signed but not ratified the Protocol. See link for a full list of signatures/ratifications: https://www.coe.int/en/web/conventions/cets-number-/-abridged-title-known?module=signatures-by-treaty&treatynum=177

» by any other act or omission by a public authority (for example, the behaviour of law enforcement officers when controlling a riot).[23]

The Explanatory Report of Protocol No. 12 also states that the Protocol applies to relationships between private persons, where these would normally be regulated by the state.[24]

The Court has confirmed that Article 1 of Protocol No.12 introduces a general prohibition of discrimination and a "free-standing" right not to be discriminated against,[25] and that Article 1 of Protocol No. 12 extends the scope of protection not only to "any right set forth by law" but beyond that. This follows from paragraph 2 of Article 1 of Protocol No. 12, which provides that no one may be discriminated against by a public authority.[26]

In order to determine whether Article 1 of Protocol No. 12 is applicable, it is first necessary to establish whether the complaint falls within one of the four categories mentioned in the Explanatory Report, which are listed above.[27]

The prohibited grounds of discrimination under Protocol 12 are identical to those in Article 14. Similarly, while the list does not explicitly include relevant grounds such as sexual orientation, disability, age, these fall under the Protocol's "other status" wording.

[23] See https://rm.coe.int/090000168008cce48#:~:text=I.-,The%20Protocol%20No.,II. "Explanatory Report to the Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms", European Treaty Series No. 177, para. 22.

[24] See also: https://fra.europa.eu/sites/default/files/fra_uploads/fra-2018-handbook-non-discrimination-law-2018_en.pdf "Handbook on European Non-Discrimination Law", European Union Agency for Fundamental Rights and Council of Europe, 2018, p.34. The Handbook summarises the overall function of Protocol 12 as follows: "*Broadly speaking, Protocol No. 12 will prohibit discrimination outside purely personal contexts, where individuals exercise functions placing them in a position to decide on how publicly available goods and services are offered.*"

[25] *Sejdić and Finci v. Bosnia and Herzegovina*, Grand Chamber judgment of 22 December 2009, nos. 27996/06 and 34836/06, §53.

[26] *Savez crkava "Riječ života" and Others v. Croatia*, judgment of 9 December 2010, no. 7798/08, §104.

[27] *Savez crkava "Riječ života" and Others v. Croatia*, judgment of 9 December 2010, no. 7798/08, §104 - 105.

b) Key principles of non-discrimination law under the ECHR

Direct vs indirect discrimination

The Court's approach to non-discrimination law envisages two kinds of discrimination: 'direct' and 'indirect' discrimination. However, Article 14 ECHR does not explicitly provide a definition of what constitutes direct or indirect discrimination.

'Direct' discrimination occurs when:

i) an individual is treated less favourably;
ii) by comparison to how others, who are in a similar situation, have been or would be treated; and
iii) the reason for this is a particular characteristic the person holds, which falls under a 'protected ground'.

The Convention requires that there must be 'a difference in the treatment of persons in analogous, or relevantly similar, situations', 'based on an identifiable characteristic' for direct discrimination to exist.[28] An applicant must also show that they have been 'directly affected' by the measure in order to lodge an application.[29]

By contrast, 'indirect' discrimination arises where:

i) there is an apparently neutral rule, criterion or practice; and
ii) it has disproportionately prejudicial effects on a protected group as a result of a particular characteristic.[30]

[28] *Biao v. Denmark*, Grand Chamber judgment of 24 May 2016, no. 38590/10, § 89; Similarly, *Carson and Others v. the United Kingdom*, Grand Chamber judgment of 16 March 2010, no. 42184/05, § 61; *D.H. and Others v. the Czech Republic*, Grand Chamber judgment of 13 November 2007, no. 57325/00, § 175; *Burden v. the United Kingdom*, Grand Chamber judgment of 29 April 2008, no. 13378/05, § 60.

[29] Council of Europe and European Court of Human Rights, "Practical Guide on Admissibility Criteria", 2014, page 11.

[30] *Biao v. Denmark*, Grand Chamber judgment of 24 May 2016, no. 38590/10, § 103; *D.H. and Others v. the Czech Republic*, Grand Chamber judgment of 13 November 2007, no. 57325/00, § 184.

In this case it is not the treatment that differs, but rather the effects of that treatment, which will be felt differently by people with different characteristics.

Indirect discrimination in violation of Article 14 can also occur when States fail to treat differently persons whose situations are significantly different *without providing an objective and reasonable justification*.[31] Treatment will lack such justification if it does not 'pursue a legitimate aim'.[32]

By way of example, a woman could be excluded from employment either because the employer does not want to employ women (direct discrimination) or because the requirements for the position are formulated in such a way that most women would not be able to fulfil them (indirect discrimination).

Shifting the burden of proof

A key feature of discrimination claims heard by the Court concerns the burden of proof: Court procedure allows the burden of proof to be 'shifted' onto the defendant State. This is because it can be particularly difficult to show that differential treatment of an applicant was based on a particular protected characteristic, because the motive behind differential treatment often exists only in the mind of the alleged defendant. Accordingly, claims of discrimination often proceed based on objective inferences related to the rule or practice in question.

The CoE's handbook on non-discrimination law summarises the principle of shifting the burden of proof as follows:

> *"Because the alleged defendant is in possession of the information needed to prove a claim, non-discrimination law allows the burden of proof to be shared with the alleged defendant (the shift of the burden of proof). Once the person alleging discrimination established a presumption of discrimination (prima facie discrimination), the burden then shifts to the defendant, which has to show that the difference in treatment is not discriminatory. This can be done either by proving that there was no causal link between the prohibited ground and the differential treatment, or by demonstrating that although the differential treatment is related to the prohibited ground, it has a reasonable and*

[31] *Thlimmenos v. Greece*, Grand Chamber judgment of 6 April 2000, no. 34369/97, § 33.

[32] See for example *Stec and Others v. United Kingdom*, Grand Chamber judgment of 12 April 2006, no. 65731/01 and no. 65900/01, §51 (included as a summary in this publication).

objective justification. If the alleged discriminator is unable to prove either of the two, they will be liable for discrimination."[33]

In order to shift the burden of proof onto the defendant, the applicant must first, therefore, establish the facts from which it may be presumed that there has been discrimination.

A narrow margin of appreciation in relation to discrimination on the basis of sex

When considering whether a Member State has breached the Convention, the Court permits a degree of discretion in respect of legislative, administrative or judicial action at state level in the area of a Convention right. The doctrine of the 'margin of appreciation' allows the Court to take account of the fact that the Convention will be interpreted differently in different Member States, given their divergent legal and cultural traditions.

Where the margin of appreciation is deemed 'narrow', the Court adopts a higher degree of scrutiny. Differential treatment by a State relating to matters considered to be at the core of personal dignity are more difficult to justify than those relating to broader social or fiscal policy considerations. Accordingly, the Court has adopted a higher level of scrutiny in these cases, noting that "very weighty reasons" must be put forward before the Court could regard a difference of treatment based exclusively on grounds of sex as compatible with the Convention.[34]

Discrimination by association

The Court has also confirmed that Article 14 covers discrimination 'by association', i.e. where an individual is treated less favourably on the basis of *another person's* protected characteristic – a legal principle derived from the jurisprudence of the CJEU.[35]

[33] See https://fra.europa.eu/sites/default/files/fra_uploads/fra-2018-handbook-non-discrimination-law-2018_en.pdf "Handbook on European Non-Discrimination Law", European Union Agency for Fundamental Rights and Council of Europe, 2018, p.232.

[34] *Burghartz v. Switzerland*, judgment of 22 February 1994, no. 16213/90; *Jurčic v. Croatia*, judgment of 4 February 2021, no.54711/15 (included as a summary in this publication); *Abdulaziz, Cabales and Balkandali v. United Kingdom*, judgment of 28 May 1985, no. 9474/81.

[35] In *Guberina v Croatia*, judgment of 22 March 2019, no.23682/13, §78, the Court found that treatment of the applicant on account of the disability of his child was a form of disability-based

c) Other Council of Europe Instruments

Along with the Convention and Protocols, CoE legislation and guidance on non-discrimination law derives from a variety of different instruments. For example, the European Social Charter, the CoE's other main human rights treaty, guarantees fundamental social and economic rights as a counterpart to the ECHR's protection of broadly civil and political rights. In particular, the ESC contains an overriding provision in Article E, securing all other rights in the ESC without discrimination 'on any ground', as well as specific rights to non-discrimination in respect of employment and occupation on grounds of sex.[36]

The CoE has also made non-binding recommendations in relation to specific issues within the ambit of non-discrimination law. These include Recommendation Rec(2002)5 on the protection of violence against women, which sets out a series of measures to end all forms of violence against women, including legislative and policy measures to prevent and investigate violence against women, assist victims, work with perpetrators, increase awareness, education and training, and collect relevant data. The recommendation calls on Member States to review domestic legislation in respect of violence against women, and to recognise that states have an obligation to 'exercise due diligence to prevent, investigate and punish' violence against women.[37]

discrimination in the light of its objective and the nature of the rights which it seeks to safeguard, confirming that Article 14 covers instances in which an individual is treated less favourably on the basis of another person's status or protected characteristics. This principle has since been confirmed the Court in the Grand Chamber judgment in *Molla Sali v Greece*, Grand Chamber judgment of 19 December 2018, no. 20452/14 (included as a summary in this publication).

[36] The ESC has its own collective complaints mechanism, which allows organisations with participatory status (such as social partners and NGOs) to directly apply to the European Committee of Social Rights ("ECSR"), the ESC's monitoring body, for rulings on possible non-implementation of the ESC by ratifying states. This mechanism constitutes a divergent pathway to securing rights to non-discrimination as distinct from litigation before the Court. So far, only 15 Member States have accepted the collective complaints mechanism: Belgium, Bulgaria, Croatia, Cyprus, the Czech Republic, Finland, France, Greece, Ireland, Italy, the Netherlands, Norway, Portugal, Slovenia and Sweden.

[37] See https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016805e2612 "Recommendation Rec(2002)5) of the Committee of Ministers to Member States on the Protection of Women Against Violence", Council of Europe, recommendation II. Implementation of the recommendation at domestic level is not mandatory but has been monitored by the CoE's Committee of Ministers on the Protection of Women against Violence in the years since

Gender equality and violence against women are high on the CoE's legislative and oversight agenda. In 2018, the CoE adopted a new Gender Equality Strategy 2018-2023, which identifies a number of key themes: gender stereotyping and sexism, violence against women and domestic violence, women's access to justice, women's role in political and public decision-making, the rights of migrant/asylum-seeker women and girls, and gender mainstreaming.[38] In March 2019, the CoE's Committee of Ministers adopted Recommendation(2019)1, recommending Member States take measures to "prevent and combat sexism and its manifestations in the public and private spheres" and encourage the implementation of legislation.[39]

d) Monitoring bodies

The European Commission against Racism and Intolerance (ECRI) is a unique human rights monitoring body within the CoE which specialises in questions relating to the fight against racism, discrimination (on grounds of "race", ethnic/national origin, colour, citizenship, religion, language, sexual orientation and gender identity), xenophobia, antisemitism and intolerance in Europe.[40] The ECRI conducts, amongst other activities, in country monitoring to analyse the situation in each of the member states and make recommendations for dealing with any problems of racism and intolerance identified there.

e) EU Legislation

The interlinkage of CoE and EU legislation and jurisprudence

Whilst the CJEU and ECtHR are independent court systems[41], the two courts informally share a broad set of values and principles, particularly given that all 27 EU member states are also CoE members.

its publication, evaluating progress and providing member states with information on progress and existing gaps.

[38] See https://rm.coe.int/prems-093618-gbr-gender-equality-strategy-2023-web-a5/16808b47e1, "Council of Europe Gender Equality Strategy 2018-2023", Council of Europe, June 2018.

[39] https://rm.coe.int/cm-rec-2019-1-on-preventing-and-combating-sexism/168094d894, "Preventing and Combating Sexism: Recommendation CM/Rec(2019)1", Council of Europe, p.9.

[40] See https://rm.coe.int/leaflet-ecri-2019/168094b101, "European Commission against Racism and Intolerance", Council of Europe, p.2.

[41] The CJEU derives its authority from the legal system of the European Union and rules on the application and interpretation of EU law while the ECtHR derives its authority from the legal system of the CoE and rules on the application and interpretation of the ECHR.

The CJEU refers to the ECHR and the ESC as providing guidance for the interpretation of EU law[42] and has formally integrated the jurisprudence of the ECtHR into part of the general principles of EU law. Conversely, the ECtHR and the ECSR also refer to EU legislation and CJEU jurisprudence in their case law.[43] In the words of current ECtHR Judge Síofra O'Leary: "*ECtHR and CJEU jurisprudence are mutually enforcing and cannot be fully understood alone.*"[44]

EU non-discrimination legislation

In terms of substantive EU non-discrimination law, the primary provision is Article 10 of the Treaty on the Functioning of the European Union (TFEU), which requires the EU to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation, when defining and implementing its policies and activities.

Since 2000, the scope of EU anti-discrimination law has expanded significantly beyond Article 10 TFEU. In particular, the adoption of the EU Charter on Fundamental Rights in 2000, and the coming into force of the Amsterdam Treaty in 1999 brought the ability to take action to combat discrimination on a wider range of grounds and led to the introduction of new equality directives. These are discussed below.

The EU Charter of Fundamental Rights

The EU Charter became binding on states with the introduction of the Treaty of Lisbon in 2009. The EU Charter is addressed to the institutions and bodies of the EU along with national authorities of member states, obliging them not to interfere with human rights in the measures they take, and includes a prohibition on discrimination. In respect of Member States, the EU Charter only applies when they are applying EU law. There is also legislative interlinkage between the EU Charter and the legislation of the CoE. For example, the preamble to the EU Charter makes reference to the CoE's European Social Charter.

[42] For example, see: *Kone Oyj and Others v. European Commission*, judgment of 24 October 2013, no. C-510/11 P, § 20-22; *Istituto nazionale della previdenza sociale (INPS) v. Tiziana Bruno and Massimo Pettini and Daniela Lotti and Clara Matteucci*, judgment of 10 June 2010, nos. C-395/08 and C-396/08, § 31-32.

[43] For example, see *Biao v. Denmark*, Grand Chamber judgment of 24 May 2016, no. 38590/10.

[44] Judge Siofra O'Leary, speaking at the AIRE Centre's Seminar on Gender and the Judiciary, 4 June 2021.

The EU Charter's equality provisions are contained in Articles 20 to 26, which provide *inter alia* that everyone is equal before the law (Article 20), for the prohibition of discrimination based on a non-exhaustive list of grounds (Article 21)[45] and for gender equality (Article 23). Unlike Article 14 of the Convention, Article 21 of the EU Charter is freestanding, meaning it does not depend on the infringement of another right.

Key EU directives

Directive 2006/54/EC (the "Gender Equality Directive (recast)") guarantees equal treatment on the basis of sex in matters of pay, occupational social security schemes and access to employment, vocational training, promotion and working conditions. Additionally, directives on gender equality have been introduced in the areas of state social security (Directive 79/7/EEC), equal treatment between self-employed men and women (Directive 2010/41/EU), relating to pregnancy (Directive 92/85/EEC) and parental leave (Directive 2010/18/EU).

Under EU law, the non-discrimination directives cited above are subject to the principle of objective justification. This means that in certain cases, the CJEU may find that differential treatment has been carried out, but that it is acceptable. In the context of employment law, the CJEU has been reluctant to accept justification of differential treatment as a result of employers' economic concerns. By contrast, it has granted a broad margin of discretion in cases based on social and employment policy goals with fiscal implications. For example, the CJEU has held that compensating female employees for the disadvantages of taking career breaks in order to bring up children constitutes a legitimate aim justifying indirect discrimination against a male employee.[46]

The Gender Equality Directive (recast) is also subject to the 'genuine occupational requirement' exception, which allows employers to differentiate between individuals on the basis of a protected characteristic where that characteristic is directly related to the suitability or competence to perform the duties required of a particular post. The CJEU has indicated areas where this exception is likely to be applicable, such as artistic professions, which may require

[45] Article 21 of the EU Charter prohibits discrimination on 'any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation'.

[46] *Maurice Leone and Blandine Leone v. Garde des Sceaux, minister de la Justice and Caisse nationale de retraite des agents des collectivités locales*, judgment of 17 July 2014, no. C-173/13.

individuals with particular attributes. For example, an operatic company may require a female singer or a young actor for a particular part.[47]

f) International Law Instruments

International law instruments concerning discrimination are also of relevance to the Court's jurisprudence. Article 53 of the Convention makes clear that Convention rights should not be construed as limiting or derogating from human rights under international legal instruments. In addition, the Court takes account of international legal instruments to which States are party when deliberating cases.[48] Accordingly, the Convention cannot be interpreted in a vacuum, but must be interpreted in harmony with the general principles of international law and relevant instruments. A summary of the key international instruments pertaining to gender equality and non-discrimination follows.

Convention on the Elimination of All Forms of Discrimination against Women

The Convention on the Elimination of All Forms of Discrimination against Women is an UN instrument, which has been ratified by all CoE Member States. It constitutes an agreement by all state parties to respect, protect, promote and fulfil the human rights of women under all circumstances.[49] Parties to CEDAW are legally obliged, firstly, to eliminate all forms of discrimination against women in all areas of life, and, secondly, to ensure women's full development and advancement in order that they can exercise and enjoy their human rights and fundamental freedoms in the same way as men. This includes taking measures to eradicate stereotyped roles for women and men; ensuring women's equal participation in public life; equality before the law; and eliminating discrimination in employment.

[47] *Commission of the European Communities v. Federal Republic of Germany*, judgment of 21 May 1985, no. C-248/83.

[48] For example, the provisions of CEDAW were central to the Court's decision in *Opuz v Turkey,* judgment of 9 June 2009, no. 33401/02..

[49] CEDAW was ratified by Albania (1994), Bosnia and Hercegovina (1993), Croatia (1992), Serbia (2001), North Macedonia (1994) and Montenegro (2006), available at: https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/Treaty.aspx?Treaty=CEDAW&Lang=en Owing to its status under UNSC Resolution 1244, Kosovo has not ratified CEDAW or the Istanbul Convention, but Article 22 of its Constitution lists CEDAW among the international human rights treaties that are directly applicable in Kosovo. Available at: https://gzk.rks-gov.net/ActDetail.aspx?ActID=3702.

CEDAW provides that affirmative action measures must not be considered discriminatory (Article 4). Further, States are required to take appropriate measures to "modify social and cultural patterns of conduct of men and women… which are based on ideas of inferiority or superiority… or on stereotyped roles for men and women" (Article 5).

While CEDAW is not directly applicable law for the purpose of the Court's decision-making, it is often referenced in the Court's jurisprudence, and informs domestic judiciaries' decision-making with respect to discrimination on grounds of sex.[50] As a result, there is now a high degree of normative overlap between CEDAW and the Convention.

Council of Europe Convention on preventing and combating violence against women and domestic violence (the "Istanbul Convention")

The Istanbul Convention is a key international legally binding instrument which seeks to tackle violence against women and domestic violence in all CoE member states. It recognises that violence against women stems from gender stereotypes, bias and discrimination, which are prevalent issues in Western Balkan societies. The Western Balkan states have all ratified the Istanbul Convention, and in doing so have assumed the obligation to bring their legislation into compliance with its provisions in order to facilitate prevention of and protection from violence against women and domestic violence.[51]

[50] See for example *Staatkundig Gereformeerde Partij v. the Netherlands*, judgment of 10 July 2012, no.58369/10.

[51] The Istanbul Convention was ratified by Albania (2013), Bosnia and Herzegovina (2013), Croatia (2018), Serbia (2013), North Macedonia (2018) and Montenegro (2014), available at: https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/210/signatures- ?module=signatures-by-treaty&treatynum=210. The European Parliament has repeatedly called for EU accession to the Istanbul Convention and for its ratification by individual Member States. The EU signed the Istanbul Convention on 13 June 2017 but limited the scope of its accession to judicial cooperation in criminal matters, asylum and non-refoulement. In September 2017, the European Parliament adopted an interim resolution on full EU accession to the Istanbul Convention. The Resolution urged Member States to speed up the negotiations on the ratification of the Istanbul Convention by the EU and called for a broad EU accession without any limitations. Further, members of European Parliament called on the member states of the EU that have not ratified the Istanbul Convention to do so, see: https://www.europarl.europa.eu/news/en/press-room/20191121IPR67113/istanbul-convention-all-member-states-must-ratify-it-without-delay-say-meps.

Preventing violence, protecting victims, prosecuting perpetrators and the need for integrated policies at the national level are the four pillars of the Istanbul Convention. Crucially, these measures are based on the principle that violence against women is a violation of human rights and a form of discrimination against women. According to the Istanbul Convention, gender-based violence against women differs from other types of violence, as gender-based violence is both the cause and the result of unequal power relations between women and men that leads to women's subordinate status in the public and private spheres.[52] Accordingly, the Istanbul Convention frames the eradication of violence against women and domestic violence in the context of the advancement of equality between women and men.

Notably, the Istanbul Convention sets out obligations to:

- Criminalise certain forms of gender-based violence (including physical and psychological violence, forced marriage, forced abortion, forced sterilisation); and
- Ensure that culture, custom, religion, tradition or so-called "honour" are not regarded as justification for any of the acts of violence covered by its scope.

The Independent Group of Experts on Action Against Violence Against Women and Domestic Violence ("GREVIO")

The Istanbul Convention foresees a two-pillar monitoring mechanism to assess and improve the implementation of the Istanbul Convention by state parties: GREVIO and the Committee of the Parties.

In particular, GREVIO draws up and publishes reports evaluating legislative and other measures taken by the Parties to give effect to the provisions of the Convention. In cases where action is required to prevent a serious, massive or persistent pattern of any acts of violence covered by the Convention, GREVIO may initiate a special inquiry procedure. GREVIO may also adopt, where appropriate, general recommendations on themes and concepts of the Convention.[53]

[52] See https://www.coe.int/en/web/istanbul-convention/key-facts, "Key Facts about the Istanbul Convention", Council of Europe.

[53] In terms of other international instruments relevant to this issue, it is worth flagging United Nations Security Council adopted Resolution 1325 on Women, Peace and Security (UNSCR 1325), dated 31 October 2000, which urges states to increase female representation at all

Framework Convention for the Protection of national minorities (FCNM)

The FCNM is the first legally binding multilateral instrument devoted to the protection of national minorities worldwide, and its implementation is monitored by the only international committee dedicated exclusively to minority rights: the Advisory Committee.[54] The work of the Advisory Committee includes country visits and the production of state reports and opinions leading to the adoption of resolutions containing recommendations for action. The protection offered by the FCNM often relates to areas in which discrimination on the basis of national minority intersects with discrimination on the basis of gender, for example the FCNM promotes education rights and effective participation in cultural, social and economic life, and in public affairs.

(2) Domestic violence, femicide and gender-based violence

The perpetration of violence against women is inextricably linked to the existence of gender stereotypes, bias and discrimination against women. Preventing domestic and gender-based violence is an essential aspect of any efforts to advance gender equality.

The Court has addressed the issue of domestic and gender-based violence ("GBV") on several occasions over the past decade. While the European Convention on Human Rights does not expressly refer to domestic violence, the Court's evolving jurisprudence in cases concerning GBV has found violations of Convention articles in this context, including:

- the right to life under **Article 2** – engaged where domestic violence reaches a level at which it poses a threat to life;
- the right to be free from torture and from inhuman or degrading treatment under **Article 3** – engaged where domestic violence reaches the relevant threshold of severity;
- the right to respect for private and family life under **Article 8** – engaged with respect to "private life" when there has been an interference with the victim's moral and physical integrity which is not sufficiently severe to engage Article 3;

decision-making levels in state institutions: see https://undocs.org/S/RES/1325(2000), "Resolution 1325 (2000)", United Nations Security Council, 31 October 2000.

[54] https://www.coe.int/en/web/minorities, "National Minorities (FCNM)", Council of Europe.

- the right to an effective remedy under **Article 13**; and
- the prohibition of discrimination under **Article 14**.

a) Overview of procedural and substantive obligations under the Convention

The Court has made an essential distinction between '**substantive**' and '**procedural**' obligations under the Convention's Articles. The underlying principle behind the distinction lies in the nature of the action expected from States.

Substantive obligations impose both **negative** and **positive** obligations on States. Negative obligations forbid States from directly engaging in prohibited treatment, such as the intentional and unlawful taking of life under Article 2, or torture and degrading treatment under Article 3. Positive obligations ensure States also have to take measures designed to safeguard individuals within their jurisdiction from violations, such as breaches of Articles 2 or 3 – or from being put at risk of such violations – including when such ill treatment is perpetrated by private individuals.[55]

A State also has a procedural obligation to conduct an effective official investigation into allegations of violations that are capable of leading, if appropriate, to prosecution and conviction.[56] These procedural obligations are considered essential to the practical and effective enjoyment of the rights guaranteed by the Convention.

As described below, cases concerning GBV and domestic violence may fall within the scope of the substantive and procedural obligations under Articles 2, 3 and/or 8.

Scope of Article 2

Article 2's positive obligations require a State not only to refrain from the "intentional" taking of life, but also to take appropriate steps to safeguard the lives of those in its jurisdiction i.e. a positive obligation to protect life.[57]

[55] *A. v. United Kingdom*, judgment of 23 September 1998, no. 100/1997/884/1096; *Z and Others v. United Kingdom*, Grand Chamber judgment of 10 May 2001, no. 29392/95.

[56] *M.C. v. Bulgaria*, judgment of 4 December 2003, no. 39272/98.

[57] *Centre for Legal Resources on behalf of Valentin Câmpeanu v. Romania*, Grand Chamber judgment of 17 July 2014, no. 47848/08, §130

Article 2 is engaged when there has been an unlawful deprivation of human life (or threat to that effect) linked to the acts or omissions of a state agent. Under the so-called 'Osman test' it must be established that:[58]

- the authorities knew, or ought reasonably to have known, of the existence of a real and immediate risk to the life of an identified individual from the acts of a third party; and
- they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk.

With regards to GBV/domestic violence, to find a State in violation of Article 2, it must be demonstrated that the government failed to adequately protect an individual from a perpetrator of domestic or GBV, where they knew or ought reasonably to have known that the perpetrator posed a real and immediate risk to their life.[59] For example, where an individual has reported repeated incidents of violence and death threats to the police.[60]

Scope of Article 3

Article 3 stipulates that nobody shall be subjected to torture or to inhuman or degrading treatment or punishment. As an absolute ECHR right, there are no prescribed derogations from the prohibitive force of Article 3, even in times of war or other events threatening the 'life of the nation'.[61]

With regards to domestic violence/GBV, ill-treatment of an individual must attain a minimum level of severity to reach the threshold of Article 3 and so engage a State's positive obligations under the Article.[62] The assessment of this

[58] *Osman v. United Kingdom*, Grand Chamber judgment of 28 October 1998, no. 23452/94 , § 117.

[59] *Osman v. United Kingdom*, Grand Chamber judgment of 28 October 1998, no. 23452/94; *Kontrová v. Slovakia*, judgment of 31 May 2007, no 7510/04; *Opuz v. Turkey*, judgment of 9 June 2009, no. 33401/02 (included as a summary in this publication); *Branko Tomašić and others v. Croatia*, judgment of 15 January 2009, no 46598/06, §50

[60] *Opuz v. Turkey*, judgment of 9 June 2009, no. 33401/02 (included as a summary in this publication).

[61] *Ocalan v Turkey* (no. 2) , judgment of 18 March 2014, nos. 24069/03, 6201/06, 10464/07, § 97-98, *Aksoy v Turkey* , judgment of 18 December 1996, no. 21987/93, § 62; Ireland v UK , judgment of 13 December 1977, no. 5310/71, § 163.

[62] *Opuz v. Turkey*, judgment of 9 June 2009, no. 33401/02, §158 (included as a summary in this publication).

minimum threshold is relative: it depends on all the circumstances of the case, such as the nature and context of the treatment, its duration, and its physical and mental effects.[63] The sex of the victim and the relationship between the victim and the perpetrator of ill-treatment are also relevant to this assessment.[64]

Treatment could be "inhuman" if it is premeditated, applied for hours at a stretch and causes either actual bodily injury or intense physical and mental suffering.[65] Treatment might be considered "degrading" if it is such as to arouse in its victims feelings of fear, anguish and inferiority, capable of humiliating and debasing them and possibly breaking their physical or moral resistance. [66] This includes where a victim of domestic violence is humiliated in their own eyes, if not in those of others.[67]

For instance, the physical ill-treatment of a woman, including strangulation, hair pulling, hits to the face and kicks to the ribs and back, combined with feelings of fear and helplessness, has been deemed sufficiently severe to trigger positive obligations under Article 3.[68]

The Court has stressed that, in addition to physical injuries, psychological impact forms an important aspect of domestic violence. Fear of further assaults can be sufficiently serious to cause victims of domestic violence to experience suffering and anxiety capable of attaining the minimum threshold of application of Article 3.[69] For example, psychological harm (including feelings of fear and powerlessness) caused by coercive and controlling behaviour, such as monitoring a woman's movements, stalking her in front of her home, locking her in a car and threatening to kill her, has been found to be sufficiently serous to amount, in its own right, to fall within the scope of Article 3.[70]

[63] *Opuz v. Turkey*, judgment of 9 June 2009, no. 33401/02 (included as a summary in this publication); *Costello-Roberts v. the United Kingdom*, judgment of 25 March 1993, no. 13134/87

[64] *Tunikova and Others v. Russia*, judgment of 14 December 2021, no. 55974/16, 53118/17, 27484/18, and 280111/19, §73

[65] *Labita v. Italy*, Grand Chamber judgment of 6 April 2000, no. 26772/95, §120

[66] *Wieser v. Austria*, judgment of 22 February 2007, no. 2293/03, §36

[67] *Volodina v. Russia*, judgment of 9 July 2019, no. 41261/17 (included as a summary in this publication).

[68] *Valiuliene v. Lithuania*, judgment of 26 March 2013, no. 33234/07, §70.

[69] *Eremia v. Republic of Moldova*, judgment of 28 May 2013no. 3564/11, §54

[70] *Tunikova and Others v. Russia*, judgment of 14 December 2021, no. 55974/16, §76

Scope of Article 8

Article 8 stipulates that everyone has the right to respect for their private and family life, home and correspondence. The primary purpose of Article 8 is to protect against arbitrary interferences with private and family life, home, and correspondence by a public authority.[71] However, Article 8 also entails positive obligations on the State to ensure effective 'respect' for private and family life. In particular, under Article 8 States have a duty to protect the physical and moral integrity of an individual from infringement by private persons.[72]

Article 8 is a qualified right. States may interfere with the enjoyment of Article 8 for a range of prescribed reasons (set out in §2 of the Article), provided that the interference is lawful and necessary. For an interference with Article 8 to be justified, the Court will assess whether it took place "in accordance with the law" or "prescribed by law", in "pursuit of a legitimate aim" and was "necessary in a democratic society".

The test of necessity "in a democratic society" involves a proportionality assessment, where the legitimate aim pursued by the State must be balanced against an individual's rights. In some cases, the individuals' rights under Article 8 must also be balanced against another individual's interests protected by other provisions of the Convention. In the context of preventing and investigating domestic violence, this could include balancing a victim's Article 8 rights with an alleged perpetrator's right to a fair trial and protection from unlawful detention under Articles 5 and 6 of the Convention.

Article 8 is engaged when abuse or violence threatens an individual's physical and moral integrity, and where the instance of domestic violence/GBV does not reach the level of severity necessary to engage Article 3. This includes cases of physical, economic and psychological abuse or harassment, for example the covert filming of a minor by her stepfather when she was naked.[73]

Cyberbullying and cybersurveillance are also recognised aspects of violence against women which fall within the scope of Article 8. For example, hacking a victim's computer, the stealing, sharing and manipulation of data and images,

[71] *Libert v. France*, judgment of 22 February 2018, no. 588/13, §40-42.

[72] *Söderman v. Sweden*, Grand Chamber judgment of 12 November 2013, no. 5786/08.

[73] *Söderman v. Sweden*, Grand Chamber judgment of 12 November 2013, no. 5786/08.

improperly monitoring, accessing and saving a person's correspondence,[74] the use of nude photographs to create fake social media profiles, and sending violent threats via social media.[75]

In numerous cases[76] where applicants have made arguments alleging violations of both Articles 3 and 8, the Court has found a violation of Article 8 and then stated that it was therefore unnecessary to also examine the case under Article 3.

This Guide will now go on to summarise the obligations on States under Articles 2, 3 and 8 to prohibit, prevent, investigate, prosecute and punish violations relating to domestic violence and GBV.

Obligation to implement an adequate legal framework

Legislative measures enacted by States should provide not only for effective prohibition of violations, but also protection, to vulnerable persons in particular, from violations. Such protection should include the State taking reasonable steps to prevent prohibited treatment of which authorities had or ought to have had knowledge by implementing an adequate legal framework.[77] Legislation should have an adequate deterrent and protective effect capable of ensuring the operative prevention of domestic violence.

This means that legislation must be sufficiently precise and ascertainable for:

- potential victims of domestic violence to know that the law protects them and how exactly it protects them; and
- potential perpetrators of domestic violence to know that the law prohibits them from inflicting violence; and
- potential perpetrators of domestic violence to know the punishment they would face for committing acts of violence or abuse.

[74] *Buturugă v. Romania*, judgment of 11 February 2020, no. 56867/15.

[75] *Volodina v. Russia (No. 2)*, judgment of 14 September 2021, no. 40419/19 (included as a summary in this publication).

[76] *Bevacqua and S. v. Bulgaria*, judgment of 12 June 2008, no 71127/01; *A. v. Croatia*, judgment of 14 October 2010, no 55164/08; *Kalucza v. Hungary*, judgment of 24 April 2012, no 57693/10; *Sandra Janković v. Croatia*, judgment of 5 March 2009, no. 38478/05.

[77] *Osman v. United Kingdom*, Grand Chamber judgment of 28 October 1998, no. 23452/94.

Where fundamental values and essential aspects of private life are at stake, this in practice requires efficient criminal law provisions. For example, States have a positive obligation under Articles 3 and 8 of the Convention to enact criminal law provisions effectively punishing rape and to apply them in practice through effective investigation and prosecution.[78]

Obligation to prevent the infliction of domestic violence in order to protect the victim

The substantive positive obligation of prevention and thus protection under Articles 2, 3 and 8 requires States to do more than simply enact legislation designed to safeguard the personal integrity of vulnerable persons.[79] It also extends, in appropriate circumstances, to a positive obligation on the authorities to take reasonable **preventive operational measures** to protect an individual whose life, or physical safety, is at risk from the criminal acts of another individual.[80]

While the concept of 'preventive operational measures' was first established in *Osman* in respect of Article 2, failing to adopt preventive operational measures has now also been established to breach state obligations under Articles 3[81] and 8[82]. Once the Court has established the State had constructive knowledge of an event, it must consider whether the State took all reasonable preventive operational measures. However, this obligation must be interpreted in a way which does not impose an impossible or disproportionate burden on the authorities.[83] Accordingly, not every claimed risk to life results in a requirement to take operational measures to prevent that risk from materialising.

In *Valiulienė v Lithania*, the Court considered the nature of the State's duty to prevent and protect individuals from domestic violence in light of the Osman test, commenting:

[78] *M.C. v. Bulgaria*, judgment of 4 December 2003, no. 39272/98.

[79] *Opuz v. Turkey*, judgment of 9 June 2009, no. 33401/02 (included as a summary in this publication)

[80] *Opuz v. Turkey*, judgment of 9 June 2009, no. 33401/02, §128 (included as a summary in this publication)

[81] *Valiuliene v. Lithuania*, judgment of 26 March 2013, no. 33234/07

[82] *Hajduova v. Slovakia*, judgment of 30 November 2010, no 2660/03

[83] *Osman v. United Kingdom*, Grand Chamber judgment of 28 October 1998, no. 23452/94, §115.

> *'If a State knows or ought to know that a segment of its population, such as women, is subject to repeated violence and fails to prevent harm from befalling the members of that group of people when they face a present (but not yet imminent) risk, the State can be found responsible by omission for the resulting human rights violations. The constructive anticipated duty to prevent and protect is the reverse side of the context of widespread abuse and violence already known to the State authorities.'*[84]

This means that the classical Osman test should be applied more strictly in the context of domestic violence cases, to take account of the serious, long-lasting and widespread problems of domestic violence in society. The standard of due diligence expected is more rigorous, with the duty to act arising for public authorities when a risk is already present, even if not imminent.

b) Procedural obligations under Articles 2, 3 and 8

Articles 2 and 3 impose a procedural positive obligation on States to effectively investigate reported crimes perpetrated by private individuals. As such, there is an operational duty on State authorities to conduct a proper inquiry into behaviour amounting to a breach of rights under Articles 2 and 3. The essential purpose of such investigations is to secure the effective implementation of the domestic laws, which protect the rights of individuals under the Convention.

The procedural obligation arising from Article 2 requires the authorities to act promptly and with reasonable expedition,[85] as soon as the matter has come to their attention; they cannot leave it to the initiative of the next-of-kin either to lodge a formal complaint or to take responsibility for the conduct of any investigative procedures.[86] Under Article 3, the procedural obligation arises when the allegations of the existence of prohibited treatment are 'arguable'.[87] Moreover, where the circumstances of an attack have the hallmarks of gender-based

[84] *Valiuliene v. Lithuania*, judgment of 26 March 2013, no. 33234/07, concurring opinion of Judge Pinto de Albuqerque.

[85] *Opuz v. Turkey*, judgment of 9 June 2009, no. 33401/02, §128 (included as a summary in this publication); *Yasa v.Turkey*, judgment of 2 September 1998, no. 22495/93 , §102-104.

[86] *Al-Skeini and Others v. the United Kingdom*, Grand Chamber judgment of 7 July 2011, no.55721/07, §165; *Nihayet Arici and Others v. Turkey*, judgment of 23 October 2012, nos. 24604/04 and 16855/05, §159.

[87] *Chiriță v. Romania*, judgment of 29 September 2009, no. 37147/02.

violence, the authorities should react with special diligence in carrying out the investigative measure. Whenever there is a suspicion that an attack might be gender-motivated, it is particularly important that the investigation is pursued with vigour.[88]

An effective investigation into an alleged breach of Articles 2, 3 and/or 8 must take account of the specific features of domestic violence in line with the Council of Europe Convention on preventing and combating violence against women and domestic violence.[89] This includes (but is not limited to):

- Carrying out the investigation without undue delay;
- Seeking to gather all relevant evidence and taking all requisite measures to elucidate the circumstances of the case;
- Ensuring that during any civil or criminal proceedings, evidence relating to the sexual history and conduct of the victim shall be permitted only when it is relevant and necessary;
- Protecting the rights and interests of victims, including their special needs as witnesses, at all stages of investigations and judicial proceedings, for example ensuring that contact between victims and perpetrators within court and law enforcement agency premises is avoided where possible; and
- The possibility for governmental and nongovernmental organisations and domestic violence counsellors to assist and/or support victims, at their request, during investigations and judicial proceedings.

The conduct of a police investigation and of any subsequent legal proceedings must respect a victim's personal integrity under Article 8, for example inappropriate or aggressive cross-examination of a victim during a trial could constitute a breach of Article 8.[90]

Further, investigations must cover all aspects of alleged domestic violence to gain a comprehensive grasp of all the possible forms of domestic violence as part of one complaint. For example, if an individual alleges that they are the victim of cyberbullying, emotional or financial abuse by their abusive partner, the

[88] *Tërshana v. Albania*, judgment of 4 August 2020, no. 48756/14, § 160.

[89] *Buturugă v. Romania*, judgment of 11 February 2020, no. 56867/15.

[90] *Y. v Slovenia*, judgment of 28 May 2015, no. 41107/10, §114-116. In *Y. v. Slovenia*, the Court found that in the criminal proceedings concerning alleged sexual assaults against the applicant, the State did not afford sufficient protection to her right to respect for private life, and especially for her personal integrity when being cross-examined by the accused.

authorities must investigate such allegations alongside any allegations of physical violence within the same complaint / investigation of domestic abuse.[91]

States should also take measures to protect victims from further abuse whilst an investigation is ongoing. Even where an applicant does not complain about the nature of the criminal investigation into allegations of domestic abuse, a failure to take preventative, protective measures alongside the investigation, such as a failure to evict an alleged perpetrator from housing shared with an applicant whilst the investigation is ongoing, could constitute a breach of Article 8.[92]

The imposition of such protective measures should be available from the time that the investigation begins, and should not, for example, be dependent on gathering sufficient evidence to charge an alleged abuser.[93]

c) Procedural obligation under Article 13 – the right to an effective remedy

Article 13 of the Convention establishes the right to an effective remedy, stating that 'everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity'.

In addition to the procedural obligations inherent in Articles 2, 3 and 8, Article 13 imposes a separate, far-reaching, obligation, specifically that 'Article

[91] *Buturugă v. Romania*, judgment of 11 February 2020, no. 56867/15: in examining the applicant's allegations of cyberbullying and her request to have the family computer searched, the Court found that the national authorities had been overly formalistic in dismissing any connection with the domestic violence which she had already reported to them. The applicant had been obliged to submit a new complaint alleging a breach of the confidentiality of her correspondence. In dealing with it separately, the authorities had failed to take into consideration the various forms that domestic violence could take.

[92] *Levchuk v. Ukraine*, judgment of 3 September 2020, no. 17496/19, §90.

[93] *Volodina v. Russia (No. 2)*, judgment of 14 September 2021, no. 40419/19 (included as a summary in this publication): where a newly created order to prohibit certain conduct was found not to offer adequate protection to victims in the applicant's situation because such orders only become available after sufficient evidence to charge the perpetrator had been gathered but, in the applicant's case, the investigation had not progressed beyond the stage of suspicion.

13 requires, in addition to the payment of compensation where appropriate, a thorough and effective investigation capable of leading to the identification and punishment of those responsible, including effective access for the complainant to the investigation procedure'.[94]

Where there is an arguable breach of a Convention right, Article 13 requires the provision of an effective remedy at national level. Failing to deal with the substance of a relevant complaint and not granting an appropriate remedy could result in a State violating Article 13.

d) Domestic and gender-based violence as discriminatory under Article 14

The Court has recognised gender-based violence, including domestic violence, as an equality issue engaging Article 14 of the Convention and one that particularly affects women (see section 1(b) (Key principles of non-discrimination law under the ECHR) of this Guide for a summary of the requirements of Article 14).[95]

Opuz v Turkey was notably the first case in which the Court held that there had been a breach of Article 14 (along with Articles 2 and 3) in a domestic violence case. The Court found that the overall unresponsiveness of the Turkish judicial system to the issue of GBV, and the impunity enjoyed by the aggressors, indicated that there was insufficient commitment by the authorities to take appropriate action to address domestic violence, even in spite of recent legislative reforms regarding domestic violence in Turkey.[96]

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[94] See, for example: *Isayev and others v. Russia*, judgment of 21 June 2011, no. 43368/04, §186-187; *Anguelova v. Bulgaria*, judgment of 13 June 2002, no. 38361/97, §161; *Mahmut Kaya v. Turkey*, judgment of 28 March 2000, no. 22535/93, §107; *El-Masri v. "the former Yugoslav Republic of Macedonia"*, Grand Chamber judgment of 13 December 2012, no. 39630/09, §255; *Labita v. Italy*, Grand Chamber judgment of 6 April 2000, no. 26772/95, §131.

[95] *Volodina v. Russia*, judgment of 9 July 2019, no. 41261/17 (included as a summary in this publication).

[96] *Opuz v. Turkey*, judgment of 9 June 2009, no. 33401/02 (included as a summary in this publication). In reaching its decision, the Court emphasised that stigma, stereotypes and prejudice against women can lead the authorities to refuse to consider victims of GBV as worthy of State protection and to the passive or active condoning of perpetrators' actions. See Sandra Fredman, "Emerging from the Shadows: Substantive Equality and Article 14 of the European Convention on Human Rights", Human Rights Law Review, Volume 16, Issue 2, June 2016, p. 292. A similar approach to *Opuz v. Turkey* was taken in the later case of *Eremia v. Republic of*

Opuz highlights three additional themes in the Court's perspective on GBV as a discrimination issue under Article 14:

1. The case confirms that there are no procedural barriers to the admissibility of evidence for the Court's assessment of whether there has been a difference in treatment of an applicant in relation to GBV. The Court accepted statistical evidence submitted by the applicant, relating to incidences of domestic violence against women in the region of Turkey, to support its conclusion that the applicant had shown that domestic violence mainly affected women and that prevalent and discriminatory judicial passivity in Turkey regarding this issue created a climate that was conducive to domestic violence.[97] The submission of findings, evidence and reports which relate to the general situation of women prevailing in the State can be used to show that a structural bias exists, meaning that an applicant does not necessarily need to prove that they were a victim of individual prejudice.[98]
2. The Court did not require proof of intention on the part of the State to discriminate against the applicant in its legislation and handling of the issue. This demonstrates the principle of 'shifting the burden of proof' in relation to discrimination.
3. The Court demonstrated its expectation that domestic authorities should continue to investigate allegations of GBV and domestic violence, even after the presumed victim has withdrawn a complaint, as the applicant had done in *Opuz*, following death threats from the perpetrator against her and her daughter. The Court noted that there was no overall consensus among Contracting States as to whether to pursue criminal proceedings once a complaint has been withdrawn. Nevertheless, it was alive to the real likelihood that the complaint was withdrawn under severe pressure, including threats of

Moldova, judgment of 28 May 2013, no. 3564/11. Eremia also concerned domestic violence resulting in a finding of a breach of Article 14: the first applicant was a victim of domestic violence at the hands of her husband, a police officer. Their two daughters, the second and third applicants, regularly witnessed the violence, which affected their psychological well-being. The Court held that the failure of the authorities to protect the applicants reflected the fact that they did not appreciate the seriousness of violence against women. The authorities' lack of consideration for the problem of violence against women in the Republic of Moldova amounted to discriminatory treatment based on sex in violation of Article 14 in conjunction with Article 3.

[97] Sandra Fredman, "Emerging from the Shadows: Substantive Equality and Article 14 of the European Convention on Human Rights", Human Rights Law Review, Volume 16, Issue 2, June 2016, p. 292

[98] *Tunikova and Others v. Russia*, judgment of 14 December 2021, no. 55974/16, §129

violence. It therefore held that "the more serious the offence or the greater the risk of further offences, the more likely that the prosecution should continue in the public interest, even if victims withdraw their complaints."[99]

Since *Opuz*, the Court has found that discriminatory treatment by a State occurs not only when acts of the authorities amount to a failure to respond to episodes of violence, but also when the State has demonstrated a 'repeated tolerance' for GBV that 'reflect[s] a discriminatory attitude towards [the] applicant as a woman'.[100]

When deliberating domestic violence cases, the Court's current practice takes into account the requirements of the Istanbul Convention (see section 1(f) of this Guide (International Law Instruments)), particularly its position that States have "particular" due diligence obligations with respect to gender-based violence, and that the peculiarity of acts of domestic violence, as acknowledged in the preamble of the Istanbul Convention, must be taken into account during internal proceedings.[101] The Court uses the Istanbul Convention as a fundamental instrument to interpret positive obligations linked to the rights enshrined in the Convention, arguably therefore imposing a gradually stricter due diligence standard with regard to cases of domestic violence.[102]

The need for protective measures with respect to GBV under Article 14

A State's failure, even where unintentional, to protect women against domestic violence, may breach their right to equal protection under the law.[103] This affirms the need for States to implement protective measures to combat violence against women.

[99] *Opuz v. Turkey*, judgment of 9 June 2009, no. 33401/02, §139 (included as a summary in this publication); Sandra Fredman, "Emerging from the Shadows: Substantive Equality and Article 14 of the European Convention on Human Rights", Human Rights Law Review, Volume 16, Issue 2, June 2016, p. 293.

[100] *Talpis v. Italy*, judgment of 2 March 2017, no. 41237/14, §141. As in *Opuz v. Turkey*, judgment of 9 June 2009, no. 33401/02, §145, the Court referred to statistical data on domestic violence in Italy, acknowledging that the phenomenon mainly affects women and that, despite reforms, a significant number of women continued to be killed by partners or former partners, while discriminatory socio-cultural attitudes to domestic violence persist.

[101] *Talpis v. Italy*, judgment of 2 March 2017, no. 41237/14, §129.

[102] Sara De Vido, "The ECtHR Talpis v. Italy Judgment: Challenging the Osman Test through the Council of Europe Istanbul Convention?", Riecerche Giuridiche Università Ca' Foscari Venezia, Volume 6, Number 2, December 2017.

[103] *M.G. v. Turkey*, judgment 22 March 2016, no. 646/10.

The Court has upheld this principle in cases where an applicant has been denied justice for a period of years, even if the State has in the intervening time introduced relevant protective measures. In *M.G. v Turkey*, the Court held that there had been a violation of Articles 3 and 14 in relation to the State's failure to adequately prosecute a domestic violence claim over a period of over five and a half years.[104] Notably, during the lengthy proceedings, new legislation had come into force in Turkey affording divorced women protection against their former spouses. Notwithstanding this new legislation, the Court considered that the legislative reality at the time of the initial events was sufficient, in view of a prevalent and discriminatory judicial passivity in Turkey that was conducive to domestic violence, to constitute a breach of Article 14.

Similarly, the Court has found a violation of Article 14 where the State failed to ensure that a domestic court order, following a prosecution for domestic violence, was actually complied with by the defendant.[105]

[104] *M.G. v. Turkey*, judgment 22 March 2016, no. 646/10. The Court also emphasised in this case that under Article 3 of the Istanbul Convention, the term "violence against women" was to be understood as a violation of human rights and a form of discrimination against women, once again affirming the importance of that Convention to the Court's reasoning on the issue.

[105] *Halime Kiliç v. Turkey*, judgment of 28 June 2016, no. 63034/11. The Court held in that case that there had been a violation of Articles 2 and 14 regarding the death of the applicant's daughter, who was killed by her husband despite having lodged four complaints and obtained three protection orders and injunctions. The State had failed to punish the husband of the applicant's daughter for his non-compliance with the orders issued against him. Accordingly, the national authorities had deprived those orders of any effectiveness, thus creating a context of impunity enabling him to repeatedly assault his wife without being held to account – in breach of the positive obligation contained in Article 2. The Court also found it unacceptable that the applicant's daughter had been left without resources or protection when faced with her husband's violent behaviour and that, in turning a blind eye to the repeated acts of violence and death threats against the victim, the authorities had created a climate that was conducive to domestic violence.

Article 14 and the minimum threshold for severity under Article 3

As discussed above, in order for Article 3 to be violated in respect of incidents of domestic violence / GBV, the offence must reach a minimum level of severity. In practice, the Court has acknowledged that the threshold for an Article 3 violation is relative[106] depending on all the circumstances of the case.[107]

Discriminatory treatment can in principle amount to degrading treatment within the meaning of Article 3 where it attains a level of severity such as to constitute an affront to human dignity.[108] Acts that in isolation would not have reached the minimum level of severity for an Article 3 violation may qualify as torture and ill-treatment because of the discriminatory nature of such treatment.[109]

The discriminatory nature of domestic / GBV may therefore constitute a factor relevant to assessing if the minimum severity threshold has been passed to engage Article 3.

[106] *Ireland v. United Kingdom*, judgment of 20 March 2018, no. 5310/71, §130.

[107] *Khlaifia and others v. Italy*, Grand Chamber judgment of 15 December 2016, no. 16483/12, §160.

[108] *M.C. and A.C. v. Romania*, judgment of 12 April 2016, no. 12060/12.

[109] *Identoba and others v. Georgia*, judgment of 12 May 2015, no.73235/12, § 65, citing *East African Asians v. the United Kingdom*, Commission's report of 14 December 1973, nos. 4403/70 et al., § 208, *Smith and Grady v. United Kingdom*, judgment of 27 December 1999, nos. 33985/96 and 33986/96 and 3986/96, §121; and *Moldovan and Others v. Romania (No. 2)*, judgment of 12 July 2005, nos. 41138/98 and 64320/01, § 111.

(3) Gender stereotyping in legal judgments

The Court has stressed that the use of discriminatory language and gender stereotyping in judicial proceedings poses an obstacle to women's ability to obtain effective remedies and satisfactorily access justice. Discrimination may take the form of:

- The use of sexist or discriminatory language during proceedings or in a judgment; and
- The reliance on discriminatory assumptions or stereotypical rationales to justify a decision.

a) Sexist or discriminatory language

The explicit use of sexist and stereotypical language by state authorities constitutes a violation of Article 14, given its negative effect on an individual's right to equality.[110]

Stereotypical language used by the domestic authorities can also constitute a violation of an applicant's Article 8 rights to respect for personal life and personal integrity.[111] The use of such language and arguments also risks exposing victims of GBV to "secondary victimisation" during the course of investigation and prosecution proceedings, contrary to Article 8.[112]

Examples of language and statements within judicial decisions which have been found to be discriminatory and/or a breach of Article 8 include:[113]

- Comments on an applicant's lifestyle which are irrelevant to the case, such as commentary on her attitude to sex, her clothing, her sexuality and her past sexual relationships; and
- Moralistic or guilt inducing language.

[110] *Carvalho Pinto de Sousa Morais v. Portugal*, judgment of 25 July 2017, no. 17484/15, §53-54.

[111] *J.L. v. Italy*, judgment of 27 May 2021, no. 5671/16 (included as a summary in this publication).

[112] *J.L. v. Italy*, judgment of 27 May 2021, no. 5671/16 (included as a summary in this publication).

[113] *J.L. v. Italy*, judgment of 27 May 2021, no. 5671/16, §141 (included as a summary in this publication). The Court held that by using "guilt-inducing and moralising" language that discourages victims' trust in the justice system, the Italian courts risked exposing female victims of gender-based violence to "secondary victimisation."

b) Stereotypical reasoning, assumptions and inferences

Gender-based stereotyping in domestic judicial thinking can be articulated both explicitly and implicitly[114] and judicial reasoning or decisions based on discriminatory assumptions in respect of gender can amount to a violation of Article 14.[115]

A judgment will be deemed to be discriminatory where it is based on assumptions about women and their role in society, in particular where the court does not test the validity of that assumption by engaging with arguments to the contrary. For example:

- The assumption that a woman would give up work once she had a child and would be "active solely as a housewife and mother".[116]
- The assumption that sexuality is not as important for a fifty-year-old woman and mother of two children as for someone of a younger age. [117]
- The assumption that female sexuality is essentially linked to child-bearing purposes ignoring the physical and psychological relevance for the self-fulfilment of women as people. [118]

[114] *Carvalho Pinto de Sousa Morais v. Portugal*, judgment of 25 July 2017, no. 17484/15. In this case, while an ageist stereotype was explicit in the domestic court's view that 50 was "an age when sex is not as important as in younger years", a gender-role stereotype was also implicit in the court's view that the applicant did not need a maid as she "probably only needed to take care of her husband".

[115] *Schuler-Zgraggen v. Switzerland*, judgment of 24 June 1993, no. 14518/89.

[116] *Schuler-Zgraggen v. Switzerland*, judgment of 24 June 1993, no. 14518/89, §64: the Court relied on this assumption to conclude that even if she had not had to give up work due to a lung condition she developed, she would not have been economically active as a result of giving birth to a child, so was not entitled to invalidity pension.

[117] *Carvalho Pinto de Sousa Morais v. Portugal*, judgment of 25 July 2017, no. 17484/15. The Court found that the judgment of the Portuguese Supreme Administrative Court was based on prejudiced stereotypes about female sexuality, which demonstrated the prejudices prevailing in the judiciary in Portugal. The domestic courts had on appeal reduced the compensation owed to the applicant after a failed operation which prevented her from having sexual relations, leading to depression and suicidal ideation. The domestic courts concluded that less compensation should be paid since the applicant was at "an age when sex is not as important as in younger years, its significance diminishing with age." Furthermore, one of the reasons for reducing the amount of compensation granted was that, given the age of the applicant's children, she "probably only needed to take care of her husband" and thus required lower household expenses.

[118] *Carvalho Pinto de Sousa Morais v. Portugal*, judgment of 25 July 2017, no. 17484/15, §52

In this context, there is no need for assessments of discrimination on grounds of sex to include a comparative exercise to evidence that a man would be treated differently on the basis of his gender; the use of sexist language or the existence of reasoning based on stereotypical assumptions is sufficient to find a violation of Article 14.[119]

When dealing with alleged discrimination in this context, it is also relevant to consider wider statistical data and reports which evidence a wider context of stereotypes regarding the role of women in the society of the State in question.[120]

The Court also acknowledges that such inferences and assumptions might be the product of the intersection of numerous grounds of discrimination. For example, the interaction of ageism and sexism to undermine the importance of non-reproductive sex in a woman's life.[121]

c) Gender diversity of national judiciaries

The Court has also developed jurisprudence with respect to the gender diversity of national judiciaries. With regards to the diversity of members of the judiciary, the process for appointing a new judge must comply with the requirements of the relevant domestic equality law.[122]

Relevant international instruments also encourage the promotion of greater representation of women and minorities in the judiciary.[123] For example, the

[119] *Carvalho Pinto de Sousa Morais v. Portugal*, judgment of 25 July 2017, no. 17484/15. In a separate concurring opinion, Judge Yudkivska noted that "where prejudicial stereotypes have affected the judicial assessment of evidence, [it] is perfectly sufficient to find a violation of Article 14."

[120] In *Opuz*, *Talpis* and *J.L.* the Court was demonstrably happy to admit statistical data in evidence, noting reports by the UN and GREVIO on the elimination of discrimination against women in Italy, and concluding that these reports demonstrated the persistence of stereotypes regarding the role of women in Italian society and the resistance of that society to the cause of sexual equality.

[121] *Carvalho Pinto de Sousa Morais v. Portugal*, judgment of 25 July 2017, no. 17484/15.

[122] *Guðmundur Andri Ástráðsson v. Iceland*, Grand Chamber judgment of 1 December 2020, no. 26374/18, §260-262

[123] The UN Basic Principles provide that in the selection of judges, there shall be no discrimination against a person on the grounds of race, colour, sex, religion, political or other opinion, national or social origin, property, birth or status, except that a requirement, that a candidate for judicial

CoE's Venice Commission for Democracy through Law, whilst highlighting that merit should be the primary criterion in selecting members of the judiciary, has stated that diversity within the judiciary will enable the public to trust and accept the judiciary as a whole. Judicial positions should, therefore, be open and access should be provided to all qualified persons in all sectors of society.[124]

Further, the CoE's Plan of Action states that gender balance and, more generally, representation of society as a whole, in the composition of the judiciary should be promoted at each level, including at the most senior levels.[125] The Consultative Council of European Judges considers that it is appropriate to encourage applications for judicial appointment from women and ethnic minorities and has underlined the need to achieve equality between women and men in the judiciary.[126]

office must be a national of the country concerned, shall not be considered discriminatory; see also https://undocs.org/A/HRC/32/34, "Report of the Special Rapporteur on the independence of judges and lawyers", Human Rights Council, 5 April 2016: The Report states that States should also ensure that anyone can enter the legal profession, the prosecution services and the judiciary without discrimination of any sort, in particular on the grounds of gender; States should promote greater representation of women and minorities.

[124] See https://rm.coe.int/1680700a63, "Report on the Independence of the Judicial System Part I", European Commission for Democracy through Law, March 2010.

[125] See https://rm.coe.int/1680700285, "Plan of Action on Strengthening Judicial Independence and Impartiality", Council of Europe, April 2016, Action 1.2.

[126] See https://rm.coe.int/1680747830, "Opinion No.1 on Standards Concerning the Independence of the Judiciary and the Irremovability of Judges", Consultative Council of European Judges, November 2001, §31.

(4) Discrimination on grounds of sex in relation to the right of respect for private and family life

The Court has, over the years, developed jurisprudence with respect to discrimination on grounds of sex in the arena of private and family life across a wide range of issues, with applications frequently seeking to engage Article 14 in conjunction with Article 8. See section 2(a) (Overview of procedural and substantive obligations under the Convention) of this Guide for a summary of the structure of Article 8 and the case law under Article 8 in respect of domestic / GBV. Private life under Article 8 is a broad-ranging concept:

> *"the notion of "private life" within the meaning of Article 8 of the Convention is a broad concept which encompasses, inter alia, the right to establish and develop relationships with other human beings […] the right to "personal development" […] or the right to self-determination as such. It encompasses elements such as names […] gender identification, sexual orientation and sexual life, which fall within the personal sphere protected by Article 8 […] and the right to respect for both the decisions to have and not to have a child".*[127]

The essential ingredient of family life has been defined by the Court as the right to live together so that family relationships may develop normally,[128] and so that members of the family may enjoy each other's company.[129] The Court's jurisprudence on discrimination in this area is discussed below on a thematic basis.

a) Parenting Rights

States must implement effective mechanisms by which fathers can challenge or establish paternity of a child.[130] With regard to their interest in contesting paternity status, the Court regards mothers and fathers to be in an analogous situation for the purpose of Article 14.[131] In certain circumstances, however, a difference in treatment between mothers and fathers may be justified in the interests of legal certainty and to protect the best interests of children and the security of family relationship. For example, under certain circumstances, the

[127] *E.B. v. France*, Grand Chamber judgment of 22 January 2008, no. 43546/02, §43.

[128] *Marckx v. Belgium*, judgment of 13 June 1979, no. 6833/74, §31.

[129] *Olsson v. Sweden (No.1)*, judgment of 24 March 1988, no. 10465/83, §59.

[130] *Paulík v. Slovakia*, judgment of 10 October 2006, no. 10699/05.

[131] *Paulík v. Slovakia*, judgment of 10 October 2006, no. 10699/05, §54.

introduction of different time-limits for the initiation of paternity proceedings is allowed.[132] However, putative fathers must at least have the opportunity to contest or establish paternity of a child and they must not be prevented from doing so by the rigid application of time-limits on initiating proceedings.[133]

Conversely, the mother of a child must have the same rights to challenge paternity as the putative father.[134] Respect for family life under Article 8 requires that biological and social reality must have the opportunity to prevail over a legal presumption in respect of parental rights. For example, a mother must have the option to challenge a legal presumption that her husband is also the father of her child, where the biological and social reality is that another man is the father of her chid.[135]

Ultimately, when seeking to assert or dispute paternity rights, there should be scope for either parent to request that an assessment be made which takes into account all the circumstances of the case. The right to private and family life of a putative father must be weighed against the best interests of the child, and the right to family life of the parents with which the child is living,[136] taking into account the social reality of the situation. For example, the extent of the contact or connection between a putative father and the child.[137]

[132] *Rasmussen v. Denmark*, judgment of 28 November 1984, no.8777/79, §41

[133] Contrast *Mizzi v. Malta*, judgment of 12 January 2006, no. 26111/02 with *Rasmussen v. Denmark*. In the latter case, the Court held that the institution of different time-limits between husbands and wives could be justified by the desire to ensure legal certainty and to protect the interests of the child. However, in that case, the applicant had an opportunity to disavow the child during the five years subsequent to the birth and within twelve months after he had become cognisant of the circumstances affording grounds for contesting paternity. By contrast, in *Mizzi v. Malta*, the applicant had no opportunity to do so. The application of the time-limit and the refusal to allow an exception to this rule, were found to deprive him of the possibility of exercising the rights guaranteed by Articles 6 and 8 of the Convention.

[134] *Kroon and Others v. the Netherlands*, judgment of 27 October 1994, no. 18535/91.

[135] *Kroon and Others v. the Netherlands*, judgment of 24 October 1994, no. 18535/91.

[136] *Różański v. Poland*, judgment of 18 May 2006, no. 55339/00, §78-79.

[137] *Nylund v. Finland*, decision of 29 June 1999, no. 27110/95, in which it was relevant that the applicant had not seen the child or formed any emotional bond with her. This case was distinguished from *Kroon and Others*, where the applicants had emotional bonds with the children in question.

b) Custody of children and contact with children

Historically, the Court was prepared to accept differential treatment between mothers and fathers with regards to the custody of children in cases where the child's parents were not married.[138] Such decisions were justified by the Court's view that a strong family relationship between a child and his mother is established by the very event of birth itself, with unmarried mothers maintaining this family tie, while the unmarried father of a child might not be willing to assume any family obligations. In its jurisprudence from the 1980s, the Court found that conferring the right of care and custody of a child of unmarried parents exclusively to the mother, even if both parents live together, was a proportionate legal consequence of the couple's choice to not marry.[139]

However, this position has been eroded by contemporary case law. The Court now consistently reinforces that the notion of "family life" in Article 8 is not confined solely to marriage-based relationships and may encompass other de facto "family" ties where the parties are living together outside marriage.[140] The mutual enjoyment by a parent and child of each other's company constitutes a fundamental element of family life under Article 8, even if the relationship between the parents has broken down.[141] As a result, very weighty reasons must be put forward before a difference in treatment on the ground of sex or birth out of or within wedlock can be regarded as compatible with the Convention in this context.[142]

In the context of custody proceedings by a father, the existence or non-existence of "family life" within the meaning of Article 8 is a question of fact, which does not depend on the marital status of the father. An assessment of whether Article 8 is engaged, and / or whether there is an interference with Article 8 depends on an assessment of the existence in practice of close personal ties between child and father, in particular the demonstrable interest in and commitment by the father to the child both before and after the birth.[143] For example, how long the father has lived with the child, the extent to which he has provided for his child's needs, and the amount of contact he has with the child.[144]

[138] *B., R. and J. v. the Federal Republic of Germany*, decision of 15 March 1984, no. 9639/82.

[139] *B., R. and J. v. the Federal Republic of Germany*, decision of 15 March 1984, no. 9639/82, §4-5.

[140] *Kroon and Others v. the Netherlands*, judgment of 24 October 1994, no. 18535/91, § 30.

[141] *Zaunegger v. Germany*, judgment of 3 December 2009, no. 22028/04, §51.

[142] *Zaunegger v. Germany*, judgment of 3 December 2009, no. 22028/043.

[143] *L. v. the Netherlands*, judgment of 1 June 2004, no. 45582/99, §3.

[144] *Zaunegger v. Germany*, judgment of 3 December 2009, no. 22028/043.

The Court accepts that it might be justified for the protection of a child's interests to initially attribute parental authority over a child to their mother, to ensure that there is a person at birth who can act for the child in a legally binding way.[145] Further, there may exist valid reasons to deny an unmarried father participation in parental authority, for example, if arguments or a lack of communication between the parents risk jeopardising the child's welfare. However, States must not implement laws or policies in this area based on a general presumption that such problems are a general feature of the relationship between unmarried fathers and their children.[146] More generally, States should not impose a general assumption that joint custody against the will of the mother is *prima facie* not in the child's interest.[147]

A father must have the opportunity to request joint custody of a child, whether he is married to the mother of his child or not.[148] Domestic courts must not prevent or create legal barriers to custody proceedings for unmarried fathers where no such barriers exist for mothers.[149] Both parents must have access to a fair decision-making procedure to determine custody disputes. Such decision-making procedures must take into account all the facts and circumstances of the case, without relying on general or gendered assumptions about the relationship between a child and their mother and father. For example, the Court has found a violation of the Convention in the following circumstances:

- A decision to award parental responsibility to a child's mother, referring solely to the child's age and her need for 'maternal care and affection' (as opposed to paternal) without examining any other circumstances of the case.[150]
- A decision to award parental responsibility exclusively to the mother which was based on the grounds of the father's sexual orientation.[151]

[145] *Zaunegger v. Germany*, judgment of 3 December 2009, no. 22028/043, §55.

[146] *Zaunegger v. Germany*, judgment of 3 December 2009, no. 22028/043, §56.

[147] *Zaunegger v. Germany*, judgment of 3 December 2009, no. 22028/043, §59.

[148] *Zaunegger v. Germany*, judgment of 3 December 2009, no. 22028/043; see also: *Sporer v. Austria*, judgment of 3 February 2011, no. 35637/03; *Sommerfeld v. Germany*, Grand Chamber judgment of 8 July 2003, no. 31871/96, §91.

[149] *Zaunegger v. Germany*, judgment of 3 December 2009, no. 22028/043; see also: *Sporer v. Austria*, judgment of 3 February 2011, no. 35637/03; *Sommerfeld v. Germany*, Grand Chamber judgment of 8 July 2003, no. 31871/96, §91.

[150] *Ilker Ensar Uyanik v. Turkey*, judgment of 3 May 2012, no. 60328/09, §57.

[151] *Salgueiro da Silva Mouta v. Portugal*, judgment of 21 December 1999, no. 33290/96.

Where custody is granted to one parent, the State is under a positive obligation to take all necessary steps to facilitate contact with the non-custodial parent, to the extent this can reasonably be demanded in the specific circumstances of a case. This could include, for example, a requirement to ensure effective contact between a father and his daughter at a time compatible with the work schedule and travel commitments of the father.[152]

c) Adoption

Article 8 does not guarantee the right to found a family (which is contained in Article 12 – the right to marry, although there is limited case law on this point) or the explicit right to adopt.[153] However, the right to establish and develop relationships with other human beings, as well as decisions regarding whether or not to have a child, do fall within the scope of Article 8.[154] As a result, cases relating to adoption do fall within the Court's competence.

While much of the case law in this area relates to differences in treatment with respect to sexual orientation, rather than gender, it is nevertheless illustrative of the Court's recent thinking on discrimination in relation to adoption.

National measures preventing adoption primarily because of the sexual orientation of the applicant are discriminatory, in particular where there are also measures in place permitting adoption by single parents.[155] However, in a case where a biological mother's homosexual civil partner sought to adopt her child, the Court did not find a violation of Article 14, on the basis that the situation of the applicants was not comparable to that of married couples because under French law, marriage conferred a special status on those who entered into it and the ECHR did not go so far as to compel States to provide for same-sex marriage.[156] The Court noted that a heterosexual couple in a civil partnership would also have had their application refused under the relevant provisions and as such, while

[152] *Gluhaković v. Croatia*, judgment of 12 April 2011, no. 21188/09.

[153] *E.B. v. France*, Grand Chamber judgment of 22 January 2008, no. 43546/02, §41.

[154] *E.B. v. France*, Grand Chamber judgment of 22 January 2008, no. 43546/02, §43.

[155] In *E.B. v. France*, the applicant was refused adoption of a child because there was no male role model in her household. Given that national law permitted single parents to adopt children, the ECtHR found that the authorities' decision was primarily based on the fact that the applicant had been in a relationship and living with another woman. Accordingly, the ECtHR found that discrimination had occurred based on sexual orientation.

[156] *Gas and Dubois v. France*, judgment of 15 March 2012, no. 25951/07.

the applicants were in a comparable legal situation, there was no difference in treatment based on their sexual orientation.[157]

d) Parental Leave from Work

In terms of the right to parental leave following the birth of a child, the Court views men and women as being in analogous positions. Whilst maternity leave is intended to enable a woman to recover from childbirth and to breastfeed her baby if she so wishes, parental leave relates to a subsequent period and is viewed as intended to enable a parent to stay at home to look after an infant personally. Whilst differences might exist between mother and father in terms of their relationship with the child, as far as the role of taking care of the child during parental leave is concerned, men and women are viewed as "similarly placed" in terms of their right to parental leave.[158]

Any differences in parental leave offered to men and women must, therefore, be justified. When considering whether a difference in parental leave arrangements for men and women is justified, the traditional distribution of gender roles in society is not a reasonable and objective justification for a difference in treatment. The reliance on such roles perpetuates gender stereotypes and is disadvantageous both to women's careers, by reinforcing their responsibility for childcare, and to men's family life.[159] In *Konstantin Markin v Russia*, the Court found:

[157] Compare *Gas and Dubois v. France* with the case of *X and Others v. Austria*, Grand Chamber judgment of 19 February 2013, no. 19010/07, where the applicants were also an unmarried same-sex couple in which one partner wished to adopt the other partner's child. Unlike in *Gas and Dubois*, the relevant provisions of Austrian law allowed for second-parent adoption for unmarried heterosexual couples. Given that the law contained an absolute prohibition on second-parent adoption by a same-sex couple, the national courts did not examine the merits of the adoption request, nor did the father's refusal to consent to the adoption play any role in the national courts' considerations of the applicants' case. The Court found that this fact constituted a difference in treatment of the applicants in comparison to heterosexual unmarried couples, which had not been reasonably and objectively justified.

[158] *Konstantin Markin v. Russia*, Grand Chamber judgment of 22 March 2012, no. 30078/06, §132 (included as a summary in this publication).

[159] *Konstantin Markin v. Russia*, Grand Chamber judgment of 22 March 2012, no. 30078/06 (included as a summary in this publication), where the Court also refused to accept the State's argument that parental leave for servicemen would have a negative effect on the fighting power and operational effectiveness of the Russian armed forces.

> *"In particular, references to traditions, general assumptions or prevailing social attitudes in a particular country are insufficient justification for a difference in treatment on grounds of sex. For example, States are prevented from imposing traditions that derive from the man's primordial role and the woman's secondary role in the family."*[160]

e) Naming rights

Rules which: (i) prevent parents from giving their child their mother's surname;[161] or (ii) prevent parents from placing a child's maternal surname before their paternal surname,[162] constitute discriminatory treatment on the basis of sex. The Court accepts that such rules arguably pursue the legitimate aim of ensuring respect for the tradition of family unity and can serve the purpose of legal certainty. However, general traditions and majority social attitudes cannot justify discrimination against women. Further, the purpose of preserving legal certainty can just as easily be served by placing the maternal surname before the paternal surname.

It must, therefore, be possible to derogate from any rule concerning the automatic imposition of a child's paternal surname when registering a new child's birth. While a rule that the paternal surname should be placed first in the event of disagreement between parents is not necessarily incompatible with the Convention, the inability to derogate from such a rule is excessively stringent and discriminatory.[163] It is not sufficient to provide that a child can subsequently change their surname, the possibility of changing one's name at a later date does not counteract the negative effects potentially suffered by a mother (and also potentially by her child) as a result of the inability to determine the child's name at birth.[164]

In respect of married couples' right to choose their new surname, States are required to put forward 'very weighty reasons' to justify preventing a family from

[160] *Konstantin Markin v. Russia*, Grand Chamber judgment of 22 March 2012, no. 30078/06, §127 (included as a summary in this publication).

[161] *Cusan and Fazzo v. Italy*, judgment of 7 January 2014, no. 77/07

[162] *León Madrid v. Spain*, judgment of 26 October 2021, no. 30306/13

[163] *León Madrid v. Spain*, judgment of 26 October 2021, no. 30306/13

[164] *León Madrid v. Spain*, judgment of 26 October 2021, no. 30306/13

taking the wife's name as a surname.[165] Similarly, it is discriminatory to prevent married women from keeping their own surname after marriage, where men are allowed to keep theirs.[166] In relation to this topic, the Court has found:

> *"The first question for the Court is whether the tradition of reflecting family unity through the husband's name can be regarded as a decisive factor in the present case. Admittedly, that tradition derives from the man's primordial role and the woman's secondary role in the family. Nowadays the advancement of the equality of the sexes in the member states of the Council of Europe, including Turkey, and in particular the importance attached to the principle of non-discrimination, prevent States from imposing that tradition on married women."*[167]

f) Transgender rights

While transgender rights are broadly outside the scope of this Guide, a summary follows here of a few key decisions of the Court, because of the manner in which transgender rights intersect with other gender-based discrimination rights.

The case of *Goodwin v. United Kingdom* is illustrative of this intersection.[168] In *Goodwin*, the applicant – a transgender woman who had undergone gender reassignment surgery – submitted that the UK had breached its positive obligation under Article 8 to ensure she enjoyed respect for her private life by refusing to legally recognise her gender reassignment.[169]

[165] *Burghartz v. Switzerland*, judgment of 22 February 1994, no.16213/90. In *Burghartz*, a family chose the wife's surname as the family name ('Burghartz'), while the husband chose to create a double-barrelled name using both surnames ('Schnyder-Burghartz'). The Swiss authorities, having recorded Schnyder as the family name, refused the family's application to substitute "Burghartz" as the family surname and "Schnyder Burghartz" as the husband's surname.

[166] *Ünal Tekeli v. Turkey*, judgment of 16 November 2004, no. 29865/96.

[167] *Ünal Tekeli v. Turkey*, judgment of 16 November 2004, no. 29865/96, §63; see also *Losonci Rose and Rose v. Switzerland*, judgment of 9 November 2010, no. 664/06.

[168] *Christine Goodwin v. United Kingdom*, Grand Chamber judgment of 11 July 2002, no. 28957/95 (included as a summary in this publication).

[169] The range of issues the applicant brought before the Court was wide-ranging, but included harassment and discrimination in the course of her employment, issues with accessing her state pension and other state benefits, and on numerous occasions a requirement to choose between revealing her transgender status and accessing services such as loan finance.

In finding a violation of Article 8, the Court acknowledged how the social context for transgender people in Member States' societies had changed; accordingly, the State's prerogative to introduce, or not, legal measures to support transgender people, now fell outside of the State's margin of appreciation. Moreover, the Court noted that there were no significant factors of public interest to weigh against the interest of the applicant in obtaining legal recognition of her gender reassignment.[170]

The Court has also found that domestic legislation preventing transgender persons from marrying to be a violation of Article 12 (the right to marry).[171] The Court held that it was for the Contracting State to determine the conditions under which a person claiming legal recognition as a trans person has established that gender re-assignment has been properly effected as well as the formalities applicable to future marriages, including, for example, the information to be furnished to intended spouses. However, there was no justification for barring a trans person from enjoying the right to marry under any circumstances.[172]

g) Sexual and reproductive rights, including forced sterilisation

A range of issues fall within the scope of sexual and reproductive rights, including abortion, forced sterilisation, and wider discrimination issues arising from pregnancy, such as in the context of employment (see section 5 (Discrimination on grounds of sex in employment and public life) of this Guide for discussion of the latter).

[170] *Christine Goodwin v. United Kingdom*, Grand Chamber judgment of 11 July 2002, no. 28957/95, §93 (included as a summary in this publication).

[171] *I. v. United Kingdom*, Grand Chamber judgment of 11 July 2002, no. 25680/94. In this case the applicant – a transgender woman who had undergone gender reassignment surgery – applied to the Court under Articles 8, 12 and 14 regarding the refusal to legally recognise her change of gender. She was unable to obtain a birth certificate that showed her status as female and had been required on a number of occasions to submit her original birth certificate. This had effects on her life where sex was of legal relevance – for example in relation to an application for a nursing course, employment in a prison and a student loan.

[172] In reaching its decision in *I. v. United Kingdom*, the Court also noted that Article 8 gave protection to the personal sphere of each individual, including the right to establish details of their identity as individual human beings, and the unsatisfactory situation in which post-operative transsexuals lived in an intermediate zone as not quite one gender or the other was no longer sustainable.

Abortion

The Court typically offers States a wide margin of appreciation when it comes to regulating abortion.[173] However, the Court has recognised that a pregnant woman's decision whether to continue her pregnancy or not belongs to the sphere of private life and autonomy. Whilst Article 8 does not, therefore, confer a right to have an abortion, legislation regulating the interruption of pregnancy does engage Article 8.[174]

Whilst not every regulation concerning the termination of pregnancy constitutes an interference with the right to respect for private life, a prohibition of abortion when sought for reasons of health and/or wellbeing constitutes an interference with a woman's right to respect for private life under Article 8, meaning such a restriction must be necessary and proportionate in the relevant circumstances.[175]

If a State chooses to permit abortion in certain situations, the legal framework derived for this purpose must be sufficiently clear and accessible to enable both a pregnant woman and the medical professionals working with her to understand the situations in which she can legally obtain an abortion. In this respect, the implementation of broad provisions concerning when an abortion is permitted are not sufficient. Such provisions must be implemented through clear legislation as well as the provision of clear guidance for medical professionals.[176]

The State has a positive obligation under Article 8 to secure the physical integrity of mothers to be. In this respect they are obliged under Article 8 to ensure that effective and accessible procedures are available to establish a woman's legal

[173] *A, B and C v. Ireland*, Grand Chamber judgment of 16 December 2010, no. 25579/05, §237 where the Court found that the question of when the right to life begins comes within States' margin of appreciation, given there was no European consensus on the scientific and legal definition of the beginning of life, meaning it was impossible to answer the question whether an unborn child is a person and is therefore protected by Article 2.

[174] *R.R. v. Poland*, judgment of 26 May 2011, no. 27617/04, §§180-181

[175] *A, B and C v. Ireland*, Grand Chamber judgment of 16 December 2010, no. 25579/05, §214 and §245

[176] *A, B and C v. Ireland*, Grand Chamber judgment of 16 December 2010, no. 25579/05, §249; *R.R. v. Poland*, judgment of 26 May 2011, no. 27617/04 §187; *P. and S. v. Poland*, judgment of 30 October 2012, no. 57375/08, § 99; *Tysiąc v. Poland*, judgment of 20 March 2007, no. 5410/03, §§116 and 178

position in respect of her right to an abortion. Such procedures should ensure that decisions are timely, to limit or prevent damage to a woman's health which might be occasioned by a late abortion. Procedures in which decisions concerning the availability of lawful abortion are reviewed *post factum* cannot fulfil such a function. Further, such procedures should provide for a way to address and resolve any confusion resulting from divergent medical opinions and should guarantee to a pregnant woman at least the possibility to be heard in person and to have her views considered.[177]

The Court has recognised the "chilling effect" on both women and medical professionals of criminal provisions prohibiting abortion, which can deter medical professionals from authorising an abortion in the absence of transparent and clearly defined procedures to determine when an abortion is permitted.[178]

Article 8 also protects a woman's right to access information about her health. This includes access to prenatal diagnostic testing and information which is integral to forming a decision about whether to continue with a pregnancy, undertake available treatment, or prepare for the birth of a baby, including in cases where foetal anomaly is detected.[179]

A right to access information about abortion is also protected under Article 10. For example, an injunction limiting the freedom to receive and impart information with respect to travelling abroad to receive an abortion, where it was lawful to do so, was found to breach Article 10. The Court stressed that such services may be crucial to a woman's health and well-being.[180]

In this context, women of "child-bearing age" do not necessarily need to be pregnant before they can bring a complaint about access to information about abortion. The fact that they could become pregnant, and thus run the risk of being prejudiced by measures regulating abortion can suffice to give them "victim" status under Article 34 ECHR.[181]

[177] *Tysiąc v. Poland*, judgment of 20 March 2007, no. 5410/03, §§107, §118-124.

[178] *A, B and C v. Ireland*, Grand Chamber judgment of 16 December 2010, no. 25579/05, §254; *Tysiąc v. Poland*, judgment of 20 March 2007, no. 5410/03, §116.

[179] *R.R. v. Poland*, judgment of 26 May 2011, no. 27617/04.

[180] *Open Door and Well Woman v. Ireland*, judgment of 29 October 1992, no.14234/88.

[181] *Open Door and Well Woman v. Ireland*, judgment of 29 October 1992, no.14234/88, §44.

In addition, CEDAW provides that the criminalisation of abortion is a form of "gender-based violence that, depending on the circumstances, may amount to torture or cruel, inhuman or degrading treatment."[182]

The Court has acknowledged that denial of access to abortion can engage Article 3.[183] In this context, it is relevant to acknowledge that the absence of a purpose to humiliate or debase the victim does not inevitably lead to a finding that there has been no violation of Article 3. Acts and omissions by authorities in the field of health-care policy can also engage their responsibility under Article 3.[184] When determining if Article 3 is engaged in this context, it is relevant to consider the age and relative vulnerability of the woman or girl concerned.[185]

The Court has found a breach of Article 3 in the following circumstances:[186]

1. Where a pregnant woman was denied access to information about the health of her foetus because of the procrastination of health professionals. She endured weeks of uncertainty and acute anguish concerning the health of the foetus, her own and her family's future and the prospect of raising a child suffering from an incurable ailment. She then obtained the results of the tests regarding the health of her baby when it was already too late for her to make an informed decision on whether to continue the pregnancy or to have a legal abortion, as the time limit provided by domestic legislation had already expired.[187]

[182] CEDAW, General Comment No. 35 on Gender-Based Violence against Women, Updating General Recommendation No. 19 (2017), (UN Doc. CEDAW/C/GC/35), para. 18.

[183] *A, B and C v. Ireland*, Grand Chamber judgment of 16 December 2010, no. 25579/05, §160-164, although in this case the treatment in question was not found to breach Article 3.

[184] *R.R. v. Poland*¸ judgment of 26 May 2011, no. 27617/04, §§151-152.

[185] *P and S v. Poland*, judgment of 30 October 2012, no. 57375/08, §§161-162.

[186] At the time of writing, the case of *K.B. and others v. Poland*, no. 1819/21 has been communicated by the Court. On 22 October 2020, the Polish Constitutional Court delivered a judgment that the domestic provision legalising abortion in case of foetal abnormalities was incompatible with the Polish Constitution. The case concerns whether the applicants (women who are not currently pregnant but who are worried about the impact of the judgment if they did get pregnant) can claim to be victims of a violation of their rights under Article 8 and/or Article 3, whether there has been an interference with their Article 8 rights, whether there has been a breach of the State's positive obligations under Article 8 and whether any issue arises under Article 3.

[187] *R.R. v. Poland*¸ judgment of 26 May 2011, no. 27617/04.

2. Where a 14 year-old girl became pregnant after she was raped and where considerable pressure was put on her and her mother by doctors to keep the child, she was forced to talk to a priest, the hospital released information about her case to the press which led to her being sent intrusive and unwanted messages, they refused her request to arrange protection from anti-abortion activists, and overall the approach of the authorities was found to be marred by procrastination, confusion and lack of proper and objective counselling and information.[188]

Decisions whether or not to become a parent

Article 8 also applies to decisions regarding whether or not to become a parent. For example, an individual is permitted to withdraw consent to the use of embryos created jointly with another person, even where this could prevent the other person from ever having a child to whom they would be genetically related. However, the conditions surrounding consent to such a process must be clearly explained to anyone participating when they commence the process. For example, it should be made clear at the outset to both parties if it is the case that no use could be made of his or her genetic material without both parties' continuing consent. Further, regulations surrounding such procedures should be clear and take considered account of the social, ethical and legal implications of developments in the field of human fertilisation and embryology and must strike a considered balance between the competing interests at stake.[189]

The Court affords States a wide margin of appreciation in this context, acknowledging that the use of IVF treatment gives rise to sensitive moral and ethical issues against a background of fast-moving medical and scientific developments.[190]

Forced Sterilisation

The Court has heard a number of applications regarding forced sterilisation performed on women, and particularly on women of Roma origin (for a more thematic discussion of Roma women's rights, see section 8 of this Guide (Discrimination on grounds of sex – Romani Women). In *V.C. v Slovakia*, the Court confirmed that as it concerns one of the essential bodily functions of human

[188] *P and S v. Poland*, judgment of 30 October 2012, no. 57375/08.

[189] *Evans v. United Kingdom*, Grand Chamber judgment of 10 April 2007, no. 6339/05.

[190] *Evans v. United Kingdom*, Grand Chamber judgment of 10 April 2007, no. 6339/05, §81.

beings, sterilisation bears on manifold aspects of an individual's personal integrity, including his or her physical and mental wellbeing and emotional, spiritual and family life.[191] Accordingly, States have a positive obligation to implement effective legal safeguards to protect women from non-consensual sterilisation. Roma women in particular require protection against sterilisation because of a history of non-consensual sterilisation against this vulnerable ethnic minority.[192] This jurisprudence also applies to inadvertent sterilisation, when a doctor fails to perform adequate checks or obtain informed consent during an abortion procedure. Where a woman undergoes a medical procedure which could result in her not being able to have children, medical professionals should involve the woman in any choice about medical treatment administered and properly inform her of the risks involved in the medical procedure, to obtain her informed consent.[193]

[191] *V.C. v. Slovakia*, judgment of 8 November 2011, no. 18968/07, §106; see also *N.B. v. Slovakia*, judgment of 12 June 2012, no. 29518/10; *I.G. and others v. Slovakia*, judgment of 13 November 2012, no.15966/04; *R.K. v. Czech Republic*, decision of 27 November 2012, no. 7883/08; *G.H. v. Hungary*, decision of 9 June 2015, no. 54041/14.

[192] *V.C. v. Slovakia*, judgment of 8 November 2011, no. 18968/07, §154-155; *I.G. and others v. Slovakia*, judgment of 13 November 2012, no. 15966/04, §143-146.

[193] *Csoma v. Romania*, judgment of 15 January 2013, no. 8759/05, §65-68.

(5) Discrimination on grounds of sex in employment and public life

The realms of work and public life are a key environment where gender inequality and discrimination on grounds of sex arise. Despite this, the structure of the Convention is not immediately facilitative for dealing with discrimination at work. There is no express right to work and private employers are not directly bound by the Convention.[194] This marks a significant contrast to the CJEU's well-developed jurisprudence on discrimination pertaining to employment and access to goods and services, including by private firms (see section 1(e) of this Guide (EU Legislation) for an outline summary of relevant EU legal instruments).

The ESC also explicitly protects the right to equal pay and equal opportunities between men and women. Article 4§3 of the ESC provides that contracting parties must recognise the rights of men and women workers to equal pay for work of equal value. The ESC encourages the implementation of legislation to guarantee equal pay, as well as the collection of high-quality pay statistics broken down by gender to enable analysis of the causes of the gender pay gap and to facilitate the design of policies to address the gender pay gap.[195] Further, Article 8 ESC contains specific protections for employed women, such as the right to adequate maternity leave and protection against dismissal during maternity leave.

Under the ECHR, a number of the cases in this area arise under Article 8 and Article 1 of Protocol No.1 (the right to property), which is briefly summarised below.

a) Article 1, Protocol 1 of the Convention – the right to property

Article 1 of Protocol 1 to the Convention requires that "every natural or legal person is entitled to the peaceful enjoyment of his possessions".[196] There is no explicit general right to social security *per se* under the Convention: Article 1 of

[194] Sandra Fredman, "Emerging from the Shadows: Substantive Equality and Article 14 of the European Convention on Human Rights", Human Rights Law Review, Volume 16, Issue 2, June 2016, p. 290.

[195] See https://www.youtube.com/watch?v=xtJokvpwa6A&list=PLy62ZXxDue4-hbowjJO-SHmu_kV3V8LQo&index=4, "Equal pay and equal opportunities: a right under the European Social Charter", Council of Europe Directorate General Human Rights and Rule of Law YouTube channel, 12 May 2021.

[196] ECHR, Article 1 of Protocol No.1.

Protocol No. 1 imposes no restriction on States' freedom to decide whether or not to have in place any form of social-security scheme, or to choose the type or amount of benefits to provide under any such scheme.[197]

The definition of the term "possessions" in the provision encompasses both immovable and movable property and other proprietary interests. Examples of proprietary interests which have been deemed to constitute "possessions" and so fall within the ambit of Article 1 of Protocol No.1, include:

- Some forms of social security such as benefit payments and social insurance benefits.[198] Where an individual has an assertable right under domestic law to a welfare benefit, the importance of that interest means that Article 1 of Protocol No.1 should apply.[199]
- State pensions,[200] whether such schemes are contributory or not.[201]
- A woman's proprietary interest in inheriting from her deceased husband.[202]

The fact that such proprietary interests fall within the ambit of Article 1 of Protocol No.1 renders Article 14 applicable to the implementation and application

[197] *Sukhanov and Ilchenko v. Ukraine*, judgment of 26 June 2014, nos. 68385/10 and 71378/10, §36; *Kolesnyk v. Ukraine*, decision 3 June 2014, no. 57116/10, §89 and §91; *Fakas v. Ukraine*, decision 3 June 2014, no. 4519/11, §34, §37-43, §48; *Fedulov v. Russia*, judgment 8 October 2019, no. 53068/08, §66.

[198] *Stec and Others v. United Kingdom*, Grand Chamber judgment of 12 April 2006, no. 65731/01 and 65900/01, §47-56 (included as a summary in this publication).

[199] *Stec and Others v. United Kingdom*, Grand Chamber judgment of 12 April 2006, no. 65731/01, §51 (included as a summary in this publication); *Moskal v. Poland*, judgment of 15 September 2009, no. 10373/05, §39; *Andrejeva v. Latvia*, Grand Chamber judgment of 18 February 2009, no. 55707/00, §77.

[200] *Stec and Others v. United Kingdom*, Grand Chamber judgment of 12 April 2006, no. 65731/01 (included as a summary in this publication); *Luczak v. Poland*, judgment of 27 November 2007, no. 77782/01; *Andrejeva v. Latvia*, Grand Chamber judgment of 18 February 2009, no. 55707/00; *Koua Poirrez v. France*, judgment of 30 September 2003, no. 40892/98; *Gaygusuz v. Austria*, 16 September 1996, no. 17371/90; *Pichkur v. Ukraine*, judgment of 7 November 2013, no. 10441/06.

[201] *Bucheň v. Czech Republic*, judgment of 26 November 2002, no. 36541/97, §46; *Koua Poirrez v. France*, judgment of 30 September 2003, no. 40892/98, §37; *Wessels-Bergervoet v. the Netherlands*, decision of 4 June 2002, no. 34462/97; *Van den Bouwhuijsen and Schuring v. the Netherlands*, decision of 16 December 2003, no. 44658/98.

[202] *Molla Sali v. Greece*, Grand Chamber judgment of 19 December 2018, no. 20452/14.

of such schemes and the enforcement of such proprietary rights, meaning that rules regulating access to social security schemes, pensions and inheritance must not discriminate against women, under Article 14 read in conjunction with Article 1 of Protocol No.1.

b) Access to employment

Despite the limitations of the Convention's provisions on workplace discrimination, the Court has taken steps to bring it within the ambit of the ECHR. While no general rights to employment, right of access to public-sector employment, or right to choose a particular profession can be derived from Article 8, the notion of "private life" does not exclude in principle activities of a professional or business nature.[203] In particular, there are some typical aspects of private life which may be affected in employment disputes, such as dismissal, demotion, non-admission to a profession or other similarly unfavourable measures.[204]

The Court's definition of the parameters of 'private life' highlights the importance of work to a person's material well-being, self-esteem and relationships with others:

> *"the concept of "private life" extends to aspects relating to personal identity, and a person's sex is an inherent part of his or her identity. Thus, a measure as drastic as a dismissal from a post on the sole ground of sex has adverse effects on a person's identity, self-perception and self-respect and, as a result, his or her private life."*[205]

Because sex discrimination at work can fall within the ambit of Article 8, Article 14 also applies in this context.[206] The dismissal of a woman from her job on the grounds of her being a woman, violates Article 14 in conjunction with Article 8,

[203] *Bărbulescu v. Romania*, Grand Chamber judgment of 5 September 2017, no. 61496/08, §71; *Jankauskas v. Lithuania (No. 2)*, judgment of 27 June 2017, no. 50446/09, §56-57; *Fernandez Martinez v. Spain*, Grand Chamber judgment of 12 June 2014, no. 56030/07, §109-110.

[204] *Denisov v. Ukraine*, judgment of 25 September 2018, no. 76639/11.

[205] *Emel Boyraz v. Turkey*, judgment of 2 December 2014, no. 61960/08, §44; Sandra Fredman, "Emerging from the Shadows: Substantive Equality and Article 14 of the European Convention on Human Rights", Human Rights Law Review, Volume 16, Issue 2, June 2016, p. 290.

[206] *Emel Boyraz v. Turkey*, judgment of 2 December 2014, no. 61960/08; see also *Hülya Ebru Demirel v. Turkey*, judgment of 19 June 2018, no. 30733/08.

if the authorities cannot provide sufficient justification to explain the purported inability of a woman to perform the role as well as a man. In particular, if the woman in question has already demonstrated that she can adequately perform the role.[207]

Disputes concerning discrimination on grounds of sex in the context of employment can also fall into the ambit of Article 6 (the right to a fair trial) in conjunction with Article 14. For example, a failure by employment authorities to implement a ruling regarding a woman's working hours, or a failure to provide a woman with compensation where it has been found that she has faced discrimination in the workplace, could violate Article 6§1 in conjunction with Article 14.[208]

c) Bullying and harassment at work

Under Article 8, States have a duty to maintain and apply an adequate legal framework affording protection against harassment at work.[209] Complaints about bullying should be thoroughly examined on a case-by-case basis, in light of the particular circumstances of each case and taking into account the entire context. States should not impose overly prescriptive definitions of what constitutes harassment at work, for example there should be no requirement to provide proof of a minimum number or frequency of incidents.[210]

[207] In *Emel Boyraz v. Turkey*, the applicant was dismissed from her post as a security officer with an arm of the Turkish civil service on the grounds that the tasks of security officers involved risks and responsibilities that women were deemed unable to assume, such as working at night in rural areas and using firearms and physical force.

[208] *García Mateos v Spain*, judgment of 19 February 2013, no. 38285/09: in which a single mother with legal custody of her son, who was under six years old at the time, was refused permission by her employer to reduce the number of hours she worked at a supermarket. The Spanish Constitutional Court found in her favour, setting aside the employment tribunal's decision to reject her claim and remitting the case for reconsideration, which was again rejected by the employment tribunal. The applicant complained to the Court that the Spanish Constitutional Court had failed to repair the violation of the principle prohibiting gender-based discrimination which it had found in her case.

[209] *Špadijer v. Montenegro*, judgment of 9 November 2021, no. 31549/18 (included as a summary in this publication), §87

[210] *Špadijer v. Montenegro*, judgment of 9 November 2021, no. 31549/18 (included as a summary in this publication), §95, the Court held that there may be circumstances in which incidents are less frequent than once a week over a period of six months and still amount to bullying, or

A State's positive duty under Article 8 to effectively apply laws against serious harassment takes on a particular importance in circumstances where such harassment may have been triggered by "whistle-blowing" activities on the part of the victim of harassment, regarding the conduct of their employer or colleagues.[211] For example, where a woman reported her colleagues for indecent behaviour at work and was subsequently subjected to bullying at work, including threats and verbal and physical abuse. The Court found a violation of Article 8 as a result of the State's failure to implement the civil and criminal law mechanisms available in response to her complaints. In particular, there was a failure to assess all of the incidents she complained about and to take account of the overall context, including the potential whistle-blowing context, where it appeared she had been subjected to such incidents by her colleagues, in an attempt to punish and silence her.[212]

d) Benefits and pay

Regarding benefits and pay, States may need to introduce measures – for example relating to pregnancy and / or maternity *specifically* to protect women's status and to uphold the principle of equal treatment between men and women.

The Court is of the view that introducing maternity protection measures is essential in order to uphold the principle of equal treatment of men and women in employment.[213] A refusal to employ or recognise an employment-related benefit to a pregnant woman based on her pregnancy amounts to direct discrimination on grounds of sex, which cannot be justified by the financial interests of the State. For example, the Court found a violation of Article 14 in conjunction with Article 1 of Protocol No.1 (right to property) where a woman was refused the status of an insured employee and, in that context, an employment-related benefit (compensation of salary during sick leave), because her employment had been declared fictitious due to her pregnancy.[214]

circumstances in which such incidents are more frequent and yet do not amount to bullying.

[211] *Špadijer v. Montenegro*, judgment of 9 November 2021, no. 31549/18 (included as a summary in this publication), §90 and §97.

[212] *Špadijer v. Montenegro*, judgment of 9 November 2021, no. 31549/18 (included as a summary in this publication), §101.

[213] *Jurčić v. Croatia*, judgment of 4 February 2021, no. 54711/15 (included as a summary in this publication), §76.

[214] *Jurčić v. Croatia*, judgment of 4 February 2021, no. 54711/15 (included as a summary in this publication). In that case the applicant was refused the status of an insured employee and an

Only women can be treated differently on grounds of pregnancy, meaning such differences in treatment will amount to direct discrimination on the grounds of sex, if they cannot be justified. As a matter of principle, even where the availability of an employee is a precondition for the proper performance of an employment contract, the protection afforded to a woman during pregnancy cannot be made dependent on whether her presence at work during maternity is essential for the proper functioning of her employer, or by the fact that she is temporarily prevented from performing the work for which she is hired. The temporary negative impact on a company in this context is not sufficient justification for discrimination on the grounds of pregnancy.[215]

The Court has also expressed concerns about gender stereotyping and assumptions about women's roles in society influencing State authorities' decisions about women's eligibility for benefits or to seek employment. Decisions which imply that women should not work or seek employment during pregnancy, even if this is not stated explicitly, present a serious obstacle to the achievement of real substantive gender equality.[216]

In a number of cases concerning pensions entitlements and other related benefits, the Court has applied a similar logic: upholding differential treatment by the State in favour of women, in order to correct factual or historical inequalities which favour men.[217] These cases are addressed in section 5(g) (Affirmative action) and section 6 (Discrimination on grounds of sex – access to goods and services, public services, welfare/benefits) of this Guide.

e) Parental employment leave

Under Article 8, in conjunction with Article 14, domestic legislation which provides for parental leave for women must also provide for parental leave

employment-related benefit, on the basis that her employment had been declared fictitious due to her *in vitro* pregnancy, which occurred shortly before the start of her employment.

[215] *Jurčić v. Croatia*, judgment of 4 February 2021, no. 54711/15 (included as a summary in this publication), §76.

[216] *Jurčić v. Croatia*, judgment of 4 February 2021, no. 54711/15 (included as a summary in this publication), §83.

[217] For example, *Andrle v. Czech Republic*, judgment of 17 February 2011, no. 6268/08; *Lindsay v. United Kingdom*, decision of 11 November 1986, no. 11089/84; *Stec and Others v. United Kingdom*, Grand Chamber judgment of 12 April 2006, no. 65731/01 (included as a summary in this publication).

for men.[218] This issue is discussed in more detail in section 4 of this Guide (Discrimination on grounds of sex in relation to the right of respect for private and family life) as there is considerable overlap between the right to respect for family life and the right to respect for private life in this respect.[219]

f) Female participation in public life

There is a limited amount of Court jurisprudence concerning the role of women in public life. One recent case in this area concerns women's role in national politics.[220] While the Court ultimately found the application inadmissible, it affirmed in its decision that "*nowadays the advancement of the equality of the sexes in the member States of the Council of Europe prevents the State from lending its support to views of the man's role as primordial and the woman's as secondary.*"[221]

[218] *Weller v. Hungary*, judgment of 31 March 2019, no. 44399/05, §30-35; *Hulea v. Romania*, judgment of 2 October 2012, no. 33411/05. In the case of *Hulea v. Romania*, the domestic courts had refused to award compensation to a soldier for the violation of his right to parental leave. The Romanian Constitutional Court had found that the legislation in question, which provided for parental leave only for female military personnel, was discriminatory. However, the Romanian appeal courts dismissed the applicant's appeal and refused him compensation on the grounds that the statutory provision in question was not applicable. The Court found this decision to be discriminatory, violating the applicant's right not to be discriminated against in the exercise of his rights to family and private life.

[219] *Konstantin Markin v. Russia*, Grand Chamber judgment of 22 March 2012, no. 30078/06 (included as a summary in this publication).

[220] *Staatkundig Gereformeerde Partij v. the Netherlands*, decision of 10 July 2012, no. 58369/10. In that case, and after protracted domestic legal proceedings, the Dutch Supreme Court ruled that, under Article 7 CEDAW, the State is obliged to ensure that political parties allow women to exercise their right to stand for election. The applicant, a traditional political party, did not allow women to be candidates for election to representative bodies. Following the domestic proceedings, it applied to the Court complaining that its rights under Convention Articles 9 (right to freedom of religion), 10 (right to freedom of expression) and 11 (right to assembly) had been breached.

[221] *Staatkundig Gereformeerde Partij v. the Netherlands*, decision of 10 July 2012, no. 58369/10, §73. The decision is also notable because the Court took the unusual step of revisiting the foundations of its human rights protection regime, stressing (§70): "*the Convention was designed to promote and maintain the ideals and values of a democratic society. Democracy . . . is the only political model contemplated in the Convention and the only one compatible with it. By virtue of the wording of the second paragraph of Article 11, and likewise of Articles 8, 9 and 10 of the Convention , the only necessity capable of justifying an interference with any of the rights enshrined in those Articles is one that may claim to spring from a "democratic society.*"

This demonstrates the Court's firm position against discrimination based on gender stereotyping, although does not greatly further the Court's jurisprudence with respect to women's role in politics specifically.

The Court has found domestic rules relating to jury service to be discriminatory on grounds of sex, where they impose differential treatment on men and women. Where men were required, at risk of criminal prosecution, to undertake jury service, but women were hardly ever requested to do so, the Court found the approach to be discriminatory in violation of Article 14 read in conjunction with Article 4§3 (prohibition of forced labour).[222] In reaching its decision, the Court rejected the State's argument that an exemption from jury service might be granted to those taking care of their family and that more women than men could successfully rely on the relevant legal provision.[223] Even in regions where there is no mandatory jury service, such as various states in the Western Balkans, the case indicates that the Court may find a violation of Article 14 in conjunction with its prohibition on forced labour in Article 4§3 in relation to mandatory aspects of public service by citizens which are applied differently to men and women.

g) Affirmative action

As the above jurisprudence suggests, the Court can be proactive in its approach to achieving substantive equality, which can mean allowing domestic measures that favour women, in order to correct a factual or historical inequality. This is seen clearly in relation to 'affirmative action' measures, i.e. policies and practices within a government or organisation which seek to include and promote particular groups based on their gender, race, sexuality, creed or nationality in areas in which they are underrepresented such as education and employment. This would include gender-based quotas and measures relating to access to public services, where the Court permits justified differentiation in treatment on grounds of sex. See section 10 of this Guide (Affirmative action / justified differences in treatment on the basis of sex) for a study of the Court's jurisprudence on this issue.

[222] In *Zarb Adami v. Malta*, judgment of 20 June 2006, no. 17209/02, the Court held that there had been a violation of Article 14 in conjunction with Article 4§3 (d) in a case where the applicant had been fined for failing to serve as a juror in domestic criminal proceedings. The applicant complained that he had been the victim of discrimination on the ground of sex, as the percentage of women requested to undertake jury service in Malta was negligible, and that he had been obliged to face criminal proceedings in relation to the imposition of a discriminatory civic obligation.

[223] *Zarb Adami v. Malta*, judgment of 20 June 2006, no. 17209/02, §82.

(6) Discrimination on grounds of sex – access to goods and services, public services, welfare/benefits.

With regards to discrimination on grounds of sex in terms of access to public services such as welfare and benefits, the Court has historically granted States a fairly wide margin of appreciation. The Court has emphasised that, because of their direct knowledge of their society and its needs, States are in principle better placed than international judges to appreciate what is in the public interest on social or economic grounds. It has also recognised that it would generally respect domestic policy choices in this area unless they are manifestly without reasonable foundation.[224] Even so, the Court has engaged with the issue of gender-based discrimination in this context, particularly with regards to property rights and social security, welfare and benefits.

a) Social security, welfare and benefits

There is no explicit general right to social security under the Convention, but it is clear from the Court's jurisprudence that some forms of social security such as benefit payments and State pensions may fall within the ambit of Article 8 or Article 1 of Protocol No.1 (protection of property), in the case of the latter because they constitute "possessions" within the meaning of that provision.[225] See section 5(a) of this Guide (Article 1, Protocol 1 of the Convention – the right to property) for a more detailed discussion of this issue.

A number of cases in this area relate to discriminatory treatment between men and women in qualifying for social security provision. Generally, while respecting the margin of appreciation afforded to States in this area, the Court has been happy to adopt a proactive approach to rectifying historic or factual inequalities in order to achieve genuine equality between men and women. In one such case, which related to the pensionable age for men who raised children alone, the Court found that this difference in treatment between men and women was objectively and reasonably justified to compensate for the inequalities women

[224] *Luczak v. Poland*, judgment of 27 November 2007, no. 77782/01, §48.

[225] *Stec and Others v. United Kingdom*, Grand Chamber judgment of 12 April 2006, no. 65731/01 (included as a summary in this publication); *Luczak v. Poland*, judgment of 27 November 2007, no. 77782/01; *Andrejeva v. Latvia*, Grand Chamber judgment of 18 February 2009, no. 55707/00; *Koua Poirrez v. France*, judgment of 30 September 2003, no. 40892/98; *Gaygusuz v. Austria*, 16 September 1996, no. 17371/90; *Pichkur v. Ukraine*, judgment of 7 November 2013, no. 10441/06.

face (such as generally lower salaries and pensions) and the hardship generated by the expectation that they would work on a full-time basis and take care of the children and the household.[226]

Domestic legislation in this field must remain abreast of current living conditions and prevailing public perception in democratic states today. States cannot justify a difference in treatment between men and women with regards to social security by reference to traditions, general assumptions or prevailing social attitudes.[227] In a case concerning male widowers' access to public benefits, the Court deemed domestic legislation to be discriminatory, noting that while the legislation may have been justified by the role and status assigned to women in Swiss society at the time of its adoption in 1948, the Convention is a "living instrument". Accordingly, the Court held that the Government could no longer rely on the presumption that a husband provides for his wife financially (the "breadwinner" concept) to justify a difference in treatment that places widowers at a disadvantage compared with widows.[228]

[226] *Andrle v. Czech Republic*, judgment of 17 February 2011, no. 6268/08, which is explored in greater detail in section 10(c) of this Guide (Justified difference in treatment: Pension, Social Security & Taxation Schemes).

[227] *B. v. Switzerland*, judgment of 20 October 2020, no. 78630/12 (included as a summary in this publication).

[228] *B. v. Switzerland*, judgment of 20 October 2020, no. 78630/12 (included as a summary in this publication). The case was referred to the Grand Chamber in March 2021, a decision is currently pending. See also *Willis v. United Kingdom*, judgment of 11 June 2002, no. 36042/97. In that case, a male applicant was denied certain state entitlements granted to widows, such as a pension and allowance, following the death of his wife. The Court's conclusion was split, declaring a violation in respect of certain benefits but not others: where the sole reason given by the State for refusal of the benefits in question was that the applicant was male, and the applicant would have actually qualified for the benefits if he had been female, the Court was able to conclude that there had been a violation of Article 14 in conjunction with Article 1 of Protocol No. 1. A similar approach was adopted in several cases: *Runkee and White v. the United Kingdom*, judgment of 10 May 2007, nos. 42949/98 and 53134/99; *Cross v. the United Kingdom*, judgment of 9 October 2007, no. 62776/00; *Blackgrove v. the United Kingdom*, judgment of 28 April 2009, no. 2895/07. Finally, see also *Aldeguer Tomás v. Spain*, judgment of 14 June 2016, no. 35214/09, in which the applicant complained that he had been discriminated against on the grounds of his sexual orientation in that, as the survivor of a *de facto* same-sex union, he had been denied a survivor's pension following the death of his partner.

Non-discriminatory access to social security can also overlap with other Convention rights with a gender angle, such as protections against domestic violence. In a case where a woman was at risk of extreme domestic violence and was accordingly granted adaptations to her property (including the installation of a 'panic room' in the attic for herself and her son), which resulted in a change to her status under housing benefit rules, the Court noted that there was a conflict between the new housing benefit rules and the goal of the State's GBV-prevention scheme which was designed to allow victims of GBV to stay in their homes. [229] In such a situation, the State would be required to present "very weighty reasons" justifying prioritising the new housing benefit rules over the aim of the GBV-prevention scheme.

b) Disability benefits

Disability benefits must also be assessed in the light of the principles of gender equality. For example, the Court found a violation of Article 14 taken in conjunction with Article 8 where a woman's workplace disability benefit was stopped after giving birth, on the basis of the domestic authorities' view that she would not have worked full time after the birth of her children. While the aim of the relevant disability insurance – to cover individuals against the risk of becoming unable to undertake paid work owing to their disability – was legitimate, the treatment to which the applicant was subjected was not proportionate. The method by which the authorities calculated the extent of disability benefit applicable was "no longer consistent with efforts to achieve gender equality in contemporary society, in which women increasingly and legitimately seek to reconcile family life and career."[230]

c) Property-related rights

The case law of the Court concerning discrimination amounting to a violation of Article 14 taken together with Article 1 of Protocol No. 1 (protection of property) is diverse. As already stated, some forms of social security such as benefit payments and pensions may fall within the ambit of Article 1 of Protocol No. 1 because they

[229] *J.D and A. v. United Kingdom*, judgment of 24 October 2019, nos. 32949/17 and 34614/17. The applicant submitted that new rules on housing benefit in the social housing sector (informally known as "the bedroom tax") discriminated against her because of her particular situation as a victim of GBV. The Court found that there had been a violation of Article 14 in conjunction with Article 1 of Protocol No.1.

[230] *Di Trizio v. Switzerland*, judgment of 2 February 2016, no. 7186/09, §100.

constitute "possessions" within the meaning of that provision.

The right to receive a survivor's pension[231] and inheritance rights also fall within the scope of Article 1 of Protocol No. 1 and may interact with discrimination on the basis of sex, and other grounds.[232] For example, where a Greek Muslim woman was denied title to her deceased husband's property, because the Greek authorities applied Islamic inheritance law instead of Greek civil law to her case. The Court noted international concerns about the application of Sharia law to Greek Muslims in Western Thrace and the discrimination thus created, in particular against women and children, not only within that minority as compared with men, but also in relation to non-Muslim Greeks[233] and accepted that the applicant was placed in a different position as compared to that of a married female beneficiary of the will of a non-Muslim husband.

The Court assessed whether the differential treatment experienced by the applicant was discriminatory on the grounds of religion.[234] Without examining the legitimacy of the differential treatment on grounds of sex, the Court found that the described divergence in treatment on grounds of religion was not justified because it was not proportional to the aim pursued. Whilst the State purported to apply Sharia law with the aim of protecting a Muslim minority within Greece, the Court stressed that the State cannot take on the role of guarantor of a minority identity of a specific population group to the detriment of the right of that group's members to choose not to belong to it or not to follow its practices and rules. Members of a religious minority must have the right to voluntarily opt for and benefit from ordinary law, to deny them this opportunity would be to deny the right to free self-identification.[235]

[231] *Aldeguer Tomás v. Spain*, judgment of 14 June 2016, no. 35214/09.

[232] *Fabris v. France*, Grand Chamber judgment of 7 February 2013, no. 16574/08.

[233] *Molla Sali v. Greece*, Grand Chamber judgment of 19 December 2018, no. 20452/14, §154 (included as a summary in this publication).

[234] *Molla Sali v. Greece*, Grand Chamber judgment of 19 December 2018, no. 20452/14 (included as a summary in this publication). The applicant, a Muslim Greek national woman, was denied title to her deceased husband's property because the will, executed under Greek civil law, was declared invalid. This was because, pursuant to a series of binding international agreements and relevant domestic norms, the law applicable to the case was Islamic inheritance law instead of Greek civil law, under a principle of legal plurality applicable to Greek Muslims.

[235] *Molla Sali v. Greece*, Grand Chamber judgment of 19 December 2018, no. 20452/14, §157 (included as a summary in this publication). The Court added that denying members of a religious community the opportunity to exit the minority confines and resort to regular law,

(7) Discrimination on grounds of sex – freedom of expression, sexual harassment, hate crimes

Rights pertaining to freedom of expression often intersect with the right to freedom from discrimination on grounds of sex. Two themes in the Court's jurisprudence are discussed below: first, cases where an applicant sought to uphold their Article 9 (freedom of thought, conscience and religion) and Article 10 (freedom of expression) rights in the context of domestic legislation that was alleged to be discriminatory; second, cases where an applicant alleged that the domestic authorities had failed in their positive obligations (such as under Article 3) to protect persons such as women from hate speech, hate crimes, and sexism.

a) Women's religious head-coverings

Article 9 of the Convention protects the right to freedom of thought, conscience and religion, as well as rights to both change and to manifest such thought, conscience or religion. Under Article 9§2, the State is entitled to interfere with that freedom where this is "prescribed by law" and "necessary in a democratic society" in the interests of an exhaustive list of legitimate aims: public safety, the protection of public order, health and morals, or the protection of the rights and freedoms of others. If a limitation of this freedom is to be compatible with the Convention it must, in particular, pursue an aim that can be linked to one of those listed in this provision.[236]

The Court has typically afforded a wide margin of appreciation to States in respect of their domestic legislation on the wearing of head-coverings for religious reasons. Restrictions on the wearing of religious head coverings do constitute an interference with the right to freedom of religion under Article 9. For example, a ban on the wearing of a full-face veil in public places and a ban on Muslim women wearing a headscarf in educational institutions[237] have both been found

as Greek civil law did by forcing Greek Muslims to comply with Islamic rules, leads not only to discriminatory treatment but also to a violation of a right of chief importance: the right to self-identification. The Court highlighted that this right constitutes a cornerstone in international law on the protection of minorities.

[236] *Svyato-Mykhaylivska Parafiya v. Ukraine*, judgment of 14 June 2007, no. 77703/01, §132 and §137; *S.A.S. v. France*, Grand Chamber judgment of 1 July 2014, no. 43835/11, §113 (included as a summary in this publication).

[237] *Leyla Şahin v. Turkey*, Grand Chamber judgment of 10 November 2005, no. 44774/98, §78 (included as a summary in this publication).

to interfere with Article 9. However, in two key cases on this topic, the Court found that the interferences with the women's right to freedom of religion were justified.

In *Leyla Şahin v Turkey,* the Court considered that the restrictions on wearing a headscarf pursued the legitimate aims of protecting the rights and freedoms of others and of protecting public order, accordingly finding no violation of Article 9. As to whether the interference was necessary, the Court noted that it was based on the Turkish Republic's principles of secularism and equality. In reaching its decision, the Court also noted the emphasis placed in the Turkish constitutional system on the protection of the rights of women. Gender equality – recognised by the Court as one of the key principles underlying the Convention and a goal to be achieved by member States of the CoE – had also been found by the Turkish Constitutional Court to be a principle implicit in the values underlying the Turkish constitution when deciding on this issue.[238]

In *S.A.S. v France*, when considering the ban on the wearing of a full-face veil in public places, the Court acknowledged that a Muslim woman wishing to wear the full-face veil in public for religious reasons did have "victim" status for the purpose of bringing a claim under Article 9. A woman does not need to show that she is obliged by her faith to wear the full-face veil, the Court accepts that for certain Muslim women, wearing the full-face veil is a form of practical observance of their religion and can be seen as a "religious practice" within the meaning of Article 9 § 1.[239]

[238] *Leyla Şahin v. Turkey*, Grand Chamber judgment of 10 November 2005, no. 44774/98, §115 (quoting the Chamber's judgment, §107-109) (included as a summary in this publication). The Court referred back to its earlier reasoning in the decision of *Dahlab v. Switzerland*, decision of 15 February 2001, no. 42393/98, which concerned a primary school-teacher wearing a Muslim headscarf. In *Dahlab*, the Court had stressed how the headscarf represented a "powerful external symbol" that was irreconcilable with gender equality, since it appeared to be imposed on women by Islamic precepts. It also noted that wearing the Islamic headscarf could not easily be reconciled with the message of tolerance, respect for others and, above all, equality and non-discrimination that all teachers in a democratic society should convey to their pupils. It is also worth citing Judge Tulkens' dissenting opinion in *Leyla Şahin v. Turkey*, which noted that "Equality and non-discrimination are subjective rights which must remain under the control of those who are entitled to benefit from them" [§12].

[239] *S.A.S. v. France*, Grand Chamber judgment of 1 July 2014, no. 43835/11, §56 (included as a summary in this publication). In S.A.S., the applicant complained that French law prevented her from wearing the burqa or niqab, both full-face veils, in violation of her rights under Articles

The Court found that the interference was justified to protect the rights and freedoms of others. However, the Court did not accept that the ban was born out of a respect for gender equality, noting that a State cannot invoke gender equality to ban a practice that was in fact defended by Muslim women in the context of the rights enshrined in Articles 8 and 9. It also added that such a ban constituted a choice of society, over which there was no consensus in the Member States of the CoE; accordingly, France must have a wide margin of appreciation on the issue.

b) Hate crimes

Article 10 protects the right to freedom of expression, including the right to hold opinions and to receive and impart information and ideas without interference. The exercise of these freedoms is, however, deemed to carry with it duties and responsibilities. Interferences with the right may be permitted where there are prescribed by law and necessary in a democratic society to pursue one of the legitimate aims set out in Article 10 § 2. These aims include, interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary. For example, the protection of women from hate speech.

States' positive obligations to protect persons from hate speech, hate crimes, sexism and sexual harassment are particularly relevant in the context of protected grounds such as gender and sexual orientation.

The Court has found a violation of Article 14 in conjunction with Article 3, due to State authorities' failure to effectively prosecute a violent homophobic hate crime against a homosexual woman.[240] The Court accepted that the hate crime attained a level of severity to fall within the ambit of Article 3, and clarified that

8, 9, 10 and 14 of the Convention. With regards to Article 14, the applicant complained that the domestic ban led to discrimination on grounds of sex, religion, and ethnic origin, to the detriment of women who, like herself, wore the full-face veil.

[240] *Sabalić v. Croatia*, judgment of 14 January 2021, no. 50231/13 (included as a summary in this publication). Following a violent attack on the applicant, for which the assailant was handed a minor-offences conviction, the applicant complained to the Court that the lack of an appropriate response of the domestic authorities to the offence was motivated by discrimination on grounds of her sexual orientation. The authorities rejected the applicant's application to indict the defendant on criminal and hate crime charges.

the ill-treatment suffered need not involve actual bodily injury or intense physical or mental suffering. Even in the absence of these aspects, where treatment humiliates or debases an individual, showing a lack of respect for or diminishing his or her human dignity, or arouses feelings of fear, anguish or inferiority capable of breaking an individual's moral and physical resistance, it may be characterised as degrading and fall within the Article 3 prohibition.[241]

The case is illustrative of the positive obligation in relation to discriminatory hate crimes under Article 3. By failing to institute criminal proceedings and to address the hate crime element of the attack, the domestic authorities had failed to discharge adequately and effectively their procedural obligation under the Convention concerning a violent attack motivated by sexual orientation. Such conduct was contrary to the authorities duty to combat impunity for hate crimes which are particularly destructive of fundamental human rights.[242]

[241] *Sabalić v. Croatia*, judgment of 14 January 2021, no. 50231/13, §68 (included as a summary in this publication).

[242] *Sabalić v. Croatia*, judgment of 14 January 2021, no. 50231/13, §114 (included as a summary in this publication).

(8) Discrimination on grounds of sex – Romani women

The issues faced and the rights discussed in the context of discrimination against all women throughout this guide are of course all relevant to Romani women. The CoE has however recognised that Romani women across Europe face the additional burden of racism as well as gender discrimination, which pushes them to the margin of societies and exacerbates their experience of the issues faced by all women, discussed throughout this guide.[243] It is, therefore, necessary to consider their right to freedom from discrimination on the basis of ethnicity, as well as on the basis of sex, to take an intersectional approach to advancing substantive equality for Romani women.

The Court acknowledges that, as a result of their turbulent history and constant uprooting, Roma people have become a specific type of disadvantaged and vulnerable minority and, as such, require special protection against direct and indirect discrimination.[244] Adopting this approach, behaviour towards Roma persons has been found to be discriminatory in a variety of contexts. For example, the Court's case law on cases of forced sterilisation of Roma women is discussed above at section 4(g) of this Guide (Sexual and reproductive rights, including forced sterilisation).

In the context of the criminal justice system, the Court has found a breach of Article 6 in conjunction with Article 14 where a Romani woman was singled out for harsher treatment in criminal sentencing and where her sentence was likely to be deemed an exemplary sentence for the Roma community.[245] Such treatment undermines the enjoyment of fair trial guarantees, as well as the principle of equality of all citizens before the law.[246]

[243] See https://rm.coe.int/16806f32ff "Strategy on the Advancement of Romani Women and Girls (2014-2020), Council of Europe, 2016.

[244] *D.H. and Others v. the Czech Republic*, Grand Chamber judgment of 13 November 2007, no. 57325/00, §182.

[245] *Paraskeva Todorova v. Bulgaria*, judgment of 25 March 2010, no. 37193/07. In that case the applicant, a woman of Roma origin, was handed a custodial sentence for criminal fraud by the domestic courts, instead of a suspended sentence, on the basis of a supposedly widespread "feeling of impunity" in Bulgarian society, "especially among minority groups", that a suspended sentence was not considered to be of the same severity as a conviction (§10, quoting from the judgment of the Plovdiv District Court).

[246] *Paraskeva Todorova v. Bulgaria*, judgment of 25 March 2010, no. 37193/07, §45.

Discrimination, racism and gender inequalities have been found to impinge on Romani women's access to justice, making them reluctant to access complaint mechanisms and seek justice in courts in part due to lack of confidence in the justice system.[247] A lack of confidence in the Courts may mean Romani women do not seek to enforce their rights and take action against incidents of discrimination on the basis of sex. Safeguarding the right to a fair trial of Roma people, and ensuring they are free from discrimination when in contact with the criminal justice system is therefore particularly important in the context of protecting Roma women from discrimination.

Low educational achievement, irregular attendance at school and dropping out of school are common issues amongst Romani women.[248] The segregation of schooling for Roma children is a widespread practice in many European countries, which is often defended on the grounds that Roma children have special needs or are unfamiliar with the dominant language. This justification appears to accord with the legitimate aim in non-discrimination law of accommodating difference. In practice, however, Roma schooling is often vastly inferior: once the claim of special treatment is set against the need to redress disadvantage to Roma children, it is clear that such a policy is a cover for perpetuating disadvantage.[249]

The Court accepts there may be a need for specific measures to be taken to include Roma people in society, including via education, but this does not mean requiring them to assimilate: "*the vulnerable position of Roma/Gypsies means that special consideration should be given to their needs and their different lifestyle both in the relevant regulatory framework and in reaching decisions in particular cases.*"[250]

[247] See https://rm.coe.int/16806f32ff "Strategy on the Advancement of Romani Women and Girls (2014-2020)", Council of Europe, 2016.

[248] See https://rm.coe.int/16806f32ff "Strategy on the Advancement of Romani Women and Girls (2014-2020)", Council of Europe, 2016.

[249] Sandra Fredman, "Emerging from the Shadows: Substantive Equality and Article 14 of the European Convention on Human Rights", Human Rights Law Review, Volume 16, Issue 2, June 2016, p.288.

[250] *Oršuš and others v. Croatia*, Grand Chamber judgment of 16 March 2010, no. 15766/03, §148. Accordingly, the Court held that there had been a violation of Article 14 in conjunction with Article 2 of Protocol No.1 (right to education). See also *D.H. and Others v. the Czech Republic*, Grand Chamber judgment of 13 November 2007, no. 57325/00 and *Horváth and Kiss v. Hungary*, judgment 29 January 2013, no. 11146/11, in which the Court emphasised that the State had positive obligations to undo a history of racial segregation in special schools and avoid the perpetuation of this past discrimination. Structural deficiencies called for the implementation of positive measures in order, inter alia, to assist the applicants with any

The Court has also ruled on matters concerning Roma women's rights to social security such as a survivor's pension. In one such case, a Roma woman was refused a survivor's pension after the death of her husband on the basis that the Spanish authorities considered her marriage – conducted according to Roma tradition only – to have no effect under Spanish civil law.[251] The Court found that it was disproportionate for the Spanish State, which had provided the applicant and her family with health coverage and collected social security contributions from her husband for over 19 years, to refuse to recognise her Roma marriage when it came to granting her a survivor's pension on her husband's death. Decisive in the Court's judgment was the fact that the Roma marriage had been solemnized in good faith and ***de facto*** recognised by the authorities by providing health coverage and collecting social security contributions.[252]

Romani women may also experience higher levels of unemployment or poor employment opportunities.[253] Migration for begging and informal street work has become a common livelihood strategy in many Romanian Roma communities[254] and can provide an essential means of subsistence for Romani women. Where a Romanian Roma woman was ordered to pay a fine of 500 Swiss francs (approximately 464 euros) for begging in public in Geneva, and then detained in a remand prison for five days for failure to pay the fine, the Court found the prohibition on begging in public places constituted unacceptable interference with her private life as it had deprived her of her means of subsistence. The Court recognised that the applicant was illiterate, came from an extremely poor family, had no work and was not in receipt of social benefits. Begging therefore constituted a means of survival for her. Being in a clearly vulnerable situation, she had the right, inherent in human dignity, to be able to convey her plight and attempt to meet her basic needs by begging.[255]

Roma rights also intersect with other areas of civil law in the Court's

difficulties they encountered in following the school curriculum.

[251] *Muñoz Díaz v. Spain*, judgment of 8 December 2009, no. 49151/07.

[252] *Muñoz Díaz v. Spain*, judgment of 8 December 2009, no. 49151/07, §61. The Court acknowledged that "whilst the fact of belonging to a minority does not create an exemption from complying with marriage laws, it may have an effect on the manner in which those laws are applied."

[253] See https://rm.coe.int/16806f32ff "Strategy on the Advancement of Romani Women and Girls (2014-2020)", Council of Europe, 2016.

[254] Jon Horgen Friberg, "Poverty, networks, resistance: The economic sociology of Roma migration for begging", Migration Studies, Volume 8, Issue 2, June 2020, pp. 228–249.

[255] *Lăcătuş v. Switzerland*, judgment of 19 January 2021, no. 14065/15.

jurisprudence, including planning law. For example, the right to respect for home under Article 8 includes mobile homes such as caravans, even in a situation where they have been located illegally.[256]

[256] *Buckley v. United Kingdom*, judgment of 29 September 1996, no. 20348/92, §60, where the applicant, a Roma woman, was refused a planning permit which would have enabled her to live in a caravan on land she owned. She claimed that the national legislation on which the refusal had been based was discriminatory on the grounds of her Roma ethnic origin. However, the Court did not consider the national legislation to be discriminatory as it did not appear that the applicant was at any time penalised or subjected to any detrimental treatment for attempting to follow a traditional Gypsy lifestyle.

(9)Discrimination on grounds of sex – refugee/ migrant/asylum-seeker women

Generally, a wide margin of appreciation has been afforded to States in organising their immigration policy. However, the Court has found violations of Article 14 with regards to sex due to discriminatory treatment towards female migrants.

Differential treatment between immigrants on the grounds of sex cannot be justified on the basis of the comparative impact of men and women on the State's job market. For example, the Court has found immigration rules based on the notion that a man is more likely to be economically active and so which make it more difficult for a man to join his wife or fiancé in another country than it is for a woman to join her husband or fiancé in that country, to be discriminatory on the basis of sex in violation of Article 14 in conjunction with Article 8.[257] The protection of a country's labour market is a legitimate aim for a State to pursue in the design of its immigration system.[258] However, given that the advancement of the equality of the sexes is a major goal in the member States of the CoE, very weighty reasons need to be advanced before a difference in treatment on the ground of sex in the design or application of immigration rules can be regarded as compatible with the Convention.[259] The Court has stressed that, whilst a proportion of female migrants, in so far as they are "economically active", are engaged in part-time work, the impact on the domestic labour market of women immigrants as compared with men ought not to be underestimated.[260]

Issues regarding discrimination on grounds of sex under Article 14 (in conjunction with Article 1 of Protocol No.1) also arise in relation to the right of refugees and migrants to access benefits. Differentiation in treatment on the ground of sex in respect of a refugee's, or their children's rights to access social security such as housing benefit cannot be justified by notions of traditional family roles, such as the idea that displaced men are more likely to be breadwinners than displaced

[257] *Abdulaziz, Cabales and Balkandali v. United Kingdom*, judgment of 28 May 1985, no's 9214/80 and 9473/81 and 9474/81

[258] *Abdulaziz, Cabales and Balkandali v. United Kingdom*, judgment of 28 May 1985, no's 9214/80 and 9473/81 and 9474/81, §75.

[259] *Abdulaziz, Cabales and Balkandali v. United Kingdom*, judgment of 28 May 1985, no's 9214/80 and 9473/81 and 9474/81, §78.

[260] *Abdulaziz, Cabales and Balkandali v. United Kingdom*, judgment of 28 May 1985, no's 9214/80 and 9473/81 and 9474/81, §79.

women.[261] Even if those roles reflected the prevailing economic reality at the time they were introduced, this does not justify treating all displaced men as breadwinners and all displaced women as unable to fulfil that role.[262] Moreover, such a difference in treatment cannot be justified simply by the need to prioritise resources: budgetary constraints alone cannot justify a difference in treatment based solely on gender.

The rights of migrant women also intersect with all the other gender-based issues discussed throughout this Guide, such as the law pertaining to challenging paternity of children (see section 4(a) of this Guide (Parenting rights) for further detail on cases in this area). In this regard, differential treatment of legal aid applicants in relation to child custody proceedings on the grounds of an applicant's residency status can be discriminatory, if there is no compelling reason to justify the difference in treatment between individuals with a residence permit and those without. For example, where an applicant has already taken steps to regularise her situation, she cannot reasonably be expected to wait until she has renewed her residence permit and risk the lapse of the time-limit prescribed by domestic law for contesting paternity.[263]

There is also overlap in this context with the right to non-discrimination on grounds of sexual orientation. The notion of respect for "family life" under Article 8 extends beyond marriage-based relationships and includes stable *de facto* same-sex partnerships irrespective of whether the couple cohabit or not.[264] In light of this, a refusal to grant a family reunification permit to same sex partners where such a permit is available to unmarried heterosexual couples amounts to discrimination on the basis of sexual orientation under Article 14 in conjunction with Article 8.[265]

[261] *Vrountou v. Cyprus*, judgment of 13 October 2015, no. 33631/06. The case concerned a Cypriot national seeking housing benefit on the basis of her mother's status as a refugee. According to domestic law, children and non-displaced women could be registered on the cards of their displaced fathers and displaced husbands respectively. However, the children and husbands of displaced women were expressly excluded from being registered as displaced persons.

[262] *Vrountou v. Cyprus*, judgment of 13 October 2015, no. 33631/06, §79-80.

[263] *Anakomba Yula v. Belgium*, judgment of 10 March 2009, no. 45413/07. In this case the applicant was refused legal aid for the purpose of contesting the paternity of her child within a one-year time-limit because she had been unlawfully residing in Belgium.

[264] *Pajić v Croatia*, judgment of 23 February 2016, no. 68453/13, §63-64.

[265] It is worth noting that in the earlier case of *Jeunesse v. the Netherlands*, Grand Chamber judgment of 3 October 2014, no. 12738/10, §107, the Court had confirmed that Article 8 does

Human trafficking

Article 4 ECHR prohibits slavery and forced labour. Whilst trafficking in human beings (THB) is not expressly included under Article 4, the ECtHR has established that THB is also prohibited under Article 4.[266] States have, therefore, numerous positive procedural and substantive obligations under Articles 2, 3 and 4 to investigate, prosecute and safeguard individuals from THB and modern slavery. A full discussion of the obligations on States to combat THB is outside the scope of this Guide. However, some examples include:

- States must adopt and implement an appropriate and comprehensive legislative and administrative framework that prohibits and punishes forced or compulsory labour, servitude, slavery and THB.[267]
- National authorities must make immediate further inquiries into whether an individual has been trafficked when there is credible suspicion to think so.[268]
- Investigations into suspected THB must be effective and independent from those implicated in the events, capable of leading to the identification, conviction and punishment of responsible individuals, be prompt and reasonably expedient, seek to gather all relevant evidence and involve the victim or the next-of-kin in the procedure to the extent necessary to safeguard their legitimate interests.[269]
- National authorities must consider the possible impact of psychological trauma on the applicant's ability to coherently relate the circumstances of exploitation during investigations and legal proceedings.[270]

Such obligations apply to internal and cross-border trafficking. It is irrelevant if there is no international element. Article 2 of the Council of Europe Convention on Action against Trafficking in Human Beings (ECAT) encompasses "all forms of trafficking in human beings, whether national or transnational".[271]

not impose general family reunification obligations.

[266] *Rantsev v. Cyprus and Russia*, judgment of 7 January 2010, no. 25965/04.

[267] *Rantsev v. Cyprus and Russia*, judgment of 7 January 2010, no. 25965/04.

[268] *Rantsev v. Cyprus and Russia*, judgment of 7 January 2010, no. 25965/04.

[269] *S.M. v. Croatia*, Grand Chamber judgment of 25 June 2020, no. 60561/14 (included as a summary in this publication).

[270] *S.M. v. Croatia*, Grand Chamber judgment of 25 June 2020, no. 60561/14 (included as a summary in this publication).

[271] *S.M. v. Croatia*, Grand Chamber judgment of 25 June 2020, no. 60561/14 (included as a

Whilst it is clear that women, girls, men and boys can all be victims of THB, European and international instruments and organisations focused on preventing THB stress the importance of taking a gender sensitive approach to the prevention and protection from THB and modern slavery.[272] Often, women are not trafficked in the same way or for the same purpose as men, and their experience of trafficking can be very different. Arguably, the whole trafficking cycle is highly gendered, from the root causes that make women and girls more vulnerable, through to policy approaches and measures aimed at combating THB. For example, according to EU data, 60% of victims detected in the EU have been trafficked for sexual exploitation, and 92% of these victims are women and girls, whilst more than 70% of traffickers are men.[273]

The gender dimensions of THB are recognised in the relevant European and international instruments.[274] For example, ECAT provides that States must aim to promote gender equality and use gender mainstreaming in the development, implementation and assessment of the measures, policies and programmes referred to elsewhere within the Convention and introduce education programmes

summary in this publication).

[272] See for example the EU Commission Briefing on the Gender Dimension of Human Trafficking, February 2016: https://www.europarl.europa.eu/RegData/etudes/BRIE/2016/577950/EPRS_BRI(2016)577950_EN.pdf, the Council of Europe Gender Mainstreaming Kit on Gender Equality and Trafficking in Human Beings: https://rm.coe.int/gender-mainstreaming-toolkit-21-gender-equality-and-trafficking-in-hum/168092e9ed and the OSCE's Paper on Applying Gender-Sensitive Approaches in Combatting Trafficking in Human Beings: https://www.osce.org/files/f/documents/7/4/486700_1.pdf

[273] The EU Commission Briefing on the Gender Dimension of Human Trafficking, February 2016: https://www.europarl.europa.eu/RegData/etudes/BRIE/2016/577950/EPRS_BRI(2016)577950_EN.pdf, page 4

[274] For example, the UN Protocol to Prevent, Suppress and Punish Trafficking in Persons Especially Women and Children, supplementing the United Nations Convention against Transnational Organized Crime, adopted by General Assembly resolution 55/25 of 15 November 2000. Article 6(4) provides: Each State Party shall take into account, in applying the provisions of this article, the age, gender and special needs of victims of trafficking in persons. Article 10(2) provides: States Parties shall provide or strengthen training for law enforcement, immigration and other relevant officials in the prevention of trafficking in persons. The training should focus on methods used in preventing such trafficking, prosecuting the traffickers and protecting the rights of the victims, including protecting the victims from the traffickers. The training should also take into account the need to consider human rights and child- and gender-sensitive issues.

for boys and girls during their schooling, which stress the unacceptable nature of discrimination based on sex, and its disastrous consequences, the importance of gender equality and the dignity and integrity of every human being.[275] Likewise, the 2011 EU Directive on preventing and combating trafficking in human beings and protecting its victims[276] recognises the gender-specific phenomenon of trafficking and recommends that assistance and support measures should be gender-specific where appropriate.[277]

States must, therefore, take a gender sensitive approach to the fulfilment of their obligations under Articles 2, 3 and 4 ECHR with respect to the design and implementation of measures to combat, investigate and prosecute THB and to safeguard victims. The need for adequate gender-sensitive approaches throughout the criminal justice process including victim-centred and gender-sensitive training of law enforcement and judicial professionals, forms a crucial aspect of such an approach, as discussed in section (3) of this Guide (Gender stereotyping in legal judgments).[278]

[275] See in particular Articles 5(3), 6(d) and 17, ECAT.

[276] Whilst Directive 2011/36/EU only applies directly to EU countries, the Court does take account of its provisions within its jurisprudence.

[277] See in particular, Article 1 and § 3 and 25 of the preamble to Directive 2011/36/EU.

[278] The OSCE's Paper on Applying Gender-Sensitive Approaches in Combatting Trafficking in Human Beings contains numerous recommendations on implementing a gender-sensitive approach to combatting trafficking: https://www.osce.org/files/f/documents/7/4/486700_1.pdf.

(10) Affirmative action / justified differences in treatment on the basis of sex

Measures involving a difference in treatment between men and women may be justified in order to compensate for pre-existing inequalities. Article 14 does not prohibit a Member State from treating groups differently in order to correct 'factual inequalities' between them.[279] As such, affirmative or positive measures promoting full and effective equality may be compatible with Article 14 if these are objectively and reasonably justified.

This approach is confirmed by the Preamble to Protocol No. 12, which affirms:

> "*the principle of non-discrimination does not prevent State Parties from taking measures in order to promote full and effective equality, provided that there is an objective and reasonable justification for those measures.*"

Such measures are regarded as being short-term, and once the factual inequality is diminished, the justification for the measure is deemed to disappear.[280] Additionally, there may be other reasons why a difference in treatment on the basis of sex is justified, which are unrelated to correcting inequality or promoting equality. For example, where deemed necessary to protect the rights of others.

Summarised below are examples of where the Court has found a difference in treatment on grounds of sex to be justified.

[279] *Stec and Others v. United Kingdom*, Grand Chamber judgment of 12 April 2006, no. 65731/01 (included as a summary in this publication); *Belgian Linguistic Case (No. 2)*, judgment of 23 July 1968, no. 2126/64, §10.

[280] *Belgian Linguistic Case (No. 2)*, judgment of 23 July 1968, no. 2126/64. It is also worth flagging that CEDAW, Article 4§1 adopts a similar approach to affirmative action: "*Adoption by States Parties of temporary special measures aimed at accelerating de facto equality between men and women shall not be considered discrimination as defined in the present Convention, but shall in no way entail as a consequence the maintenance of unequal or separate standards; these measures shall be discontinued when the objectives of equality of opportunity and treatment have been achieved.*"

a) Justified difference in treatment: Pregnancy

Termination of employment, primarily because a woman is pregnant amounts to a difference in treatment on the grounds of sex as only women can fall pregnant. However, in certain circumstances, such a difference in treatment could be justified if the termination of employment is necessary to avoid jeopardising the functional capacity of the employer. [281]

Whether or not termination of employment is justified will depend, however, on the nature of the work carried out and the exact impact of continued employment. For example, the early termination of a woman's diplomatic posting abroad due to her pregnancy has been found to be necessary to ensure that her absence due to pregnancy did not jeopardise the functional capacity of the embassy's consular section, and ultimately to secure the legitimate aim of the protection of the rights of others, notably Romanian nationals in need of consular assistance in Slovenia.[282] However, in this case, it was her particular posting which came to an end, rather than her employment as a whole.

It will also be relevant to consider the impact of the termination of employment on the woman, including whether or not she suffers any significant long-term setbacks in her career.[283] For example, whether the termination relates to a specific aspect of a woman's employment but she is able to return to work after giving birth and whether she continues to obtain promotions while absent during her pregnancy and soon after her return to work.

b) Justified difference in treatment: Prison Sentencing & Leave

Differential treatment between men and women may be justified by the need to protect women from gender-based violence, abuse and sexual harassment in the prison environment, as well as the need for the protection of pregnancy and motherhood.

The Court generally grants national authorities a wide margin of appreciation

[281] *Napotnik v. Romania*, judgment of 20 October 2020, no. 33139/13, §77.

[282] *Napotnik v. Romania*, judgment of 20 October 2020, no. 33139/13.

[283] *Napotnik v. Romania*, judgment of 20 October 2020, no. 33139/13: it was relevant to the Court's finding that there was no breach of Protocol No. 12 that the applicant continued to obtain promotions while she was absent during her first pregnancy and again about a year after her return to work.

in matters of penal policy, noting that it is not the Court's place to determine the appropriate punishment for a given crime.[284] The Court also, therefore, affords a wide margin of appreciation to States to assess whether differential treatment is justified in this context.[285]

A difference in treatment has been found to be justified in the following circumstances:

- The exemption of female offenders from life imprisonment to protect women from gender-based violence, abuse and sexual harassment in the prison environment, and on the basis of "*the needs for protection of pregnancy and motherhood*".[286]
- The implementation of a special measure granting female inmates a stay of execution of their prison sentence until their child's first birthday if they were pregnant or had a child under the age of one, to protect the best interests of the child, taking account of the particular situation of a pregnant woman and the special bond between the mother and child during the first year following birth.[287]

In respect of the exemption from life imprisonment, the Court took into consideration statistical data indicating the relatively small proportion of female inmates, of which very few were serving life sentences, which showed a clear public interest underlying the policy of exemption. As such, the Court held that there was a reasonable relationship of proportionality between the means employed and the legitimate aim of promoting the "principles of justice and humanity", such that there had been no violation of Article 14.

[284] *Khamtokhu and Aksenchik v. Russia*, Grand Chamber judgment of 24 January 2017, nos. 60367/08 and 961/11, §78 (included as a summary in this publication); *Alexandru Enache v Romania*, judgment of 3 October 2017, no. 16986/12, §72.

[285] *Clift v. United Kingdom*, judgment of 13 July 2010, no. 7205/07, §73; *Costel Gaciu v. Romania*, judgment of 23 June 2015, no. 39633/10, §56; *Khamtokhu and Aksenchik v. Russia*, Grand Chamber judgment of 24 January 2017, nos. 60367/08 and 961/11, §85 (included as a summary in this publication).

[286] *Khamtokhu and Aksenchik v. Russia*, Grand Chamber judgment of 24 January 2017, nos. 60367/08 and 961/11, §82 (included as a summary in this publication).

[287] *Alexandru Enache v Romania*, judgment of 3 October 2017, no. 16986/12, §76.

c) Justified difference in treatment: Pension, Social Security & Taxation Schemes

A difference in treatment between men and women in respect of the operation of pension, social security and taxation schemes, could be justified in order to correct factual inequalities. These topics are discussed above at section 6(a) of this Guide (Social security, welfare and benefits), but are revisited here in the context of situations where a difference in treatment is justified.

As with penal policy, national authorities are granted a wide margin of appreciation in the field of economic or social strategy,[288] on account of them being best placed to determine complex issues that depend on manifold domestic variables and direct knowledge of the society concerned.[289] In the context of a "transitional measure forming part of a scheme carried out in order to correct an inequality", the normally strict test for sex discrimination gives way to the 'manifestly without reasonable foundation' test, meaning the Court respects the national authority's choice unless it is manifestly without reasonable foundation.[290]

In respect of pension, social security and taxation schemes, the Court has emphasised the ever-evolving nature of women's working and home lives, making it impossible to pinpoint a precise date at which measures correcting factual inequalities are no longer needed. As such, the Court is hesitant to criticise national authorities for not having abolished measures correcting factual inequalities earlier.[291]

For example, a difference in treatment has been found to be justified, meaning there was no breach of Article 14, in the following circumstances:

» The payment of social-welfare benefits until a person reached pensionable age, where the pensionable age of men and women was different, to

[288] *Stec and Others v. United Kingdom*, Grand Chamber judgment of 12 April 2006, no. 65731/01 (included as a summary in this publication).

[289] *Andrle v. Czech Republic*, judgment of 17 February 2011, no. 6268/08.

[290] *J.D and A. v. United Kingdom*, judgment of 24 October 2019, nos. 32949/17 and 34614/17, §88; *Runkee and White v. the United Kingdom*, judgment of 10 May 2007, nos. 42949/98 and 53134/99.

[291] *Runkee and White v. the United Kingdom*, judgment of 10 May 2007, nos. 42949/98 and 53134/99.

correct the disadvantaged economic position of women arising out of their traditional domestic role.[292]

- The lowering of the pensionable age for women who had children to compensate women for inequalities (including lower salaries and pensions) and the hardship generated by expectations that women would work full-time whilst also taking care of children and the household.[293]
- Preferential treatment in relation to pension benefits for older widows to recognise the fact that older widows, as a group, faced financial hardship and inequality on account of the married woman's traditional role of caring for husband and family in the home rather than earning money in the workplace.[294]
- Favourable tax policies for families where the mother was the main earner, to encourage married women back to work after having children.[295]

d) Justified difference in treatment: ethnic minorities

Regarding ethnic minority groups, such as Roma people (see also section 8 of this Guide (Discrimination on grounds of sex – Romani women)) the Court has stated that "there could be said to be an emerging international consensus amongst the Contracting States of the Council of Europe recognising the special needs of minorities and an obligation to protect their security, identity and lifestyle, not only for the purpose of safeguarding the interests of the minorities themselves but to preserve a cultural diversity of value to the whole community."[296]

e) Justified difference in treatment: people with disabilities

Women with disabilities constitute another group who are particularly vulnerable to discrimination on the basis of their multiple intersecting identities. For example, women with disabilities are at higher risk of being exposed to violence, lack services tailored to the needs of victims of violence with disabilities,

[292] *Stec and Others v. United Kingdom*, Grand Chamber judgment of 12 April 2006, no. 65731/01 (included as a summary in this publication).

[293] *Andrle v. Czech Republic*, judgment of 17 February 2011, no. 6268/08; see also *Runkee and White v. the United Kingdom*, judgment of 10 May 2007, nos. 42949/98 and 53134/99.

[294] *Runkee and White v. the United Kingdom*, judgment of 10 May 2007, nos. 42949/98 and 53134/99.

[295] *Lindsay v. United Kingdom*, decision of 11 November 1986, no. 11089/84.

[296] *D.H. and Others v. the Czech Republic*, Grand Chamber judgment of 13 November 2007, no. 57325/00, §181.

face additional barriers to accessing protection and support services, and face a higher risk of being exposed to forced abortion and forced sterilisation.[297] When implementing positive measures to advance the equality of women it is, therefore, also important to note the obligations under the ECHR to take positive or affirmative action in the context of discrimination on the grounds of disability. For example, a failure to take positive steps to ensure that students with disabilities can enjoy education through reasonable accommodation measures (for example a failure to adapt teaching methods to make them accessible to blind students) constitutes discrimination on the grounds of disability.[298] When implementing the positive obligations described throughout this guide, for example in the sections on domestic violence and reproductive rights, any positive obligations should be implemented in a way that takes account of the specific needs of women with disabilities. For example, informative materials on support services should be accessible to deaf and blind women, and access to support services should be made accessible.

f) Justified difference in treatment: women as a vulnerable group

The Court has not acknowledged women in the CoE as a vulnerable group in any general terms in the same way as, for example, Roma people. Instead, the Court tends to focus on particular situations that give rise to vulnerability, including women who are victims of domestic violence or pregnant women.

For example, as discussed in section 2 of this Guide (Domestic violence, femicide and gender-based violence), there are a number of positive obligations on States to protect against and investigate gender based violence.[299] The Court has also held that "introducing maternity protection measures is essential in order to uphold the principle of equal treatment of men and women in employment".[300] On the other hand, in certain circumstances, the Court has noted that positive developments in respect of women's working and home lives, obviate the need for positive or affirmative action.

[297] https://eca.unwomen.org/en/news/stories/2020/12/women-with-disabilities-at-higher-risk-of-violence-in-private-and-public-realms, "Women with disabilities at higher risk of violence in private and public realms", UN Women, 7 December 2020.

[298] *Çam v. Turkey*, judgment of 23 February 2016, no. 51500/08.

[299] *Kalucza v. Hungary*, judgment of 24 April 2012, no 57693/10, §53; *Opuz v. Turkey*, judgment of 9 June 2009, no. 33401/02, §139 (included as a summary in this publication).

[300] *Jurčić v. Croatia*, judgment of 4 February 2021, no. 54711/15, §76 (included as a summary in this publication).

(11) The impact of Covid-19 on women's rights – impact on domestic violence, gender roles

The impact of the Covid-19 pandemic has deepened already profound gender gaps grounded in patriarchal structures and cultures in the Western Balkans and across Europe. Incidents of domestic violence increased, whilst support systems available to victims of domestic violence decreased. Lockdowns resulted in a higher rate of unemployment amongst women than men, women more often had to go on leave or had reduced wages, social protection measures adopted in response to the pandemic were less accessible to women and women carried out more unpaid care work and domestic work.

It is also worth adding that women constitute the majority of frontline workers in the health sector, which has left them at a higher risk of exposure to Covid-19.[301]

Throughout the pandemic and in its aftermath, the rights and obligations described throughout the rest of this guide continue to apply. However, the pandemic has brought about new situations in which the rights of women must be protected, new contexts in which different Convention rights must be balanced against each other, and new factors to weigh in any proportionality assessments concerning the protection of rights which are not 'absolute'.

a) Gender-Based Violence & Domestic Violence

The Covid-19 pandemic and, in particular, the lockdowns that have ensued have been a catalyst for an increase in incidents of gender-based violence and domestic violence, on account of factors including increased stress related to health risks, cramped and difficult living conditions, economic losses and breakdowns in community support mechanisms.[302]

[301] In Bosnia and Herzegovina, women account for 67% of jobs in the health and care sector, in North Macedonia, this figure is 77%, in Montenegro it is 81%, in Serbia it is 76%: See https://www.ilo.org/wcmsp5/groups/public/---europe/---ro-geneva/---sro-budapest/documents/publication/wcms_774439.pdf, "Covid-19 and the World of Work: Assessment of the Employment Impacts and Policy Responses in Bosnia and Herzegovina", International Labour Organisation, 2021.

[302] According to the Human Rights and Gender Equality Network of Committees in the Western Balkans, during the pandemic, there was a 40% increase in the number of calls for help from victims of gender-based and domestic violence: See https://www.worldbank.org/en/news/

There has been an increase in incidents of psychological abuse, characterised by arguments and conflicts primarily between parents, but also between parents and children, especially adolescents.[303] The nature of abuse inflicted has also changed, with an increase of complaints of online abuse.[304]

The Covid-19 pandemic has also further limited the ability of women to escape abuse. This is in part due to fear of the disease or of spreading it to others, the closure or reduction in services for the prevention and protection of women, a lack of information on new types of services, restrictions on movement and a lack of access to new online services.[305] Some safehouses were closed, some did not have adequate space due to the isolation and distancing measures imposed on residents, and many lacked the requisite protective equipment and disinfectants.[306]

opinion/2021/03/05/gender-inequality-the-pandemic-has-hit-women-at-more-levels-than-men "Pandemija produbljuje nejednakosti, teret krize posebno osjećaju žene", Vijesti Online, 2 March 2021. Similarly, the Parliamentary Committee for Gender Equality in Croatia reported a 31% increase in domestic violence during 2020: See https://www.worldbank.org/hr/news/opinion/2021/03/05/gender-inequality-the-pandemic-has-hit-women-at-more-levels-than-men "Gender (In)Equality: The Pandemic has Impacted Women in Croatia on More Levels than Men" by Valerie Morrica and Nga Thi Viet Nyuyen, The World Bank, 5 March 2021; and in Bosnia and Herzegovina, the Association of Social Workers has stated that there was increase in the number of cases of gender-based violence and domestic violence: See https://www.osce.org/files/f/documents/7/a/470658.pdf, "Odgovor Na Krizu Uzrokovanu Pandemijom Covid-19: Analiza Iz Perspektive Ljudskih Prava I Rodne Ravnopravnosti", Organisation for Security and Co-operation in Europe: Mission to Bosnia and Herzegovina, 17 November 2020.

[303] See https://www.vijesti.me/vijesti/drustvo/517081/pandemija-produbljuje-nejednakosti-teret-krize-posebno-osjecaju-zene "Pandemija produbljuje nejednakosti, teret krize posebno osjećaju žene", Vijesti Online, 2 March 2021.

[304] See https://www.endviolenceagainstwomen.org.uk/online-abuse-during-covid-almost-half-of-women-have-experienced-online-abuse-during-pandemic/ "Online abuse during Covid: Almost half of women have experienced abuse online during pandemic", End Violence Against Women, 8 September 2020.

[305] See https://eca.unwomen.org/en/news/in-focus/in-focus-gender-equality-in-covid-19-response; "In Focus Gender equality matters in COVID-19 responses", UN Women News, 23 March 2020; See also https://www.osce.org/files/f/documents/7/a/470658.pdf, "Odgovor Na Krizu Uzrokovanu Pandemijom Covid-19: Analiza Iz Perspektive Ljudskih Prava I Rodne Ravnopravnosti", Organisation for Security and Co-operation in Europe: Mission to Bosnia and Herzegovina, 17 November 2020.

[306] See https://bit.ly/34WaFHi "Impact of COVID-19 Pandemic on Functioning of Safe Houses in Bosnia and Herzegovina", UN Women, March 2020.

Women with disabilities were more exposed to gender-based violence, as they were more often locked in with an abuser on whom they depended in some way.[307] Women living in rural areas, as well as Roma women, face obstacles that prevent them from reporting violence personally or finding information or reaching support services through online channels, including not possessing a mobile phone, computer or internet and living in isolated, deprived communities.[308] Refugee women need complex forms of support, including interpreters, lawyers and social workers, but organisations providing support within refugee camps were forbidden to enter and found that online communication was not effective.[309]

All of the above difficulties facing women without access to the internet, or who live in isolated locations, have been exacerbated by restrictions on movement, including cancellation of public transport.[310]

Any measures taken to protect life and health by preventing the spread of Covid-19 must also take account of the State's obligations to protect life and prevent inhuman and degrading treatment at the hands of an abuser. The obligations under Article 2 and 3 described in section 2 (Domestic violence, femicide and gender-based violence) of this Guide are absolute. States cannot derogate from such obligations, even during times of emergency.

In light of these positive obligations to prevent, prohibit, investigate and prosecute incidents of domestic violence, States should ensure that authorities, including the police and courts, continue to define and treat incidents of domestic abuse as urgent cases which should be prioritised and towards which resources should be diverted even amidst the pandemic.

States should also seek to adopt measures to ensure that shelters and support services can continue to run to the maximum extent possible without

[307] See https://www.osce.org/files/f/documents/7/a/470658.pdf, "Odgovor Na Krizu Uzrokovanu Pandemijom Covid-19: Analiza Iz Perspektive Ljudskih Prava I Rodne Ravnopravnosti", Organisation for Security and Co-operation in Europe: Mission to Bosnia and Herzegovina, 17 November 2020.

[308] See https://eca.unwomen.org/en/news/in-focus/in-focus-gender-equality-in-covid-19-response; "In Focus Gender equality matters in COVID-19 responses", UN Women News, 23 March 2020.

[309] See https://eca.unwomen.org/en/news/in-focus/in-focus-gender-equality-in-covid-19-response; "In Focus Gender equality matters in COVID-19 responses", UN Women News, 23 March 2020.

[310] See https://eca.unwomen.org/en/news/in-focus/in-focus-gender-equality-in-covid-19-response; "In Focus" Gender equality matters in COVID-19 responses", UN Women News, 23 March 2020.

compromising the health and safety requirements of the pandemic.[311] Any restrictions on movement and any closure of support services must be necessary and proportionate to achieve the aim of protecting health and preventing the spread of Covid-19. Given the discriminatory impact on women and children and the harm it can cause to their mental and physical health, a complete closure of safe houses and refuge spaces is unlikely to be a proportionate means of pursuing the aim of protecting health. Further, any blanket restrictions on movement, or measures prohibiting staying at a second address, which do not allow for exceptions for those seeking to flee from domestic abuse, are unlikely to be necessary or proportionate restrictions on movement.

When implementing blanket policies such as "stay at home, stay safe", States must take account of how such policies can impact the rights of different groups differently, and potentially have a discriminatory effect on vulnerable groups, such as victims of domestic abuse, for whom home may not be a safe place.[312] They must be "particularly attentive" to the impact of their choices on the most vulnerable[313] and make reasonable adjustments to general policies to address any discriminatory impact identified. In reality, governmental responses have been criticised for failing to take account of differing needs, and in some cases failing to even consider or consult with relevant stakeholders as to how adjustments could be made to protect women.[314]

[311] See https://eca.unwomen.org/en/news/stories/2020/4/albania-adopts-new-protocol-to-ensure-undisrupted-shelterservices "Albania adopts new protocol to ensure undisrupted shelter services", UN Women News, 21 April 2020.

[312] See https://www.osce.org/files/f/documents/7/a/470658.pdf, "Odgovor Na Krizu Uzrokovanu Pandemijom Covid-19: Analiza Iz Perspektive Ljudskih Prava I Rodne Ravnopravnosti", Organisation for Security and Co-operation in Europe: Mission to Bosnia and Herzegovina, 17 November 2020.

[313] *Enver Şahin v. Turkey*, judgment of 30 January 2018, no. 23065/12, §68.

[314] For example, two representatives of safe houses (one from the Federation of Bosnia and Herzegovina and the other from Republika Srpska) confirmed that no one had consulted them prior to the introduction of lockdown measures: See https://www.osce.org/files/f/documents/7/a/470658.pdf, "Odgovor Na Krizu Uzrokovanu Pandemijom Covid-19: Analiza Iz Perspektive Ljudskih Prava I Rodne Ravnopravnosti", Organisation for Security and Co-operation in Europe: Mission to Bosnia and Herzegovina, 17 November 2020.

b) Unemployment

Measures implemented to prevent the spread of the Covid-19 pandemic, such as lockdowns, have resulted in a significant increase in unemployment, which has impacted women more severely than men.[315] Women were more likely to lose their job and income, and less likely to receive the associated social security benefits, including those specifically linked to the Covid-19 pandemic.[316] Aside from unemployment, women more often had to go on leave or had reduced wages on account of the Covid-19 pandemic.[317]

A primary factor that has resulted in women constituting the majority of those unemployed (or underemployed) following the Covid-19 pandemic is that women are often overrepresented in sectors that were highly impacted by the pandemic, including service industries such as restaurants, hotels, personal care services and leisure services, as well as in informal work. Accordingly, women were more likely to be harmed economically by lockdown and quarantine measures, social distancing and economic slowdown.[318] Moreover, women who informally provide services to households, such as cleaning/household maintenance, childcare and

[315] In Serbia, in 2020, 7% of women and 4% of men were unemployed: See https://www.danas.rs/ekonomija/pandemijska-kriza-najvise-pogodila-zene/; "Pandemijska kriza najviše pogodila žene", by M. N. Stevanović, Danas Online, 6 April 2021. In Montenegro, from the end of February to the end of June 2020, the number of unemployed women rose by 3,560, which constitutes 56% of the number of unemployed individuals in that period. This trend has continued; in March 2021, women constituted 58.5% of the unemployed population: see https://gradski.me/tokom-pandemije-znacajno-se-povecao-broj-nezaposlenih-zena/ "Tokom pandemije značajno se povećao broj nezaposlenih žena", Gradski Portal, 13 May 2021.

[316] See https://www.worldbank.org/hr/news/opinion/2021/03/05/gender-inequality-the-pandemic-has-hit-women-at-more-levels-than-men "Gender (In)Equality: The Pandemic has Impacted Women in Croatia on More Levels than Men" by Valerie Morrica and Nga Thi Viet Nyuyen, The World Bank, 5 March 2021.

[317] See https://www.danas.rs/ekonomija/pandemijska-kriza-najvise-pogodila-zene/ "Pandemijska kriza najviše pogodila žene", by M. N. Stevanović, Danas Online, 6 April 2021.

[318] COVID-19 and the Impact on Human Rights – AIRE Centre; in Croatia, 52% of women as opposed to 18% of men work in the service sector, including in the health, education, tourism and restaurant/catering sectors, which have been most prone to being closed. See https://www.worldbank.org/en/news/opinion/2021/03/05/gender-inequality-the-pandemic-has-hit-women-at-more-levels-than-men "Gender (In)Equality: The Pandemic has Impacted Women in Croatia on More Levels than Men" by Valerie Morrica and Nga Thi Viet Nyuyen, The World Bank, 5 March 2021.

care for the elderly have in many cases been left without work or income.[319] Many women also reduced their working hours, or had to stop working entirely to care for their children and provide home-schooling whilst schools were closed.

A further factor that has contributed to women constituting the majority of those left unemployed following the Covid-19 pandemic lies in the fact that employers prefer male employees, as there is a greater chance that a woman of 30 years old will go on leave to raise a child.[320]

As explained above in section 5(b) of this Guide (Access to employment), the dismissal of women from work without sufficient justification as to why a woman, instead of a man, has been dismissed can amount to a violation of Article 14 in conjunction with Article 8.[321] Further, terminating employment primarily because a woman is pregnant amounts to a difference in treatment on the grounds of sex which will only be justifiable in limited circumstances. Where an employer terminates the employment of certain members of staff due to the economic impact of lockdowns etc. decisions to make women redundant, rather than men, without any justification aside from the fact that they are a woman or that they could get pregnant, would likely amount to unjustified discrimination under Article 1 of the Protocol no. 12, or under Article 14 in conjunction with Article 8.[322]

As discussed in section 5(g) and section 10 of this Guide (Affirmative action / justified differences in treatment on the basis of sex), Article 14 does not prohibit a Member State from treating groups differently in order to correct 'factual inequalities' between them.[323] As such, affirmative or positive measures promoting full and effective equality may be compatible with Article 14 if these

[319] See https://eca.unwomen.org/en/digital-library/publications/2020/05/impact-of-the-covid-19-pandemic-on-specialist-services-for-victims-and-survivors-of-violence, "Impact of the COVID-19 Pandemic on specialist services for victims and survivors of violence in the Western Balkans and Turkey: A proposal for addressing the needs" UN Women, 2020.

[320] See https://bit.ly/3gZMVVz "Janković: Korona ostavlja sve više žena bez posla", PTC Online, 8 October 2020.

[321] *Emel Boyraz v. Turkey*, judgment of 2 December 2014, no. 61960/08.

[322] *Napotnik v. Romania*, judgment of 20 October 2020, no. 33139/13; *Emel Boyraz v. Turkey*, judgment of 2 December 2014, no. 61960/08.

[323] *Stec and Others v. United Kingdom*, Grand Chamber judgment of 12 April 2006, no. 65731/01 (included as a summary in this publication); *Belgian Linguistic Case (No. 2)*, judgment of 23 July 1968, no. 2126/64

are objectively and reasonably justified. In assessing whether measures are objectively and reasonably justified, the Court takes account of the extent to which such factual inequalities continue to exist / the extent to which progress has been made to correct such inequalities.

The impact that the pandemic has had on women's employment opportunities, and the ways in which it has undermined progress made towards advancing employment opportunities for women would, therefore, be relevant to any assessment as to whether a difference in treatment between men and women in this context is justified. For example, economic recovery measures or access to work schemes targeted at women following the pandemic are more likely to be justified given the ways in which the pandemic has disproportionately impacted their employment opportunities.

c) Social Protection Measures

A significant number of women faced the Covid-19 pandemic without basic social security benefits, such as unemployment benefits, pension contributions, the right to sick leave and health insurance. This largely results from the fact that women who stay at home, cultivate the land, carry out informal work or help in family businesses are often invisible within the social security system.[324]

This situation has been further exacerbated by the fact that governmental responses to the Covid-19 pandemic failed to consider the different needs of men and women and the different contexts in which they live and work.[325] For example,

[324] Research by the World Bank in Croatia indicated that Women in Croatia receive on average 23% lower social benefits for the elderly than men. Depending on the duration of the unemployment, at least 40% of men receive unemployment benefits, while roughly 30% of women receive these benefits. See https://www.worldbank.org/hr/news/opinion/2021/03/05/gender-inequality-the-pandemic-has-hit-women-at-more-levels-than-men "Gender (In)Equality: The Pandemic has Impacted Women in Croatia on More Levels than Men" by Valerie Morrica and Nga Thi Viet Nyuyen, The World Bank, 5 March 2021. In Kosovo, approximately 30% of women employed in the private sector work informally and are unable to access social security benefits: See https://www.radiokim.net/vesti/saopstenja/sgg-poziva-vladu-na-usvajanje-mera-za-podrsku-zena.html "SGG poziva vladu na usvajanje mera za podršku žena", 20 Kim Godina Online, 17 April 2020.

[325] See https://data.undp.org/gendertracker/ "COVID-19 Global Gender Response. Tracker" United Nationas Development Programme; See https://crd.org/wp-content/uploads/2021/03/Kosovo_eng_web.pdf "Striking a Balance: Human Rights v. Combating COVID-19 in Kosovo",

in Kosovo, women employed in the informal economy and single mothers were left out of government aid intended for workers and businesses.[326]

The Covid-19 pandemic and, in particular, the lockdowns that have ensued have added to the weight of unpaid care work for children, the elderly and family members with disabilities or special needs as well as to the weight of domestic work more generally. Women, more often than men, have provided childcare and home-schooled their children during the closure of kindergartens and schools, as well as taking care of older family members whilst their movement was reduced or prohibited.[327][328]

Less educated women were disproportionately affected by the unequal distribution of family responsibilities.[329] Thus, less educated women face a number of mutually reinforcing challenges; they are more likely to lose their jobs or income, are less likely to be receiving social security benefits or emergency benefits related to the Covid-19 pandemic and perform the lion's share of unpaid work in the family, which significantly limits their ability to find a new job.[330]

Civil Rights Defenders, March 2021.

[326] See https://crd.org/wp-content/uploads/2021/03/Kosovo_eng_web.pdf "Striking a Balance: Human Rights v. Combating COVID-19 in Kosovo", Civil Rights Defenders, March 2021.

[327] See https://eca.unwomen.org/en/digital-library/publications/2020/05/impact-of-the-covid-19-pandemic-on-specialist-services-for-victims-and-survivors-of-violence, "Impact of the COVID-19 Pandemic on specialist services for victims and survivors of violence in the Western Balkans and Turkey: A proposal for addressing the needs" UN Women, 2020.

[328] See https://hcabl.org/covid-19-znacajno-usporio-postizanje-rodne-ravnopravnosti/?la=en "Covid-19 significantly slowed down achieving gender equality" Helsinki Citizens' Assembly Banja Luka, 11 March 2021; See https://www.worldbank.org/hr/news/opinion/2021/03/05/gender-inequality-the-pandemic-has-hit-women-at-more-levels-than-men "Gender (In) Equality: The Pandemic has Impacted Women in Croatia on More Levels than Men" by Valerie Morrica and Nga Thi Viet Nyuyen, The World Bank, 5 March 2021.

[329] See https://www.worldbank.org/hr/news/opinion/2021/03/05/gender-inequality-the-pandemic-has-hit-women-at-more-levels-than-men "Gender (In)Equality: The Pandemic has Impacted Women in Croatia on More Levels than Men" by Valerie Morrica and Nga Thi Viet Nyuyen, The World Bank, 5 March 2021

[330] See https://www.worldbank.org/hr/news/opinion/2021/03/05/gender-inequality-the-pandemic-has-hit-women-at-more-levels-than-men "Gender (In)Equality: The Pandemic has Impacted Women in Croatia on More Levels than Men" by Valerie Morrica and Nga Thi Viet Nyuyen, The World Bank, 5 March 2021.

As discussed above in section 6 of this Guide (Discrimination on grounds of sex - access to goods and services, public services, welfare/benefits), whilst there is no general right to social security under the Convention, where social security systems are in place, their operation must be assessed in the light of the principles of gender equality. In particular, the method by which the authorities calculate benefits must be consistent with efforts to achieve gender equality in contemporary society.

Where social security benefits or financial aid packages introduced during the pandemic were harder to access for women, for example because the eligibility criteria required evidence of employment history of a kind more likely to be undertaken by men, States would need to be able to demonstrate a justification for their failure to make reasonable adjustments to such policies to take account of how they might impact women differently.

(12)Conclusion

Clearly, in many aspects, the position of women and girls in the Western Balkans remains worse than men. Domestic courts across the region have a vital role to play in addressing this imbalance. They must effectively protect and enforce the rights and freedoms related to gender equality contained within the ECHR and other relevant international instruments.

Just as the role of women in society, and the challenges they face, continue to evolve, the nature and scope of the protections afforded by the Convention continue to develop. Looking forward, the jurisprudence of the Court summarised in this Guide is likely to be of increasing relevance given the impact of the Covid-19 pandemic on women, including the specific social and economic consequences they faced, as well as the alarming rise in incidents of domestic violence.

The Court's jurisprudence on gender equality and women's rights recognises that the position of women in society and the most effective means of tackling inequality are by no means a settled topic across European countries. The Court's application of the margin of appreciation doctrine in this respect leaves some room for States to develop social, economic, political and cultural policies and regulations which take account of the realities and specific needs of women in their society.

However, the Court has consistently emphasised that the advancement of the equality of the sexes is a major goal in the member States of the CoE and that, in any context, very weighty reasons must be advanced before a difference in treatment on the ground of sex can be justified. The doctrine of the margin of appreciation cannot, therefore, be used to undermine efforts to advance equality. In spheres where the State is typically afforded a wide margin of appreciation, such as the design of immigration rules or fiscal policies for example, the Court is willing to intervene where such rules and policies operate in a discriminatory manner.

The Convention is a living instrument, the interpretation of which must take account of changes regarding the role of women in society. In this respect the Court has emphasised that differences in treatment between men and women cannot be justified on the basis of stereotypes, presumptions or traditional, outdated notions about the respective roles of men and women in society.

To ensure the true advancement of equality for women within the CoE, States must adopt a multi-dimensional and intersectional approach, based on distributive, recognition-based, participative and transformative elements of equality. In some contexts, this might require a difference in treatment between men and women to correct factual inequalities or to advance the position of women in society. The Court's jurisprudence increasingly acknowledges the importance of an intersectional approach to gender discrimination and is conscious of the cumulative effect of multiple grounds of discrimination on applicants. This was the case in *B.S. v Spain*, a case concerning a Spanish woman of Nigerian origin who was verbally and physically abused when she was stopped and questioned while working as a prostitute. The Court held that there had been a violation of Article 14 in conjunction with Article 3, noting the special vulnerability inherent in the applicant's situation as an African woman working as a prostitute.[331] Similarly, in the case of *S.A.S. v France* (see above section 7(a) of this Guide (Women's religious head-coverings)), the Court acknowledged that a ban on the full-face veil had specific negative effects on the situation of Muslim women who wished to wear the veil.[332]

Ultimately, to ensure that the obligations and protections discussed throughout this Guide are implemented and protected effectively, courts and legal professionals across the Western Balkans must also adopt a gender sensitive approach to the conduct of legal proceedings and the delivery of judgments, as well as seeking to advance gender equality within the judiciary itself. The Court's jurisprudence in cases such as *J.L. v Italy and Carvalho Pinto de Sousa Morais v Portugal* illustrates the impact of pernicious gender stereotypes on judicial decision-making, and the knock-on effect this can have on efforts to promote equality.

[331] *B.S. v. Spain*, judgment of 24 July 2012, no. 47159/08.

[332] *S.A.S. v. France*, Grand Chamber judgment of 1 July 2014, no. 43835/11 (included as a summary in this publication).

Part 2 – Case Summaries arranged in chronological order

The failure to recognise the new sex of a post-operative trans woman in all areas of life was held to violate Articles 8 and 12 after the Court narrowed the State's margin of appreciation

GRAND CHAMBER JUDGMENT IN THE CASE OF CHRISTINE GOODWIN v. THE UNITED KINGDOM

(Application no. 28957/95)
11 July 2002

1. Principal facts

The applicant, Ms. Christine Goodwin, was a United Kingdom national born in 1937. In the mid-1960s she was diagnosed as being transsexual, with her own opinion being that her 'brain sex' did not fit that of her body. From the mid-1960s until 1984, during which time she married a woman and had four children, the applicant dressed as a man for work but as a woman in her free time. In January 1985 she began publicly funded medical treatment to change her sex, including hormone therapy, vocal cord therapy and full gender-reassignment surgery. During this time the applicant divorced her wife, but continued to enjoy a loving relationship with her children.

Beginning in 1990 the applicant alleged that she was sexually harassed at work and then dismissed on the basis of her trans status. She was subsequently unable to pursue a claim of discrimination as she was considered by law to be a man. Her request for her State pension to reflect her gender reassignment was then refused and her subsequent employer consequently discovered her trans status, causing her to suffer discriminatory treatment again. The applicant was also unable to change her male state pension age to that of a woman, from 65 to 60. While the applicant did arrange for her state pension contributions to be modified after the age of 60, the applicant's case was then marked 'sensitive' and she was required to make special face-to-face appointments at the relevant government department for even the most trivial matters. Further, her government record continued to state her sex as male, with all her mail addressed to her former male name rather than her female name.

Finally, the applicant also stated that on numerous occasions she had to choose between revealing her birth certificate, and thus her trans status, and accessing benefits including a loan, a remortgage offer, and an entitlement to winter fuel allowance. She was also required to pay higher motor insurance premiums associated with men and once felt that she was unable to report a crime that she was a victim of to the police for fear that an investigation would necessitate her disclosing her trans identity.

2. Decision of the Court

The applicant complained to the Court that her treatment had violated Articles 8, 12, 14 and 13 of the Convention. Specifically, she argued that the UK Government had taken no constructive steps to address the suffering and distress experienced by her and other post-operative trans people and that the failure to recognise her changed gender led to discrimination and humiliation from which she had no legal protection.

Article 8

The Court began by noting that the case raised issues concerning whether the State had fulfilled its positive obligations under Article 8 to ensure that the applicant enjoyed the right to respect for her private life. Such positive obligations were recognised by the Court as dependent on the margin of appreciation afforded to States in determining how to fulfil their obligations. In any case, under the Convention a State must fulfil its positive obligations by ensuring that a fair balance is struck between the general interests of the community and the interests of the individual in question.

In prior cases relating to the points raised in this case the Court had found no violation of the Convention. The Court recognised that it should not depart without good reason from its own precedents, but also affirmed that the Convention had to be interpreted in a way that rendered its rights practical and effective, not theoretical and illusory. As the context around trans people had changed since the Court's prior judgments it was necessary to determine what the appropriate interpretation and application of the Convention should be.

To assess how best to interpret and apply the Convention, the Court considered each of the relevant aspects and interests involved in the case in turn. First, the Court considered the applicant's situation as a trans person, specifically that while the applicant had undergone gender reassignment surgery and lived in

society as a female, legally she was still a male. Even where she had obtained special exclusions, such as in relation to her state pension contributions, the Court recognised that such exclusions would still draw attention to her trans status. The Court had previously recognised that where domestic law conflicted with an important aspect of an individual's personal identity, the stress and alienation caused could not be regarded as only a minor inconvenience. The Court was further struck by the fact that the applicant's treatment was provided by the national health service, and that it seemed illogical for the State to refuse to recognise in law the implications of this treatment funded by the State.

The second consideration was in relation to medical and scientific knowledge. Here the Court considered it particularly significant that there was wide international recognition of transsexualism as a medical condition, for which treatment, such as that provided by the national health service in the United Kingdom, could be provided. Given the irreversible, painful, and numerous medical interventions inherent in such treatment, and the level of commitment and conviction required to change one's social gender role, the Court considered that there was nothing arbitrary or capricious about a decision to undergo gender re-assignment. Once hormone and surgical treatments were completed, the Court considered that the only unchanging aspect of a person's gender identity was their chromosomal element. The Court did not see this element as a decisive factor for the purposes of gender identification. Therefore, the Court did not think that medical or scientific knowledge could critically determine any argument regarding the legal recognition of trans people.

The third consideration was the state of European and international consensus. The Court recognised that there was a growing trend within the Contracting States and internationally towards providing legal recognition following gender reassignment. The Court assessed that at the time there was still little consensus on this matter amongst States. Therefore, the Court recognised that on this basis the United Kingdom could enjoy a wide margin of appreciation to decide on the measures necessary to secure Convention rights within its jurisdiction under the principle of subsidiarity. However, the Court did state that there remained a clear and uncontested trend towards the legal recognition of the new sexual identity of post-operative trans people.

The final consideration was the impact on the United Kingdom's birth register system. The Court recognised that it had previously allowed Governments to put great importance on the historical nature of the birth record system and its function as a historical record. However, the Court recognised that many

exceptions were made to this principle of birth records being historical documents and the Court considered that making a further exception for trans people would not threaten to overturn the entire system.

The Court then moved to consider the balance struck between the interests of the applicant and the interests of the public. Here the Court acknowledged the difficulties experienced by the applicant. It stated that the right of trans people to enjoy their rights under Article 8 to the same level as others could not be a matter of controversy and that the 'intermediate zone' experienced by the applicant was not sustainable. The Court recognised the difficulties faced by States in making major changes to their legal systems but also that society could reasonably be expected to tolerate a certain inconvenience to enable individuals to live in dignity and worth in accordance with their identity, especially if such an identity was attained only at great personal cost. In prior cases the Court had emphasised to the UK the importance of keeping the need for appropriate legal measures under review with regard to scientific and societal developments, but the Court saw no evidence of this having occurred. Given these factors, the Court decided that the decision to institute these legal measures, or not, now fell outside the United Kingdom's margin of appreciation and that there were no significant factors of public interest to weigh against the interest of the applicant. While the decision of how to institute the appropriate measure still fell within the State's margin of appreciation, the fair balance inherent in the Convention now favoured the applicant and there had accordingly been a violation of her right to a private life under Article 8.

Article 12

Considering the issues and conclusions reached in relation to the applicant's arguments in relation to Article 8, the Court considered that while it was for States to determine the conditions under which a person could claim legal recognition as a trans person and therefore invalidate past marriages as well as regulate the formalities applicable to future marriages, there was also no justification for effectively barring trans people from enjoying the right to marry under any circumstances. Therefore, the prevention of the applicant from marrying her male partner violated Article 12.

Article 14

The Court stated that no issues arose under Article 14 that were not addressed in relation to Article 8. It therefore saw no reason to address any of the issues under this article.

Article 13

The Court affirmed that the right to an effective remedy should not be interpreted as requiring a remedy against the state of domestic law, as to do so would require the Convention to be incorporated into domestic law. Therefore, there was no violation of Article 13.

Article 41

The Court did not find it appropriate to make an award in this case as the Court considered it was sufficient for the Government to take measures to fulfill its new obligations under the Convention after the Court had found that the issue no longer fell within the State's margin of appreciation. The Court awarded the applicant €39,000 in respect of costs and expenses.

A university's ban on students wearing the Islamic headscarf did not amount to a violation of the applicant's rights to freedom of religion and to education

GRAND CHAMBER JUDGMENT IN THE CASE OF LEYLA ŞAHİN v. TURKEY

(Application no. 44774/98)
10 November 2005

1. Principal facts

The applicant, Leyla Şahin, was a Turkish national born in 1973. She had lived in Vienna since 1999, when she left Istanbul to pursue her medical studies at the Faculty of Medicine at Vienna University. She came from a traditional family of practising Muslims and considered it her religious duty to wear the Islamic headscarf.

At the material time she was a fifth-year student at the faculty of medicine of Istanbul University. On 23 February 1998 the Vice-Chancellor of the University issued a circular directing that students with beards and students wearing the Islamic headscarf would be refused admission to lectures, courses and tutorials.

In March 1998 the applicant was refused access to a written examination on one of the subjects she was studying because she was wearing the Islamic headscarf. Subsequently the university authorities refused on the same grounds to enrol her on a course, or to admit her to various lectures and a written examination. The faculty also issued her with a warning for contravening the university's rules on dress and suspended her from the university for a semester for taking part in an unauthorised assembly that had gathered to protest against them. All the disciplinary penalties imposed on the applicant were revoked under an amnesty law.

2. Decision of the Court

The applicant complained under Article 9 that she had been prohibited from wearing the Islamic headscarf at university, and of an unjustified interference with her right to education, within the meaning of Article 2 of Protocol No. 1. She also relied on Articles 8, 10 and 14.

In its judgment of 29 June 2004, the Chamber of the European Court held that there had been no violation of Article 9 and that no separate question arose under Articles 8 and 10, Article 14 taken together with Article 9, and Article 2 of Protocol No. 1 to the Convention. The case was referred to the Grand Chamber under Article 43 at the request of the applicant.

Article 9

The Grand Chamber proceeded on the assumption that the circular in issue, which placed restrictions of place and manner on the right to wear the Islamic headscarf in universities, constituted an interference with the applicant's right to manifest her religion.

As to whether the interference had been "prescribed by law", the Court noted that the circular had been issued by the Vice-Chancellor within the statutory framework set out in Law no. 2547 and in accordance with the regulatory provisions that had been adopted earlier, and the practice of the Constitutional Court of Turkey. In these circumstances, the Court found that there was a legal basis for the interference in Turkish law and that it would have been clear to the applicant, from the moment she entered the university, that there were restrictions on wearing the Islamic headscarf, and, from the date the circular was issued in 1998, that she was liable to be refused access to lectures and examinations if she continued to wear the headscarf. The decisions of the higher domestic courts, supporting the circular, were based on the notion that wearing a headscarf at university was contrary to the fundamental principles of the Republic. This was particularly true, according to the domestic courts, given that the headscarf was an increasingly political symbol of a vision that was contrary to the freedoms of women.

The Court considered that the impugned interference primarily pursued the legitimate aims of protecting the rights and freedoms of others and of protecting public order.

As to whether the interference was necessary, the Court noted that it was based on the principles of secularism and equality. According to the practice of the Constitutional Court, the principle prevented the State from manifesting a preference for a particular religion or belief; it thereby guided the State in its role of impartial arbiter, and necessarily entailed freedom of religion and conscience.

The Court also noted the emphasis placed in the Turkish constitutional system on the protection of the rights of women. Gender equality – recognised by the European Court as one of the key principles underlying the Convention and a goal to be achieved by member States of the Council of Europe – had also been found by the Turkish Constitutional Court to be a principle implicit in the values underlying the Constitution.

In those circumstances and having regard to the Contracting States' margin of appreciation, the Court found that the interference in issue was justified in principle and proportionate to the aims pursued and could be considered to have been "necessary in a democratic society". It therefore found no violation of Article 9.

Article 2 of Protocol No. 1

The Court first examined the applicability of Article 2 of Protocol No. 1 in the circumstances of this case. While the first sentence of that provision essentially established access to primary and secondary education, the Court considered there was no watertight division separating higher education from other forms of education. The Court considered that any institutions of higher education existing at a given time came within the scope of the first sentence of Article 2 of Protocol No. 1, since the right of access to such institutions was an inherent part of the right set out in that provision.

In the case before it, by analogy with its reasoning on the question of the existence of interference under Article 9, the Court accepted that the regulations on the basis of which the applicant had been refused access to various lectures and examinations for wearing the Islamic headscarf constituted a restriction on her right to education. As with Article 9, the restriction was foreseeable and pursued legitimate aims and the means used were proportionate.

The ban on wearing the Islamic headscarf had not impaired the very essence of the applicant's right to education. Neither did it conflict with other rights enshrined in the Convention or its Protocols. The Court therefore found that there had been no violation of Article 2 of Protocol No. 1.

Articles 8, 10 and 14

The Court held that there had been no violation of Articles 8, 10 or 14.

Imposing conditions linked to different pension ages for men and women in relation to a work-related social welfare payment did not breach Article 14 in conjunction with Article 1 of Protocol 1

GRAND CHAMBER JUDGMENT IN THE CASE OF STEC AND OTHERS v. THE UNITED KINGDOM

(Application nos. 65731/01 and 65900/01)
12 April 2006

1. Principal facts

The applicants were Anna Stec, born in 1933 and living in Stoke-on-Trent, Patrick Lunn, born in 1923 and living in Stockton-on-Tees, Sybil Spencer, born in 1926 and living in Bury, and Oliver Kimber, born in 1924 and living in Pevensey.

Each applicant had been awarded a social welfare payment after sustaining a work-related injury. Each had brought proceedings before their respective Social Security Appeals Tribunal ("SSAT") concerning alleged discriminatory treatment. Before the SSAT, three of the applicants were successful and the other had his application dismissed. Each set of proceedings was appealed to the Social Security Commissioner ("the Commissioner"), who joined the applications and sought a preliminary ruling from the European Court of Justice ("ECJ"). After the ECJ ruled that it was objectively necessary for the scheme to treat men and women differently, the Commissioner struck out the cases in which the applicants were the appellants and allowed those in which the SSAT adjudication officers had been the appellants.

The welfare payment in question was Reduced Earnings Allowance ("REA"), an earnings-related additional benefit which was introduced under a different name (Special Hardship Allowance) in 1948. In the late 1980s, the Government introduced various pieces of legislation with the aim of removing or reducing the entitlement for claimants who were no longer of working age. Prior to this, claimants had enjoyed a continued right to REA regardless of whether the claimant had reached retirement age. The method that was used to reduce entitlement was to impose cut-off conditions relating to the ages used by the statutory pension scheme (i.e. 65 for men and 60 for women until 1996, then tapering up to equality in 2020).

2. Decision of the Court

The applicants complained that the scheme was discriminatory, in breach of Article 14 of the Convention when read alongside Article 1 of Protocol No. 1. They argued that a single cut-off age or overlapping benefit regulations should have been used, rather than linking eligibility for the payments to the state pension age, because the chosen method discriminated on the basis of sex. The Chamber of the Court relinquished jurisdiction to the Grand Chamber under Article 30 of the Convention.

Article 14 of the Convention in conjunction with Article 1 of Protocol No. 1

In setting out the relevant principles, the Court noted that Article 14 of the Convention does not prevent States from treating some groups differently where it is done in order to address factual differences between them. The differential treatment must be objectively justified in that it must pursue a legitimate aim and be reasonably proportionate to that aim. States enjoy a certain margin of appreciation in this respect, which varies according to the circumstances. On one hand, very weighty reasons would be required to justify any discrimination on the grounds of sex as compatible with the Convention. On the other, States enjoy a wide margin of appreciation with regard to general measures of economic or social strategy.

There was no dispute between the parties as to whether the decision to stop paying REA to those who were no longer of working age was a legitimate aim. The REA was a work-related benefit. As such, the Government had made a policy decision in 1986 to remove the entitlement from those who would no longer be in paid employment. This satisfied the first stage of the test outlined above.

Regarding the proportionality of the measures taken, the Court found that the Government had been justified in linking eligibility for REA to the statutory retirement age. The Court dismissed the applicants' submission that a single cut-off age should have been used, finding that this would only have created greater disparity between men and women. The question of how best to pursue the legitimate aim identified was essentially one of administrative economy, which fell within the Government's margin of appreciation. The Court placed significant weight on the ECJ's ruling, which recognised this justification, given that it was directly related to the applicants' complaints.

In terms of the historical progression towards parity between the sexes, the Court identified developments including pension reforms in 1977 and 1978 which benefitted women who had been out of work for extended periods, a 1986 law prohibiting employers from having different retirement ages for men and women, and the Government's 1993 White Paper, in which it recognised that the number of women in paid employment had increased significantly between 1967 and 1992. The most significant step taken was the Government's 1991 Green Paper, which represented a "first, concrete move" towards a universal pensionable age.

The Court considered whether this underlying difference in treatment between men and women was justified under Article 14 of the Convention. It recognised that, given the history of working practices in the United Kingdom, the historical disparity of treatment between the sexes aimed to address factual inequalities. In particular, the difference in treatment was intended to mitigate against financial difficulties arising out of women's traditional domestic role. Given the gradual change towards equality of working practices between men and women, it was not possible to point to an exact moment at which differential treatment was unjustified. Ultimately, the Court found that the decision as to how best to navigate the transition towards parity between the sexes in this sphere was one which fell within the margin of appreciation of the Contracting State.

In summary, the Court found that the historical difference in treatment between men and women was aimed at addressing factual inequalities. The difference in state pension age was reasonably and objectively justified as long as these inequalities persisted. The authorities' decisions as to the precise timing and means of putting right the inequality were not so manifestly unreasonable as to exceed the wide margin of appreciation allowed it in such a field. On this basis, the respondent's decision to link REA to the state pension age was reasonably and objectively justified as that benefit was inextricably linked to a person's working life. As such, the Court found that there had been no violation of Article 1 of Protocol No. 1 when read in conjunction with Article 14 of the Convention.

States have positive obligations under Articles 2 and 3 to protect women from domestic violence by private actors, and discriminatory judicial passivity in relation to gender-based violence is contrary to Article 14

JUDGMENT IN THE CASE OF OPUZ v. TURKEY

(Application no. 33401/02)
9 June 2009

1. Principal facts

The applicant, Ms Nahide Opuz, was a Turkish national who was born in 1972 and lived in Turkey.

In 1990, the applicant started living with H.O., the son of her mother's husband. The applicant and H.O. got married in November 1995 and had three children in 1993, 1994 and 1996. They had serious arguments from the beginning of their relationship and subsequently divorced.

Between April 1995 and March 1998 there were four incidents of H.O.'s violent and threatening behaviour towards the applicant and her mother which came to the notice of the authorities. Those incidents involved several beatings, a fight during which H.O. pulled out a knife and H.O. running the two women down with his car. Following those assaults the women were examined by doctors who testified in their reports to various injuries, including bleeding, bruising, bumps, grazes and scratches. Both women were medically certified as having sustained life-threatening injuries: the applicant as a result of one particularly violent beating; and her mother following the assault with the car.

Criminal proceedings were brought against H.O. on three of those occasions for death threats, actual, aggravated and grievous bodily harm, and attempted murder. As regards the knife incident, it was decided not to prosecute for lack of evidence. H.O. was twice remanded in custody and released pending trial.

However, as the applicant and her mother withdrew their complaints during each of those proceedings, the domestic courts discontinued the cases, their complaints being required under the Criminal Code to pursue any further. The proceedings concerning the car incident were nevertheless continued in respect of the applicant's mother, given the seriousness of her injuries, and H.O. was convicted to three months' imprisonment, later commuted to a fine.

On 29 October 2001, the applicant was stabbed seven times by H.O. and taken to hospital. H.O. was charged with knife assault and given another fine of almost 840,000 Turkish lira (the equivalent of approximately €385) which he could pay in eight instalments. Following that incident, the applicant's mother requested that H.O. be detained on remand, maintaining that on previous occasions her and her daughter had had to withdraw their complaints against him due to his persistent pressure and death threats.

Finally, on 11 March 2002, the applicant's mother, having decided to move to Izmir with her daughter, was travelling in the removal van when H.O. forced the van to pull over, opened the passenger door and shot her. The applicant's mother died instantly.

In March 2008, H.O. was convicted for murder and illegal possession of a firearm and sentenced to life imprisonment. He was released from custody pending the appeal proceedings. In April 2008, the applicant filed another criminal complaint with the prosecution authorities in which she requested the authorities take measures to protect her as, since his release, her ex-husband had started threatening her again. In May and November 2008, the applicant's representative informed the Court that no such measures had been taken and the Court requested an explanation. The authorities then took specific measures to protect the applicant, notably by distributing her ex-husband's photograph and fingerprints to police stations with the order to arrest him if he was spotted near the applicant's place of residence.

In the meantime, in January 1998, the Family Protection Act entered into Force in Turkey which provides for specific measures for protection against domestic violence.

2. Decision of the Court

The applicant alleged that the Turkish authorities failed to protect the right to life of her mother and that they were negligent in the face of the repeated violence, death threats and injury to which she herself was subjected. She relied on Articles 2, 3, 6 and 13. She further complained about the lack of protection of women against domestic violence under Turkish domestic law, in violation of Article 14.

Article 2

The Court considered that, in the applicant's case, further violence, indeed a lethal attack, had not only been possible but even foreseeable, given the history

of H.O.'s violent behaviour and criminal record in respect of his wife and her mother and his continuing threat to their health and safety.

According to common practice in the member States, the more serious the offence or the greater the risk of further offences, the more likely it should be that the prosecution continue in the public interest, even if victims withdraw their complaints. However, when repeatedly deciding to discontinue the criminal proceedings against H.O., the authorities referred exclusively to the need to refrain from interfering in what they perceived to be a "family matter". The authorities had not apparently considered the motives behind the withdrawal of the complaints, despite the applicant's mother's statements to the prosecution authorities that she and her daughter had felt obliged to do so because of H.O.'s death threats and pressure. The Court rejected the Government's argument that any further interference by the national authorities would have amounted to a breach of the applicant's rights under Article 8. Such interference with the private or family life of individuals may be necessary to protect the health and rights of others or to prevent the commission of criminal acts. The seriousness of the risk to the applicant's mother rendered such intervention by the authorities necessary.

Despite the withdrawal of the victims' complaints, the legislative framework should have enabled the prosecuting authorities to pursue the criminal investigations against H.O. on the basis that his violent behaviour had been sufficiently serious to warrant prosecution and that there had been a constant threat to the applicant's physical integrity. The Court held that the legislative framework then in force fell short of the inherent requirements in the State's positive obligations to establish and apply effectively a system punishing all forms of domestic violence and providing sufficient safeguards for victims.

The Court concluded that the national authorities had not shown due diligence in preventing violence against the applicant and her mother, in particular by pursuing criminal or other appropriate preventive measures against H.O. In this light, the State had failed its positive obligation to take preventative operational measures to protect individuals whose lives were at risk. Nor could the investigation into the killing, to which there had been a confession, be described as effective considering that proceedings were still pending after six years. Moreover, the criminal law system had had no deterrent effect in the present case. The Court reiterated that once a situation has been brought to their attention, national authorities cannot use victims' attitude as an excuse for their failure to take adequate measures. The Turkish authorities had therefore failed to protect the right to life of the applicant's mother, in violation of Article 2.

Article 3

The Court considered that the applicant fell within the group of "vulnerable individuals" entitled to State protection. She could be placed in this category due to the violence suffered by her, her social background, the threats issued by H.O. and the situation of women in south-east Turkey. Furthermore, the violence suffered by the applicant in the form of physical injuries and psychological pressure was sufficiently serious to amount to ill-treatment within the meaning of Article 3. Therefore, the State was under obligations to take all reasonable measures to prevent the recurrence of violent attacks against the applicant's physical integrity.

The Court considered that the response to H.O.'s conduct had been manifestly inadequate in the face of the gravity of his offences. The judicial decisions, which had had no noticeable preventive or deterrent effect on H.O., had been ineffective and even disclosed a certain degree of tolerance towards his acts. Notably, after the car incident, H.O. had spent just 25 days in prison and only received a fine for the serious injuries he had inflicted on the applicant's mother. Even more striking, as punishment for stabbing the applicant seven times, he was merely imposed with a small fine, which could be paid in instalments.

Turkish law did not provide for specific administrative and policing measures to protect vulnerable persons against domestic violence before January 1998, when the Family Protection Act came into force. Even after that date, the domestic authorities had not effectively applied those measures and sanctions in order to protect the applicant.

Finally, the Court noted with grave concern that the violence suffered by the applicant had not come to an end and that the authorities continued to display inaction. Despite the applicant's request in April 2008 for the authorities to take measures for her protection, nothing was done until after the Court requested the Government to provide information about the protection measures it had taken.

The Court therefore concluded that there had been a violation of Article 3 as a result of the authorities' failure to take protective measures in the form of effective deterrence against serious breaches of the applicant's personal integrity by H.O..

Article 14

The Court set out that discrimination means treating persons in similar situations differently, without an objective or reasonable justification. A general

policy or measure that has disproportionately prejudicial effects on a particular group may be considered discriminatory even though it is not aimed at that particular group. It reiterated that once an applicant has shown a difference in treatment, the government bears the burden of proof to show that it was justified. There are no procedural barriers to the admissibility of evidence for the Court's assessment of whether there has been a difference in treatment, and the Court may rely on statistics.

According to reports submitted by the applicant, drawn up by two leading non-governmental organisations, and uncontested by the Government, the highest number of reported victims of domestic violence was in Diyarbakır, where the applicant had lived at the relevant time. All those victims were women, the great majority of whom were of Kurdish origin, illiterate or of a low level of education and generally without any independent source of income. Indeed, the reports suggested that domestic violence was tolerated by the authorities and that the remedies indicated by the Government did not function effectively. The Court therefore considered that the applicant had been able to show that domestic violence affected mainly women and that the general and discriminatory judicial passivity in Turkey created a climate that was conducive to domestic violence.

Bearing that in mind, the violence suffered by the applicant and her mother could be regarded as gender-based, which constituted a form of discrimination against women. Despite the reforms carried out by the Government in recent years, the overall unresponsiveness of the judicial system and impunity enjoyed by the aggressors, as found in the applicant's case, indicated that there was insufficient commitment to take appropriate action to address domestic violence. The Court therefore concluded that there had been a violation of Article 14, in conjunction with Articles 2 and 3.

Other Articles

Given the above findings, the Court did not find it necessary to examine the same facts in the context of Articles 6 and 13.

Article 41

The Court awarded the applicant €30,000 in respect of non-pecuniary pecuniary damage and €6,500 for costs and expenses.

The exclusion of military servicemen from the entitlement to parental leave was discriminatory on the basis of sex in violation of Article 14 in conjunction with Article 8 and perpetuated gender stereotypes

GRAND CHAMBER JUDGMENT IN THE CASE OF KONSTANTIN MARKIN v. RUSSIA

(Application no. 30078/06)
22 March 2012

1. Principal Facts

The applicant, Konstantin Markin, was a Russian national born in 1976.

In 2004 he signed a military service contract according to which he undertook to "serve under the conditions provided for by law". He started serving as a radio intelligence operator and was often replaced in his duties by female military personnel.

Following the applicant's divorce from the mother of his three children, he was left to raise the children alone. In October 2005, he applied for three years' parental leave shortly after the birth of his third child. The head of his military unit rejected this request, stating that three years' parental leave could be granted only to female military personnel. The applicant was allowed to take three months' leave. However, on 23 November 2005 he was recalled to duty. The applicant challenged his recall to duty and the Military Court of Garrison accepted and upheld the applicant's right to the remaining 39 working days of his three months' leave.

Concurrently, in November 2005, the applicant brought proceedings against his military unit, claiming three years' parental leave, citing that he was the sole carer for his children. On 14 March 2006, the Military Court of the Pushkin Garrison dismissed the applicant's claim as having no basis in domestic law. The court held that only female military personnel were entitled to three years' parental leave, while male military personnel had no such entitlement. The applicant appealed, arguing that the refusal to grant him three years' parental leave violated the principle of equality between men and women guaranteed by the Constitution. On 27 April 2006 the Military Court of the Leningradskiy Command dismissed the appeal, holding that under domestic law "male military personnel were not in any circumstances entitled to parental leave".

In October 2006, despite the Military Courts' judgments, the applicant's military unit granted him almost two years' parental leave and financial aid of approximately €5,900 due to his difficult financial situation. Subsequently, the Military Court of the Pushkin Garrison issued a decision criticising the military unit for granting the applicant parental leave, noting the unlawfulness of the military unit's actions.

In August 2008, the applicant applied to the Constitutional Court, claiming that the provisions of the Military Service Act concerning the three-year parental leave were incompatible with the equality clause in the Constitution. In January 2009, the Constitutional Court rejected his application, finding that the provisions were compatible with the Constitution.

On 13 March 2011, a military prosecutor visited the applicant's home. According to the Russian authorities, the visit was at the request of the Representative of Russia at the European Court of Human Rights with the aim of conducting an inquiry into the applicant's family situation. Upon consulting his lawyer by phone, the applicant refused to answer any questions or to produce any documents. He signed a written statement to that effect following which the prosecutor left his flat immediately. The prosecutor questioned the applicant's neighbours, who testified that he and his ex-wife were living together. According to the Government, their inquiry established that the applicant had remarried his ex-wife and mother of his children in April 2008 and that they had had a fourth child in August 2010. In December 2008, the applicant terminated his military service for health reasons. He and his wife were then living together with their four children and his parents-in-law.

2. Decision of the Court

Relying on Article 14 taken in conjunction with Article 8 of the Convention, the applicant complained that the refusal to grant him parental leave had amounted to discrimination on th e ground of sex. On 7 October 2010, a Chamber found a violation of Article 14 in conjunction with Article 8. The case was referred to the Grand Chamber under Article 43 at the request of the Government.

Article 37 § 1 (b)

As a preliminary objection, the Government sought to strike out the applicant's complaint, arguing that the matter had already been resolved, in accordance with Article 37 § 1 (b). The Government submitted that the applicant had been granted parental leave and had received financial aid.

The Court rejected the Government's request. First, it held that the effects of a possible violation of the Convention had not been sufficiently redressed for it to conclude that the matter has been resolved within the meaning of Article 37 § 1 (b). Although parental leave had been granted from his military unit, there was a one-year delay and only two years' leave granted. The applicant had not received any compensation for the delay or for the reduction. Furthermore, the financial assistance granted by the applicant's military unit was for reasons of his difficult financial situation, rather than for compensation.

The Court also underlined that its judgments served not only to provide individual relief, but also to safeguard and develop the Convention rules, thereby raising the general standards of protection of human rights and extending human rights jurisprudence throughout the community of the Convention States. Consequently, the case involved an important question of general interest, not only for Russia but also for other State parties to the Convention, which the Court had not yet examined. Further examination of the present application would contribute to elucidating, safeguarding, and developing the standards of protection under the Convention.

Article 14 in conjunction with Article 8

The Court noted that the advancement of gender equality was today a major goal in all member States of the CoE. Thus, very weighty reasons had to be put forward for such a difference of treatment to be regarded as compatible with the Convention. References to traditions, general assumptions or prevailing social attitudes in a given country were insufficient justifications for a difference in treatment on the grounds of sex.

In the specific context of the armed forces, the Court accepted the possibility of placing limitations on some of the rights and freedoms of the members of the armed forces, which could not otherwise be imposed on civilians.

The Court observed that Article 8 did not include a right to parental leave, nor did it impose an obligation on States to provide parental leave allowances. However, parental leave and related allowances fell within the scope of Article 8, given that they promoted family life and necessarily affected the way it was organised. It followed that Article 14, taken together with Article 8, was applicable. Accordingly, if a State decided to create a parental leave scheme, it had to do so in a manner compatible with Article 14 of the Convention.

In order to ascertain whether there was a breach of Article 14 in conjunction with Article 8, the Court first considered whether the applicant was in an analogous situation to service women. The Court reiterated that in relation to parental leave and parental leave allowances, men are in an analogous situation to women, given that the role of taking care of the child during the parental leave period was "similarly placed" between men and women. Therefore, the purpose of parental leave for the applicant, a serviceman, was analogous to the situation of a servicewoman.

Next, the Court considered whether the difference in treatment between servicemen and servicewomen was objectively and reasonably justified under Article 14. The Court rejected the State's argument that a difference in treatment could be justified on the basis that women hold a special social role of raising of children. It noted that most European countries, including Russia, maintained legislation that allowed civilian men and women alike to take parental leave. In addition, in a significant number of States both servicemen and servicewomen were entitled to parental leave. It followed that European societies had moved towards a more equal sharing between men and women of responsibility for the upbringing of their children and that men's caring role has gained recognition.

Furthermore, the Court did not accept that the difference in treatment of servicemen and service women was explained by positive discrimination in favour of women. In fact, the Court found that such different treatment had the effect of perpetuating gender stereotypes and was disadvantageous both to women's careers and to men's family life. Similarly, the difference in treatment could not be justified by reference to prevailing traditions. The perceptions of women as primary child-carers and men as primary breadwinners, could not, by themselves, be considered to amount to sufficient justification for a difference in treatment, any more than similar stereotypes based on race, origin, colour or sexual orientation.

The Court accepted that, given the importance of the army for the protection of national security, certain restrictions on the entitlement to parental leave could be justifiable provided they were not discriminatory. For example, military personnel, be it male or female, could be excluded from parental leave entitlement if they could not be easily replaced because of their hierarchical position, rare technical qualifications, or involvement in active military actions. In Russia, by contrast, the entitlement to parental leave depended exclusively on the sex of the person. By excluding servicemen from that entitlement, the legal provision imposed a blanket restriction. The Court found that, as such a general

and automatic restriction applied to a group of people on the basis of their sex, it fell outside any acceptable margin of appreciation of the State.

The Court observed that the applicant, who served as a radio intelligence operator, was capable of being replaced by either servicemen or servicewomen. Those servicewomen had an unconditional entitlement to three years' parental leave. The applicant, by contrast, did not have such entitlement, and that was only because he was a man. He was therefore subjected to discrimination on grounds of sex.

Finally, the Court rejected the Government's argument that by signing a contract with the military, he had voluntarily waived his right not to be discriminated. The fundamental importance of the prohibition of discrimination on grounds of sex meant that no waiver could be accepted as it would be counter to an important public interest.

In view of all the above, the Court considered that the exclusion of servicemen from the entitlement to parental leave could not be said to be reasonably or objectively justified. The Court concluded that this difference in treatment, of which the applicant was a victim, amounted to discrimination on grounds of sex. Accordingly, there had been a violation of Article 14 in conjunction with Article 8.

Article 34

The Court emphasised that it was, in principle, not appropriate for the authorities of a State against which there was a pending complaint before the Court, to enter into direct contact with an applicant in connection with that case. As regards the prosecutor's visit to the applicant's home, there had been no evidence that it had been calculated to induce him to withdraw his complaint before the Court or to modify it, nor that it had in practice had that effect. Thus, the authorities could not be held to have hindered the applicant's exercise of his right to individual petition. Accordingly, Russia had not breached its Article 34 obligation.

Article 41

The Court held that Russia was to pay the applicant €3,000 in respect of non-pecuniary damage and €3,150 for costs and expenses.

A blanket ban on clothing concealing the face in public could be justifiable as a legitimate aim for the protection of rights and freedoms of others under Articles 8 and 9 of the Convention

GRAND CHAMBER JUDGMENT IN THE CASE OF S.A.S. v. FRANCE

(Application no. 43835/11)
1 July 2014

1. Principal facts

The applicant was a French national, who was born in 1990 and lived in France. She was a practising Muslim. She complained that the ban on wearing clothing designed to conceal one's face in public places, introduced by Law no. 2010-1192 of 11 October 2010, deprived her of the possibility of wearing the full-face veil in public.

The applicant submitted that she wore the burqa and niqab in accordance with her religious faith, culture, and personal convictions. The applicant also emphasised that neither her husband nor any other member of her family put pressure on her to dress in this manner. She added that she wore the niqab in public and in private, but not systematically. Lastly, her aim was not to annoy others but to feel at inner peace with herself.

2. Decision of the Court

The applicant complained that the statutory ban on wearing clothing designed to conceal the face in public was contrary to Articles 8, 9 and 10 of the Convention. Further, under Article 14 she complained that the ban led to discrimination on grounds of sex, religion, and ethnic origin, to the detriment of women who, like herself, wore the full-face veil.

Article 8 and Article 9

While personal choices as to one's appearance relate to the expression of an individual's personality and thus fall within the notion of private life, the applicant complained that she was prevented from wearing in public places clothing that she was required to wear by her religion, thus mainly raising an issue regarding the freedom to manifest one's religion or beliefs laid down in Article 9 of the Convention.

The Court found that there had been a continuing interference with the exercise of the applicant's rights under Article 8 and 9, as she was confronted with the dilemma to either comply with the Law of 11 October 2010 by refraining from dressing in accordance with her approach to religion, or to refuse to comply and thus face criminal sanctions. The interference in question was prescribed by law.

The Court accepted that the interference pursued two of the legitimate aims listed in Articles 8 and 9, namely public safety and the protection of the rights and freedoms of others. Looking first at the aim of public safety, the Court noted that the Law satisfied the need to identify individuals to prevent danger for the safety of persons and property and to combat identity fraud. However, in view of its impact on the rights of women who wished to wear the full-face veil for religious reasons, a blanket ban on the wearing in public places of clothing designed to conceal one's face could be regarded as proportionate only in a context where there was a general threat to public safety and where public safety could not be assured by the simple obligation to remove clothing with a religious connotation in the context of security checks. The Government had not shown that the ban introduced by the Law fell into such a context and thus the Law was not necessary in a democratic society for public safety.

The Court then considered whether such interference pursued the legitimate aim of protection of the rights and freedoms of others. The Government referred to the need to "ensure respect for the minimum set of values of an open democratic society", listing three values: respect for gender equality, respect for human dignity and respect for the minimum requirements of life in a society (or of 'living together'). The Court accepted that gender equality might justify an interference with the exercise of certain rights. For instance, where a State Party prohibits anyone from forcing women to conceal their face, this pursues an aim which corresponds to the "protection of the rights and freedoms of others" within the meaning of Articles 8 and 9. However, a State cannot invoke gender equality to ban a practice that is defended by women, such as in the case of the applicant. The Court also found that respect for human dignity cannot justify a blanket ban on the wearing of the full-face veil in public places. The full-face veil is an expression of cultural identity which contributes to the pluralism that is inherent in democracy. In contrast, the Court accepted that the barrier raised against others by a veil concealing the face in public could undermine the notion of 'living together', as the face plays a significant role in social interaction.

In view of the flexibility of the notion of 'living together' the Court had to engage in a careful examination of necessity of the measure at issue, in particular

whether the ban was proportionate to the aim pursued. It noted that the blanket ban could appear excessive and disproportionate, in view of the small number of women concerned. While the Court was aware that the disputed ban mainly affected certain Muslim women, it nevertheless noted that there was no restriction on the freedom to wear in public any item of clothing which did not conceal the face. The ban was thus not expressly based on the religious connotation of the clothing in question but solely on the fact that it concealed the face. In addition, the sanctions provided for by the Law (a fine of €150 maximum and/or the possible obligation to follow a citizenship course) were among the lightest that could have been envisaged. Furthermore, as the question of whether or not it should be permitted to wear the full-face veil in public places constituted a choice of society, over which there was no consensus in the Member States of the Council of Europe, France had a wide margin of appreciation. In this context the Court had a duty to exercise a degree of restraint in its review of Convention compliance.

The ban complained of could therefore be regarded as proportionate to the aim pursued, namely the preservation of the conditions of 'living together'. The impugned limitation could thus be regarded as "necessary in a democratic society". Accordingly, the Court held that there had not been a violation of either Article 8 or Article 9 of the Convention.

Article 10

The Court was also of the view that no separate issue arose under the right of freedom of expression taken separately or together with Article 14.

Article 14

The applicant complained of indirect discrimination, since as a Muslim woman, she belonged to a category of individuals who were particularly exposed to the ban in question. While the ban imposed by the French Law admittedly had specific negative effects on the situation of Muslim women who, for religious reasons, wished to wear the full-face veil in public, that measure had an objective and reasonable justification for the reasons previously indicated. Therefore, there had not been a violation of Article 14 taken together with Articles 8 or 9.

The unfavourable treatment of men aged 18-65 in the imposition of life sentences compared to other groups did not amount to a breach of Article 14 read in conjunction with Article 5

GRAND CHAMBER JUDGMENT IN THE CASE OF KHAMTOKHU AND AKSENCHIK v. RUSSIA

(Application nos. 60367/08 and 961/11)
24 January 2017

1. Principal facts

The applicants were Mr Khamtokhu, born in 1970, and Mr Aksenchik, born in 1985. The former had been found guilty of various offences, including escape from prison, attempted murder of police officers and State officials, and illegal possession of firearms. The latter had been found guilty of three counts of murder.

Both had been sentenced to life imprisonment. By virtue of Article 79 § 5 of the Criminal Code of the Russian Federation, where an offender was sentenced to life imprisonment, they would only become eligible for early release once a 25-year period had elapsed. However, Article 57 contained an exemption to the imposition of life sentences for women, offenders under the age of 18 and those over the age of 65.

2. Decision of the Court

The applicants complained that the differential treatment of their group, on the basis of both age and sex, amounted to discriminatory treatment in violation of Article 14 of the Convention when read alongside Article 5.

Article 14 in conjunction with Article 5

The Court first considered whether the case fell within the ambit of Article 5 read alongside Article 14. It noted that the applicants were convicted by a competent court, as required by Article 5 § 1, and stated that matters of sentencing generally fall outside the scope of the Court's review. Although Article 14 is not a standalone provision its prohibition of discrimination extends to cover additional rights, falling within the general scope of any Convention Article, for which the State has voluntarily decided to provide. Given that domestic legislation exempted certain categories of convicted prisoner from life imprisonment, this case fell within

Article 5 § 1 for the purposes of Article 14. Lastly, the Court recognised that age and sex were both grounds which were covered by Article 14. Accordingly, Article 5 in conjunction with Article 14 was applicable to the present case.

Next, the Court considered whether the provision which exempted certain categories of convicted prisoner from the life sentence was compliant with the Convention. The test contained two parts: firstly, was there a difference in treatment compared to persons in analogous situations? Secondly, was that difference in treatment objectively and reasonably justified, or was there a relationship of proportionality between the means and the aim? The burden fell on the applicant to identify a difference, then passed to the government to prove that it was justified.

On the first question, the Court accepted that the applicants had been treated differently compared to others in analogous situations. For example, if they had been female or outside the 18-65 age range, and had been convicted of the same offence, they would not have been sentenced to life imprisonment.

On whether that differential treatment was justified or proportionate, the Court set out some observations and general principles, before examining whether the differential treatment of men aged 18-65 was justified in comparison to each of the exempted groups. It recognised the margin of appreciation that States have in the area of penal policy. It noted that the imposition of life sentences is not incompatible with the Convention *per se*. Under the Russian penal code, life sentences were reserved for the most serious offences and were never imposed automatically. Although different treatment on the grounds of sex would require particular justification, it was not for the Court to determine an appropriate sentence in criminal proceedings.

Regarding juvenile delinquents, the Court did not see any reason to question their differential treatment. This was clearly justified on the basis of fundamental physiological differences between young people and adults. Regarding people aged 65 and over, the Court reiterated that a life sentence would only be compatible with Article 3 if there was a realistic prospect of release and the possibility of review. Given that the Russian penal code provided a minimum period of 25 years for a life sentence, the cut-off age of 65 pursued the legitimate aim of ensuring that the possibility of release was not illusory. The State had acted within its margin of appreciation in this respect. Lastly, regarding female offenders, the Court found that the exemption recognised the need, as enshrined in various European and international instruments, to protect women from gender-based

violence, abuse and sexual harassment in prison, as well as the need to protect pregnancy and motherhood. The Court took into consideration data, provided by the Government, which highlighted the relatively small proportion of female inmates, of which very few were serving life sentences. This showed a clear public interest underlying the policy of exempting female prisoners from life sentences.

A prominent strand of the applicants' submissions concerned the alleged evolution of global attitudes towards the general abolition of life sentences, citing the fact that twenty countries now did not provide for its imposition. Whilst the Court agreed that penal policy was an area of development, in that the various rights and freedoms concerned were evolving, it rejected the notion of there being an established consensus. Furthermore, it recognised the margin of appreciation afforded to States in determining matters of penal policy.

Overall, the Court found that there was a reasonable relationship of proportionality between the means employed and the legitimate aim pursued. The impugned exemptions to the general provision for life sentences did not constitute a prohibited difference in treatment for the purposes of Article 14 taken in conjunction with Article 5.

The application of Sharia inheritance law against the wishes of the testator, a Greek citizen belonging to the Muslim minority, violated Article 14 read in conjunction with Article 1 of Protocol No. 1

GRAND CHAMBER JUDGMENT IN THE CASE OF MOLLA SALI v. GREECE

(Application no. 20452/14)
19 December 2018

1. Principal facts

The applicant was a Greek national born in 1950, and at the time of the proceedings she was living in Komotini. Before passing away, the applicant's husband drew up a notarised public will in accordance with the Greek Civil Code. The husband, who was a member of the Thrace Muslim community, bequeathed his whole estate to his wife. The Komotini Court of First Instance approved the will based on the next-of-kin certificate submitted by the applicant, and she proceeded to accept her husband's estate on 6 April 2010 and registered the transferred property in the land registry.

On 12 December 2009, the deceased husband's two sisters challenged the validity of the will before the Rodopi Court of First Instance. The sisters made a claim to three-quarters of the property bequeathed. They reasoned that both the deceased and themselves belonged to the Thrace Muslim community and therefore estate matters were subject to Sharia law, not the Civil Code. The sisters maintained that the application of Sharia law to Greek nationals of Muslim faith was established in the provisions of the 1920 Treaty of Sèvres and the 1923 Treaty of Lausanne, both ratified in Greece. They contended that law of succession for Muslims was intestate rather than testate. If the deceased was survived by close relatives, the will only complemented the intestate succession. On 1 June 2010 the Rodopi Court dismissed the sisters' challenge, holding that applying Sharia law to Greek Muslims created discrimination on religious grounds.

The sisters proceeded to Thrace Court of Appeal where their claim was again dismissed. An appeal was then lodged at the Court of Cassation. On 6 April 2017, the Court of Cassation held that the applicable law to the estate was Sharia law. Specifically, it was noted that the estate had been public land (*mulkia*) belonging to the Ottoman administration and previously governed by Sharia law. Thus, the public will had to be invalid and null since Sharia law did not recognise the

institution. The Court of Cassation remitted the case to the Thrace Court of Appeal whose judgment was in line with the former court and who set aside the Rodopi Court's judgment made on 1 June 2010.

The applicant appealed against the Court of Appeal's judgment to the Court of Cassation, arguing the judgment was insufficiently reasoned regarding whether her husband had been a practising Muslim – a precondition for the application of Sharia law. Secondly, she argued that the incorrect interpretation of the Civil Code created a separate body of law for Greek Muslim nationals even if Muslims did not faithfully adhere to Islamic doctrine. Lastly, she argued that establishing a public will was a right afforded to all Greek citizens regardless of religion. The applicant further argued that applying Sharia law violated individual rights of Muslims under the Greek Constitution and Article 6 as well as Article 1 of Protocol 1 to the ECHR. On 6 April 2017, the applicant's appeal was dismissed without reference to the Convention. The applicant was ultimately deprived of three-quarters of the property bequeathed.

2. Decision of the Court

The applicant alleged a violation of Article 6 alone and in conjunction with Article 14, and Article 1 of Protocol No. 1. The Court, being the master of the characterisation to be given in law to the facts of a case, considered that since the main focus of the case was the Court of Cassation's refusal to apply the law of succession as laid down in the Civil Code for reasons linked to the testator's Muslim faith, the primary issue was whether there had been a difference in treatment amounting to religious discrimination. It therefore decided to consider the case solely under Article 14 of the Convention read in conjunction with Article 1 of Protocol No. 1.

Article 14 in conjunction with Article 1 Protocol No. 1

The Court firstly examined whether the applicant's inability to inherit under a will fell within the scope of Article 1 of Protocol No. 1. Taking into account the steps the applicant took to secure the estate and the challenges that arose from the sisters contesting the validity of the will upon its approval, the applicant would have inherited the estate had the testator not been Muslim. Thus, the proprietary interest in inheriting was sufficient and constituted a possession as stipulated in Article 1 of Protocol No. 1, which meant that Article 14 was applicable.

In considering whether Article 14 has been breached, the Court had to ascertain whether there was a difference in treatment of persons in analogous or similar

situations and if that difference was based on an identifiable characteristic which amounted to discrimination. In the present case, the Court found that there was a difference in treatment between the applicant's situation as a beneficiary of a will drawn up in accordance with the Civil Code by a Muslim testator and that of a non-Muslim testator. It was clear that the applicant would expect, like any other Greek national, that her husband's estate would be settled in accordance with his will. The Court of Cassation's decision to apply Sharia law treated the relatively similar situation differently on the basis of the testator's religion.

The Court proceeded to decide whether there was an objective and reasonable justification for the difference in treatment. The Government submitted that the difference in treatment pursed the legitimate aim of protecting the Thrace Muslim minority. The Court found that it was not necessary to adopt a firm view on the matter and proceeded to consider whether the difference in treatment was proportionate.

The Court firstly discussed the Government's justifications for depriving the applicant of a portion of her property. The justifications included Greece's international obligations and the nature of the property in question constituting *mulkia*. The Court examined the international treaties of Athens, Sèvres, and Lausanne and determined that these international obligations did not require Greece to apply Sharia law or confer any jurisdiction on a special group in relation to religious practices. Additionally, the Court assessed that *mulkia* was only relevant where an estate was governed by a mufti. However, under domestic law, the mufti's area of competence was solely referred to for Islamic wills and intestate succession, and not to other types of inheritance. In this case, the deceased husband clearly requested the notary's services to draw up a will, placing the estate outside the mufti's governance.

The Court also noted the uncertainty within Greek case-law on whether Sharia law was compatible with the principle of equal treatment and international human rights standards. This divergence of judicial opinion undermined legal certainty and was incompatible with the requirements of the rule of law. Several international bodies expressed concern about the application of Sharia law to Greek Muslims, especially in the case of women and children. The Council of Europe Commissioner for Human Rights reported that the application of Sharia law in family and inheritance law was incompatible with the international obligations of Greece. The Commissioner recommended that Greek authorities interpret the Treaty of Lausanne and other relevant treaties in compliance with their obligations under international and European human rights instruments.

The Court concluded that Greece's aim of protecting the Thrace Muslim minority was not proportionate to the measure taken against the applicant's inheritance rights. Freedom of religion does not require States to create a legal framework to grant religious communities a special status with specific privileges. However, where States have granted special status, they must ensure that the criteria to establish special status is applied in a non-discriminatory manner. It cannot be assumed that a Muslim testator has waived their right to not be discriminated against on the basis of religion. Moreover, a person's religious beliefs cannot entail waiving certain rights if that would run counter to important public interest. A State cannot protect a minority group to the detriment of members who subsequently choose not to belong to it or follow its practices and rules. Accordingly, refusing members of a religious minority the right to voluntarily opt for ordinary law amounts to discriminatory treatment and breach of the fundamental right to free self-identification. Self-identification entails the right to choose not to be treated as a member of a minority and must be respected by the other members of the minority and the State. By denying individuals the choice to opt out of a specific legal regime intended to protect Muslims, Greece failed to reach the legitimate aim of protecting the Thrace Muslim minority.

The Court found that the difference of treatment suffered by the applicant, as a beneficiary of a will drawn up in accordance with the Civil Code by a testator of Muslim faith, as compared to a beneficiary of a will drawn up in accordance with the Civil Code by a non-Muslim testator, had no objective and reasonable justification. The Court therefore found that there had been a violation of Article 14 of the Convention read in conjunction with Article 1 of Protocol No. 1 to the Convention.

Article 41

Under Article 41, the Court stated that the issue of just satisfaction was not ready for a decision. The question was reserved with regard to any agreement that might be reached between the State and the applicant within three months' time.

The absence of any legislative or procedural safeguards against domestic violence, and the disproportionate effect this had on women, amounted to a violation of Article 3, as well as a separate violation of Article 3 read in conjunction with Article 14

JUDGMENT IN THE CASE OF VOLODINA v. RUSSIA

(Application no. 41261/17)
9 July 2019

1. Principal facts

The applicant, Ms Valeriya Igorevna Volodina, was a Russian national born in 1985. She secured a legal change of name in August 2018, meaning the name on this application was no longer the one she used.

In November 2014 she entered into a brief relationship with 'S', which ended in May the following year. S proceeded to abuse her over an extended period. This primarily took the form of physical violence, one instance of which led her to require a medically induced abortion. It also involved damage to her property, an attempt on her life, verbal threats, an attempt to plant a tracking device on her and publication of photographs without her consent.

The applicant moved cities to escape S, but this did not stop the abuse. Having moved to Moscow, she uploaded her CV to a job-hunting website and was contacted by D. She arranged a meeting with D and, on getting into D's car, discovered that she had been lured into a trap. D handed the car keys over to S, who proceeded to drive the applicant back to their hometown.

The applicant contacted the police multiple times over the period of abuse, but in most cases these complaints were set aside for procedural or evidential reasons. One exception was the investigation into the publication of the applicant's photographs on social media, however this did not yield any results. She also tried unsuccessfully to apply for State protection, relying on her status as an injured party in a criminal investigation (into the publication of her photographs).

2. Decision of the Court

The applicant complained that the domestic authorities had failed to protect her from repeated acts of domestic violence and to hold her abuser accountable,

amounting to a violation of Article 3 of the Convention. She also complained about the absence of effective prevention mechanisms against domestic violence in Russia, amounting to a violation of Article 13 taken alongside Article 3. Finally, she complained about the disproportionate effect these failures had on women, amounting to a violation of Article 14, taken alongside Article 3.

Article 3

Noting the severity of the abuse allegedly suffered by the applicant, and the likely physical and emotional harm this caused her, the Court found that the present case fell within the ambit of Article 3. The Court read Article 3 alongside Article 1, which obliges Contracting Parties to secure the rights and freedoms contained in the Convention. The positive obligations on the authorities in such a situation were threefold: to establish an effective legal framework to provide protection against ill-treatment, to take reasonable steps to prevent any known risk of mistreatment, and to carry out an effective investigation where an arguable claim has been raised.

The Court found that the respondent State fell short of each of these requirements. Firstly, States were expected to criminalise acts of violence within the family and provide effective sanctions. In Russia, no specific provisions addressing inter-familial violence existed, nor was there a distinct concept of 'domestic violence' in domestic law. The fact that an assault only amounted to a criminal offence following the second instance within a 12-month period breached the Court's caselaw, which prohibits any requirement of minimum severity. The Court dismissed the government's claim that domestic violence was adequately caught by existing provisions. It was not sufficient to rely on private prosecutions, given how onerous these were on victims. At any rate, even if guilt could be established, Russian legislation did not provide effective sanctions such as protective or restraining orders.

On the second point, the Court noted the inadequacy of the State's response to the applicant's complaints in the instant case. Between January 2016 and March 2018, she had contacted the authorities a total of seven times, each time explaining the nature of the violent abuse she was facing, meaning the authorities were aware of the risk posed. Again, the Court noted the absence of protective measures available to victims of domestic violence, such as protection orders, which could have provided some level of safety to the applicant. The authorities had effectively allowed S to continue threatening, harassing, and assaulting the applicant with impunity.

Finally, the Court found that the persistent pattern of setting aside the applicant's complaints by the domestic authorities, and their failure to open a criminal investigation, meant that an effective investigation had not been carried out. Whilst the government argued that other legal avenues had been open to the applicant, such as a civil claim for damages, this was an inadequate option as it could not have led to a prosecution, which was a key requirement in respect of violent acts under Article 3. Overall, the Court found a violation of Article 3.

Article 13

Having found a violation of Article 3, the Court did not consider it necessary to examine whether there had also been a violation under Article 13.

Article 14 in conjunction with Article 3

The applicant complained that the authorities' failure to put in place specific measures to combat gender-based discrimination against women amounted to a breach of Article 14, read alongside Article 3.

The Court reiterated that, in order for an issue to arise under Article 14, there had to be a difference in treatment of persons in analogous situations, without objective and reasonable justification. It recognised the importance of the work of the Committee on the Elimination of Discrimination Against Women (CEDAW), and the CEDAW Convention, in establishing that violence against women is a form of discrimination against women. As concerns the burden of proof within the context of violence against women, once the existence of discriminatory violence has been established, the onus shifts to the State to demonstrate what remedial processes are in place to redress the disadvantage associated with gender and to ensure that women can exercise and fully enjoy all human rights and freedoms on an equal footing with men. The applicant was free to rely on statistical data, and reports by international or academic bodies to establish a *prima facie* indication of the existence of a disproportionate effect of domestic violence against women. Therefore, in determining whether a violation had occurred, the Court applied a two-stage test: first, whether a structural bias existed which disproportionately affected women; second, whether the Russian authorities had taken sufficient steps to counter it.

Considering the first question, whether women were disproportionately affected by domestic violence in Russia, the Court dismissed the government's argument that the applicant was at fault for not submitting precise official data in

support of her complaint. Data showing that women were discriminated against in this context did not readily exist, on account of the fact that 'domestic violence' did not exist as a standalone concept in Russian domestic law. The Court noted the work of numerous international bodies, such as the CEDAW Committee, the UN Special Rapporteur on violence against women, and Human Rights Watch, in highlighting the absence of such data for Russia. The Court accepted the applicant's submission of official data regarding 'crimes committed within the family and household' as a close approximation to the specific issue of disparity in gender-based violence. It noted the general underreporting of domestic violence around the world and accepted that the situation was considerably worse in Russia than in most countries. Taken together, the information provided by the applicant and from international sources was sufficient to establish a *prima facie* indication that women were disproportionately affected by domestic violence in Russia.

The second question was whether the authorities had in place policies aimed at bringing about gender equality. A key shortcoming in Russia was the absence of any specific provision for domestic violence within the domestic legal code. This had been highlighted by various international bodies, including the CEDAW Committee, the Committee on Economic, Social and Cultural Rights and the Committee against Torture and ran in stark contrast to the high prevalence of domestic violence within Russia. Apart from a brief period between July 2016 and January 2017, when a specific offence of battery against 'close persons' was created, the legal framework failed to capture domestic violence. This meant that victims were forced to rely on the more onerous private prosecution procedure, which was considerably less accessible than the public procedure given the need to show a previous administrative sanction within a 12-month period. The domestic authorities had tolerated, for many years, a climate which was conducive to domestic violence. As such, there had been a violation of Article 3 taken in conjunction with Article 14 of the Convention.

Article 41

The Court awarded the applicant €20,000 in respect of non-pecuniary damage, in addition to €5,875.69 for costs and expenses.

The authorities' investigation into the applicant's complaint that she had been forced into prostitution was not adequate and so violated the procedural obligation under Article 4

GRAND CHAMBER JUDGMENT IN THE CASE OF S.M. v. CROATIA

(Application no. 60561/14)
25 June 2020

1. Principal Facts

The applicant was born in 1990 and lived in Z. From 2000 to 2004 she lived with a foster family. She then moved to a public home for children and young persons where she stayed until she completed professional training as a waiter.

On 27 September 2012, the applicant lodged a complaint with the police against T.M., a former policeman, alleging that between the summer of 2011 and September of the same year he had forced her into prostitution using physical and psychological pressure. The applicant relayed that she had met T.M. in 2011 through Facebook and that he had offered to find her a job as a waitress. Instead he had begun demanding that she perform sexual services for other men and would beat her if she did not comply. He gave her a mobile phone so that clients could contact her. The applicant said that she had been too scared of T.M. to resist. T.M. then rented a flat where he and the applicant lived together and she provided sexual services to other men. When she refused he would beat her, which he did every couple of days. Since T.M. lived in the same flat he controlled everything she did.

The applicant went on to say that once when she was left at home with a key she called a friend, M.I., and asked her to help her escape. M.I.'s boyfriend, T.R. then arrived and took her to M.I.'s home, where she stayed for about ten days. M.I. relayed to the police that only after the applicant came to live with M.I. and her mother did M.I. learn where or for whom the applicant was involved in prostitution. The applicant told M.I. that she had used an opportunity to run away from T.M. when he had been out of the flat where they had lived. M.I.'s boyfriend, T.R., had told her that he had spoken with the applicant about the situation but did not give any details.

On 6 November 2012, the County State Attorney's Office indicted T.M. on the charges of forcing another to prostitution, as an aggravated offence of organising prostitution. On 21 December 2012, the applicant was officially given the status of human trafficking victim by the Office for Human and Minority Rights of the Government of Croatia. The Croatian police contacted the Croatian Red Cross, who in turn organised individual counselling for the applicant. The applicant was also provided with legal aid by a non-governmental organisation within the legal-aid scheme supported by the State.

During the applicant's testimony in court she elaborated on her first statement to the police. T.M. however denied the applicant's version of events and instead claimed that she had entered into prostitution in order to pay her debts and to gain money. T.M. had lived with her in the flat where the applicant sometimes met clients, but never compelled her to do anything. On 15 February 2013, the domestic court acquitted T.M. on the grounds that although it had been established that he had organised a prostitution ring, it had not been established that the applicant had been forced into prostitution. As he had been indicted on the aggravated charge, he could not be convicted on the basic charge of organising prostitution.

The applicant's testimony was given less weight in the court's deliberations because the domestic court had found her statement to be incoherent, unsure, and that she had paused and hesitated when speaking. The County Court dismissed the Attorney's Office appeal. The Constitutional Court declared the applicant's complaint inadmissible on 10 June 2014.

2. Decision of the Court

Relying on Articles 3, 4, and 8 of the Convention the applicant complained of the inadequacy of the domestic legal framework and the procedural response of the domestic authorities to her allegations against T.M.. In particular she alleged that the domestic authorities had failed to elucidate all the circumstances of the case, had not secured her adequate participation in the proceedings, and had not properly qualified the offence. In its judgment of 19 July 2018, the Chamber held that there had been a violation of Article 4. At the Government's request under Article 43, the case was referred to the Grand Chamber. Being the master of the characterisation to be given in law to the facts, the Court considered the case solely under Article 4.

Article 4

The present case allowed the Court to clarify its case-law and consider whether trafficking as well as exploitation of prostitution fell within the scope of Article 4. Having regard to its obligation to interpret the Convention in light of present-day conditions and referring to its previous case-law, the Court reiterated that it was not necessary to specify whether human trafficking constitutes slavery, servitude or forced labour under Article 4 since there is no doubt that human trafficking threatens human dignity and runs counter to the spirit and purpose of Article 4. Therefore, human trafficking, as defined by ECAT and the Palermo Protocol, whether national or transnational and whether or not connected with organised crime, falls within the scope of Article 4. This does not however, exclude the possibility that some cases related to human trafficking may raise an issue under another provision. Human trafficking is defined by these international instruments as a combination of the following three elements: (1) an action (such as recruitment, transportation, transfer, harbouring or receipt of persons); (2) means (including the treat or use of force, coercion, abduction, fraud, deception, abuse of power or positions of vulnerability, lending money or benefits); and (3) purpose (such as the exploitation of prostitution).

While the Court considered that it was not necessary to determine whether prostitution was itself contrary to Article 3, it stressed that an issue arose under Article 3 where the prostitution was coerced. Similarly, without coercion, the applicant was not subject to "forced or compulsory labour" within the meaning of Article 4. This term is intended to protect against instances of serious exploitation including forced prostitution irrespective of whether it relates to a human trafficking context.

The Court concluded that it could not attach decisive importance to the fact that the applicant had been granted administrative recognition for her status as a victim of human trafficking by the Human Rights Office since this could not be taken to mean that elements of the offence had been made out. In particular and in this connection, it stressed the protection of the right of the accused to the presumption of innocence and other fair trial guarantees under Article 6.

The present case concerned the State's positive obligation under Article 4 to investigate situations of potential trafficking. The question as to whether this procedural obligation arose had to be assessed at the time the relevant allegations were made and not based on the conclusion reached upon the completion of the investigation. In the present case, the applicant had clearly made an arguable

claim with prima facie evidence that she was a victim of human trafficking and exploitation of prostitution contrary to Article 4. This was evident from the manner in which T.M. allegedly first contacted the applicant, belonging to a vulnerable group, with a promise of employment. Further, T.M. admitted both to using force against the applicant and lending her money which suggested the possibility of debt bondage; all recognised 'means' of trafficking. The circumstances of the case therefore triggered the authorities' procedural obligation to conduct an investigation under Article 4.

While the authorities' reacted promptly to the applicant's allegations, their investigation failed to establish the true nature of her relationship with T.M.; an obvious line of inquiry that should have been pursued. Any lack of action on the victim's part does not justify the authorities' inaction given that they are better placed to conduct the investigation. There was no indication that the authorities inspected T.M.'s Facebook accounts, questioned the applicant's mother who appeared to have had earlier contacts with T.M., or formally questioned the owner of the flat where the applicant lived with T.M. or any neighbours to establish 'the action' of trafficking. Further, although the authorities' questioned the applicant's friend M.I., they failed to question M.I.'s mother and boyfriend who supposedly knew of the applicant's escape from T.M.. Therefore, the Court considered that the authorities had failed to effectively investigate all the relevant circumstances of the case, as a result of which the prosecution essentially relied on the applicant's statements alone against T.M.'s denial in the subsequent court proceedings. In this connection, the Group of Experts on Action against Trafficking in Human Beings (GRETA) and other international bodies had warned against overreliance on the victim's testimony alone given the potential impact of psychological trauma.

In conclusion, there were significant flaws with the authorities' procedural response to the applicant's arguable claim, including the failure to establish the true nature of her relationship with T.M.. Accordingly, there had been a violation of the procedural aspect of Article 4.

Article 41

The Court awarded the applicant €5,000 in respect of non-pecuniary damage and dismissed her claim for costs and expenses since she had been granted legal aid for the proceedings before the Grand Chamber.

Taking account of statistics indicating that the general climate in Albania was conducive to violence against women, the authorities' failure to react with special diligence in conducting a prompt and thorough investigation into an acid attack on a woman violated the procedural aspect of Article 2

JUDGMENT IN THE CASE OF TËRSHANA v. ALBANIA

(Application no. 48756/14)
4 August 2020

1. Principal facts

The applicant was born in 1984 and lived in Tirana, Albania. At around 4pm on 29 July 2009, she suffered grievous injuries in an acid attack by an unidentified assailant while walking along a street in Tirana. The applicant was immediately taken to hospital and was subsequently transferred to a hospital in Italy for specialist medical treatment for medium deep burns caused by sulphuric acid. Between 2009 and 2012 she underwent at least fourteen operations.

While the applicant did not recognise her assailant, she suspected her attack had been organised as an act of revenge by her former partner ("E.A."), who had been violent to her in the past and had also threatened to kill her. The applicant's family members corroborated her account of E.A.'s violence. However, when questioned, E.A. maintained that the had been in Durres (an hour's drive from Tirana) until 6pm that day, an alibi supported by E.A.'s family.

On 29 July 2009, the judicial police officer decided that a number of reports should be drawn up, namely a forensic medical report, a fingerprint expert report on the glass container used for throwing the acid, and two chemical and toxicology expert reports on the container and clothes of the applicant and the other victim (a colleague walking with the applicant). On 30 July 2009 the judicial police officer referred the suspected offence by E.A. to the district prosecutor's office, who subsequently ordered analysis of the fingerprint expert report, forensic medical report and other expert reports; the questioning of every person with any knowledge of the event; the examination of telephone interceptions; the obtaining of telephone records; the finding and verification of phone numbers used by E.A. and the confiscation of CCTV footage.

However, the steps taken failed to identify the assailant. The fingerprint expert report did not identify any fingerprints on the glass container. It was not

possible to identify the assailant from the CCTV footage nor obtain additional footage due to technical issues. Additionally, it was not possible to produce the requested chemical and toxicology reports as the respective institutions lacked the necessary specialised equipment and maintained that the report did not fall within its sphere of competence.

On 2 February 2010 the district prosecutor stayed the investigation, in a decision that was not amenable to appeal. In the subsequent years, the applicant received no official communication relating to the investigation, and as such on 10 March 2012 she authorised the Albanian Centre for the Rehabilitation of Trauma and Torture (the Centre) to pursue her case. On 23 May 2012, the police informed the Centre that the investigation was ongoing. However, on 8 January 2014 the prosecutor informed the Centre that the investigation had been stayed.

2. Decision of the Court

The applicant alleged that there had been violations of the substantive and procedural aspects of the right to life under Article 2 of the Convention. She submitted that the legislative framework in place did not sufficiently protect women against violence, and that in light of data regarding the frequency of violence against women, the authorities ought to have known of the risk and taken the preventive measures necessary to protect the applicant. She further submitted that the investigation had not been effective, thorough and expeditious, and that the authorities had failed to inform her of the progress of the investigation against E.A.

Article 2

The Court first recalled that the protection of Article 2 may be invoked not only in the event of the death of the victim of violent acts but also in situations where the person concerned was the victim of an activity or conduct which by its nature put his or her life at real and imminent risk, and he or she had suffered life-threatening injuries. In the present case the applicant was the subject of a violent attack which resulted in grievous injuries, pain, and disfigurement of twenty five percent of her body. She was sent to hospital in a critical condition and her life would have been in danger if no specialist medical aid had been given. Article 2 was therefore applicable.

Regarding the substantive aspect of Article 2, it was recalled that under Article 2, the State is required not only to refrain from the intentional and unlawful

taking of life but to safeguard the lives of those within its jurisdiction. This primarily involves a duty to secure the right to life by way of effective criminal law provisions backed up by the machinery of law enforcement. When appropriate, authorities may also be obliged to take preventative measures to protect an individual whose life is at risk due to the criminal acts of another. However, this duty must be interpreted in a way which does not impose a disproportionate burden on the authorities. For a positive obligation to arise, it must be shown that the authorities knew (or ought to have known) of the real and immediate risk to the life of the identified individual presented by the criminal acts of the third party. Where this is established, the courts will assess whether the authorities took sufficient measures which might have reasonably been expected to avoid that risk.

With respect to the first limb, it was considered that the criminal law legislative framework in Albania was effective and that action had been taken to open an investigation. Moreover, on the facts of the case, the State's positive obligation to take preventive measures to protect the applicant's life was not triggered. Whilst the applicant suspected E.A. was behind the attack, at no time before the attack did the applicant bring to the authorities' attention the risks posed to her life. Therefore, there was no violation of the substantive limb of Article 2.

Regarding the procedural aspect of Article 2, the Court recalled that the positive obligation to safeguard lives necessitates that, where there is reason to believe an individual has sustained life threatening injuries in suspicious circumstances, there should be some form of effective official investigation capable of establishing the cause of the injuries and identifying those responsible, with a view to their punishment. While obstacles may hamper progress, the authorities' response must be prompt and expeditious, this being essential to maintaining public confidence in the rule of law and preventing any appearance of tolerance of unlawful acts. In addition, to the extent necessary to safeguard their legitimate interests, the investigation must be accessible to the victim's family.

According to a number of national reports, violence against women was a widespread problem in Albania at the time. Further, international reports in respect of Albania repeatedly stressed a high prevalence of violence against women since at least 2003. In addition, international reports also pointed to a general climate of impunity towards perpetrators of violence against women and highlighted that between 2006 and 2012, violence against women was under-reported, under-investigated, under-prosecuted and under-sentenced. It was therefore concluded that, at the time of the attack, there existed in Albania a general climate that was

conducive to violence against women. When an attack happens in such a climate, the investigation assumes a greater importance and requires greater diligence on the behalf of the authorities.

In the present case, although several investigative actions were taken, crucially the authorities failed to establish the nature of the substance found in the container and on the applicant's clothes. The context of the attack, which had the hallmarks of gender-based violence, should have incited the authorities to react with special diligence and vigour. However, the authorities failed to undertake the necessary steps with due expedition and determination. It was also noted that the decision of 2 February 2010 to stay the investigation did not provide any definite answer to the nature of the substance found in on the container and on the clothes. Despite repeated enquiries, the applicant was not given any information about the investigation or documents and therefore could not challenge the action taken, request the authorities to take other measures or bring a claim for damages in the absence of an unidentified perpetrator. In conclusion, the authorities failed to provide an adequate and timely response in accordance with its obligations under Article 2, therefore violating its procedural limb.

Other allegations

The applicant also alleged violations of Article 8 on the basis that the local authorities failed to provide her with psychotherapy or rehabilitation treatment and Article 13 on the grounds that the applicant was neither able to challenge the actions of the prosecution nor seek compensation. Both allegations, in addition to an allegation of discrimination under Article 14, were rejected as inadmissible.

Article 41

The Court ordered that the State pay damages of €12,000 and the applicant's costs and expenses of €2,720, plus interest.

Domestic legislation curtailing male widowers' access to public benefits versus those accessible to female widows was held to be discriminatory on the basis of sex under Article 14 when read in conjunction with Article 8

JUDGMENT IN THE CASE OF B. v. SWITZERLAND

(Application No. 78630/12)
20 October 2020

1. Principal Facts

The applicant was born in 1953 and lived in the Canton of Appenzell Ausserrhoden in Switzerland. After losing his wife in an accident, he stopped work to care full-time for his two children, then aged one year and nine months and four years' old.

On 9 September 2010, after noting that the applicant's younger daughter was about to reach the age of majority, the cantonal Compensation Office terminated the payment of the applicant's widower's pension, in accordance with the provisions of the Federal Law on Old-Age and Survivor's Insurance (*la loi fédérale sur l'assurance-vieillesse et survivants* – "LAVS"). The applicant was 57 at the time and had not been gainfully employed for more than 16 years.

The applicant appealed the decision, invoking the principle of gender equality laid down in the Swiss Constitution, an argument which the Compensation Office rejected. He then appealed to the Cantonal Court, arguing that there was no reason to place him at a disadvantage in relation to a widow. The Cantonal Court dismissed his appeal, observing that the legislature had been aware of the unequal treatment of widows and widowers when drafting and amending LAVS and had taken the view that widowers with childcare responsibilities could be expected to return to work when those responsibilities ended, whereas this could not reasonably be required of women in the same circumstances.

2. Decision of the Court

The applicant complained that he had been discriminated against by comparison to widowed mothers with sole responsibility for raising their children, in violation of Article 14 (prohibition of discrimination) taken together with Article 8 (right to respect for private and family life).

Admissibility

The Court recalled that Article 14 has no "independent existence": it is a supplementary provision of the Convention, providing protection against discrimination in the enjoyment of the rights and freedoms guaranteed by the other normative clauses of the Convention and its Protocols. Accordingly, the facts of the case must fall within the scope of at least one substantive provision of the Convention or its Protocols for a complaint under Article 14 to be admissible.

The Court found that the applicant's complaint fell within the scope of Article 8 because the purpose of a widow's or widower's pension was to relieve the surviving spouse of the need to engage in gainful employment, so that they may care for their children. This benefit was therefore clearly of a "family" nature, as it had a real impact on the organisation of the applicant's family life. Moreover, as the applicant had been 57 years old when he had stopped receiving the pension and 59 when the Federal Supreme Court had delivered its judgment, it would have been difficult for him to return to the labour market, a factor that had had a practical impact on the way in which he had organised his family life.

Accordingly, the Court rejected the Government's submission that the complaint was inadmissible pursuant to Article 35 §3 (a), either by virtue of being incompatible *ratione materiae* with the Convention or manifestly ill-founded, and found Article 14 taken together with Article 8 applicable.

Article 14

The Court noted that a difference in treatment is discriminatory within the meaning of Article 14 if it lacks objective and reasonable justification. Citing prior case-law, it was reiterated that progress towards gender equality had long been an important goal of the CoE's member states and that only "very weighty reasons" could lead to a finding that such differential treatment was compatible with the Convention.

The Court agreed that the applicant could rightly claim to be the victim of discrimination on the ground of sex (being one of the prohibited grounds of discrimination in Article 14), since the payment of his widower's pension had been terminated when his younger daughter had reached the age of majority solely on the basis that he was a man, whereas a widow in the same situation would not have lost her entitlement to a pension.

The Court was prepared to accept the Government's submission that the applicant's treatment was objectively justified based on the reasoning that a presumption underpinned LAVS that a husband was generally responsible for his wife's maintenance, and consequently that widows should be afforded greater protection than widowers.

However, the Court did not agree that there were "very weighty reasons" capable of justifying the difference in treatment complained of as being reasonable. The unequal treatment provided for in LAVS may have been justified by the role and status assigned to women in Swiss society at the time of the adoption of the legislation in 1948; however, the Convention is a "living instrument" to be interpreted in light of current living conditions and prevailing public perception in democratic states today. Furthermore, references to traditions, general assumptions or prevailing social attitudes in a particular country were insufficient nowadays to justify a difference in treatment on grounds of sex. It followed, therefore, that the Government could not rely on the presumption that a husband provides for his wife financially (the "breadwinner" concept) to justify a difference in treatment that places widowers at a disadvantage compared with widows.

The Court also noted that the Swiss Federal Court had already accepted that the provisions in LAVS were clearly contrary to the principle of equality set out in the Swiss Constitution, and that the Swiss legislature, though aware of the non-conformity, had never subsequently remedied it despite efforts to do so.

Referring more specifically to the facts, the Court failed to see why the applicant would have had less difficulty returning to the labour market aged 57, after 16 years out of the job market, than a woman in a similar situation, or why the termination of the pension would have affected him to a lesser extent than a widow in comparable circumstances.

Accordingly, the Court concluded that since "very weighty reasons" had not been provided, the Government had failed to provide a reasonable justification for the difference in treatment on grounds of sex complained of by the applicant. There had therefore been a violation of Article 14 taken together with Article 8. However, the Court stressed that this conclusion was not to be construed as an encouragement to abolish or reduce the corresponding pension paid to women in order to redress the inequality in treatment it had found.

Article 41

The Court awarded the applicant €5,000 in respect of non-pecuniary damage and €6,380 for costs and expenses.

The Croatian authorities' response to a violent homophobic attack was ineffective and in violation of Article 3 in conjunction with Article 14 of the Convention

JUDGMENT IN THE CASE OF SABALIĆ v. CROATIA

(Application no. 50231/13)
14 January 2021

1. Principal facts

The applicant was born in 1982 and lived in Zagreb. On 13 January 2010 she was physically attacked at a nightclub in Zagreb by M.M. The police report immediately following the attack read: the applicant "was approached by an unidentified man who started flirting with her but she was constantly refusing him. After the nightclub closed they were all standing in front of it and the man continued pressing [the applicant] to be with him. When she said that she was a 'lesbian' he grabbed her with both of his arms and pushed her against a wall. He then started hitting her all over her body and when she fell to the ground he continued kicking her. ..." M.M. also shouted "All of you should be killed!" and "I will f... you, lesbian!" The applicant sustained multiple injuries all over her body for which she was treated in hospital.

On 14 January 2010 the police instituted minor offences proceedings in the Minor Offences Court against M.M. for breach of public peace and order. M.M. confessed to the charges against him. No further evidence was taken and the applicant was not informed of the proceedings. M.M. was found guilty and fined 300 Croatian kunas (approximately €40).

On 29 December 2010 the applicant lodged a criminal complaint with the Zagreb Municipal State Attorney's Office ("the State Attorney's Office") against M.M., after having realised that the police had failed to institute a criminal investigation. The State Attorney's Office rejected the complaint: M.M. had already been prosecuted in the minor offences proceedings; therefore, criminal prosecution would contravene the *ne bis in idem* principle.

On 26 October 2011 the applicant took over the prosecution as a subsidiary prosecutor in Zagreb Municipal Criminal Court ("the Criminal Court) against M.M. on charges of attempted grave bodily and violent behaviour, motivated by the hate crime element and the criminal offence of discrimination. She contended that the State Attorney's Office had misinterpreted the law on the ***ne bis in idem***

principle and that the matter had not been finally adjudicated. She further argued that the minor offences proceedings had fallen short of the authorities' duty to investigate and effectively prosecute hate crime. The Criminal Court rejected the applicant's indictment. This decision was upheld on appeal by the County Court on 9 October 2012.

On 5 December 2012 the applicant lodged a complaint with the Constitutional Court, referring to the European Court of Human Rights' case-law concerning the State's procedural obligation to investigate acts of violence and hate crime, and complaining of the ineffectiveness of the domestic authorities in addressing her complaints effectively. She also contended that the lower authorities had misinterpreted the relevant law on the application of the *ne bis in idem* principle and thus erred in their assessment that the matter had been *res judicata*. On 31 January 2013 the Constitutional Court declared the applicant's constitutional complaint inadmissible.

2. Decision of the Court

The applicant complained of a lack of an appropriate response of the domestic authorities to the act of violence against her, motivated by her sexual orientation. She relied on Articles 3, 8 and 14 of the Convention.

Article 3 in conjunction with Article 14

In general, ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3. Ill-treatment that attains such a minimum level of severity usually involves actual bodily injury or intense physical or mental suffering. However, even in the absence of these aspects, where treatment humiliates or debases an individual, showing a lack of respect for or diminishing his or her human dignity, or arouses feelings of fear, anguish or inferiority capable of breaking an individual's moral and physical resistance, it may be characterised as degrading and also fall within the prohibition set forth in Article 3. Discriminatory treatment as such can in principle amount to degrading treatment within the meaning of Article 3, where it attains a level of severity such as to constitute an affront to human dignity. The Court held that this is particularly true for violent hate crime.

Taking into account the 13 January 2010 police report, there was sufficient evidence to conclude that the attack against the applicant was influenced by her sexual orientation. Therefore, the treatment to which the applicant was subjected and which was directed at her identity and undermined her integrity

and dignity, must necessarily have aroused in her feelings of fear, anguish and insecurity reaching the requisite threshold of severity to fall under Article 3 of the Convention.

The police had immediately responded at the scene and made initial findings, which presented *prima facie* indications of violence motivated by, or at least influenced by, the applicant's sexual orientation. According to the Court's case-law, this mandated an effective application of domestic criminal-law mechanisms in order to elucidate the possible hate motive with homophobic overtones and to identify and, if appropriate, adequately punish those responsible.

The police were under a duty to lodge a criminal complaint with the State Attorney's Office, which was competent to conduct further official investigations into the indications of violent hate crime even in cases of only minor bodily injuries. The police failed to lodge any such complaint.

Furthermore, M.M.'s sentence in the minor offences proceedings was manifestly disproportionate to the gravity of the ill-treatment suffered by the applicant. The proceedings had not in any manner addressed the hate crime element to the physical attack, nor had M.M been indicted or convicted of any charges related to violence motivated by discrimination. Such a response was not capable of demonstrating the State's Convention commitment to ensuring that homophobic ill-treatment does not remain ignored by the relevant authorities and to providing effective protection against acts of ill-treatment motivated by the applicant's sexual orientation.

The State Attorney's Office and the criminal courts had found that M.M.'s final conviction in the minor offences proceedings had created a formal impediment to his criminal prosecution for the violent hate crime on the grounds of the *ne bis in idem* principle. However, Article 4 § 2 of Protocol No. 7 sets a limit on the application of the principle, expressly permitting States to reopen a case where a fundamental defect is detected in the proceedings. Here, both the failure to investigate hate motives behind a violent attack and the failure to take into consideration such motives in determining the punishment for violent hate crimes, amounted to such "fundamental defects".

The domestic authorities had themselves brought about the situation in which they, by unnecessarily instituting the ineffective minor offences proceedings, had undermined the possibility to put properly into practice the relevant provisions and requirements of the domestic criminal law. They then failed to remedy the

impugned situation, although it could not be said that there were *de jure* obstacles to do so.

By instituting the ineffective minor offences proceedings and as a result erroneously discontinuing the criminal proceedings on formal grounds, the domestic authorities failed to discharge adequately and effectively their procedural obligation under the Convention concerning the violent attack against the applicant motivated by her sexual orientation. Such conduct of the authorities was contrary to their duty to combat impunity for hate crimes which are particularly destructive of fundamental human rights. Accordingly, there had been a violation of Article 3 under its procedural aspect in conjunction with Article 14 of the Convention.

Article 41

The Court awarded the applicant €10,000 in respect of non-pecuniary damage and €5,200 for costs and expenses.

Refusing employment-related benefit to a pregnant woman who underwent in vitro fertilisation shortly before employment constituted discriminatory treatment on the basis of sex in violation of Article 14 in conjunction with Article 1 of Protocol 1

JUDGMENT IN THE CASE OF JURČIĆ v. CROATIA

(Application no. 54711/15)
4 February 2021

1. Principal facts

The applicant was born in 1975 and lived in Rijeka, Croatia. On 17 November 2009 she underwent *in vitro* fertilisation ("IVF"), following which the doctor recommended she take rest. Ten days later, the applicant entered into an employment contract with company N ("the company"). The company was headquartered near Split, about 360 kilometres away from the applicant's place of residence. The applicant was registered on 11 December 2009 as an insured employee with the Croatian Health Insurance Fund ("the Fund").

On 14 December 2009 the applicant's doctor established that the IVF had been successful and informed the applicant that she needed to rest, owing to pregnancy-related complications. A period of sick leave was thus prescribed. On 28 December 2009 the applicant filed a request for salary compensation during her sick leave on account of pregnancy-related complications.

On 16 February 2010 the Fund re-examined the applicant's health insurance status, rejecting her application for insurance and salary compensation due to sick leave. The Fund contended that when the applicant had taken up her employment she had been medically unfit to do so, because she had undergone IVF ten days earlier. It therefore considered that the applicant's employment was fictitious and aimed solely at obtaining pecuniary advantages.

The applicant challenged this decision before the Central Office of the Fund, arguing that there had been no reason for her to miss out on an opportunity to take up employment, given that she had felt well after undergoing the IVF and had had no way of knowing whether the implantation would be successful. A report by a gynaecology and obstetrics specialist dated 3 March 2010 supported this claim. The Central Office dismissed the appeal, as did the High Administrative Court, to which the applicant appealed next.

The applicant then lodged complaints with the Constitutional Court and the Gender Equality Ombudsperson. The Ombudsperson issued a warning to the Fund that its decision had violated the prohibition of less favourable treatment on grounds of pregnancy, and that this constituted discrimination based on sex. On 22 April 2015 the Constitutional Court dismissed the applicant's complaint as unfounded.

2. Decision of the Court

The applicant complained that she had been discriminated against, as a pregnant woman who had undergone IVF, in the revocation of her status as an insured employee, contrary to Article 14 read in conjunction with Article 1 of Protocol No. 1 to the Convention.

Article 14 in conjunction with Article 1 of Protocol 1

Article 14 was applicable in conjunction with Article 1 of Protocol 1. Article 14 affords protection against different treatment, without objective and reasonable justification, of individuals in relevantly similar situations. For the purposes of Article 14, a difference in treatment is discriminatory if it does not pursue a legitimate aim, or if there is no reasonable relationship of proportionality between the means employed and the aim sought to be realised.

The applicant was refused the status of an insured employee and an employment-related benefit, on the basis that her employment had been declared fictitious due to her pregnancy. Such a decision could only have been adopted in respect of a woman. Therefore, such a decision constituted a difference in treatment on grounds of sex. The Government argued that this difference in treatment was justified, in order to protect public resources from fraudulent misuse, and the overall stability of the healthcare system. However, a woman's pregnancy could not be considered fraudulent behaviour, and financial obligations imposed on the State during a woman's pregnancy by themselves could not constitute sufficient reasons to justify difference in treatment on the basis of sex.

The relevant authorities had been entitled to review the applicant's health insurance status under the applicable legislation, under suspicion that the applicant had concluded her employment agreement only to be able to claim an employment-related benefit. However, such reviews in practice frequently targeted pregnant women. Women who had concluded an employment contract at an advanced stage of their pregnancies or with close family members had

automatically been put in the "suspicious" category of employees. Such an approach was generally problematic.

Because her doctor had recommended rest following her IVF ten days before, the authorities had concluded that the applicant had been unfit to work on the date of concluding her contract. In particular, they had relied on the fact that the applicant had been expected to work at the employer's headquarters, located far from her place of residence, and that travel in her condition carried risks to successful fertilisation. As a matter of principle, even where the availability of an employee was a precondition for the proper performance of an employment contract, the protection afforded to women during pregnancy could not be dependent on whether her presence at work during maternity was essential for the proper functioning of her employer, or by the fact that she was temporarily prevented from performing the work for which she had been hired. Moreover, introducing maternity protection measures was essential to uphold the principle of equal treatment of men and women in employment.

By concluding that, due to the IVF, the applicant had been medically unfit to take up the employment in question, the domestic authorities had implied that she had to refrain from doing so until her pregnancy had been confirmed. That conclusion was in direct contravention to both domestic and international law.

The foregoing was sufficient to conclude that the applicant had been discriminated against on the basis of her sex. However, the Court found it necessary to point out some additional factors, which had made the difference in treatment even more striking: 1) the applicant had regularly paid contributions to the compulsory health insurance scheme during her fourteen years of prior work experience; 2) the applicant had had no way of knowing when entering into her employment whether the IVF procedure had been successful, nor could she have known that her future pregnancy, if any, would have resulted in complications requiring her to be issued sick leave for a prolonged period of time; 3) the authorities had failed to explain how the applicant could have consciously concluded a fraudulent employment contract, without even knowing whether she would actually become pregnant, particularly bearing in mind that she had not been under any legal obligation to report the fact that she had undergone the IVF procedure or that she might be pregnant while concluding the contract. Asking a woman information about her possible pregnancy, or obliging her to report such a fact at the moment of recruitment, would have amounted to direct discrimination based on sex; 4) the authorities had reached their conclusion without assessing whether the applicant had ever started performing her work assignments for

the employer; nor had they sought to establish whether the IVF procedure had necessitated her absence from work due to health reasons. There was also nothing to show that women who had undergone the IVF procedure would generally be unable to work during their fertility treatment or pregnancy; 5) the Court expressed concern that the domestic authorities' conclusion had implied that women should not work or seek employment during pregnancy. Such gender stereotyping presented a serious obstacle to the achievement of real substantive gender equality, one of the major goals of the member States of the CoE. Such considerations had not only been found to breach domestic law but had also been at odds with international gender equality standards.

Accordingly, the Court found that there had been a violation of Article 14 in conjunction with Article 1 of Protocol 1. Refusal to employ or recognise an employment-related benefit to a pregnant woman based on her pregnancy amounted to direct discrimination on grounds of sex, which could not be justified by the financial interests of the State. The difference in treatment to which the applicant, as a woman who had become pregnant through IVF, had been subjected, had not been objectively justified or necessary.

Article 41

The Court awarded the applicant €7,500 in respect of non-pecuniary damage and €1,150 for costs and expenses.

Certain passages of the Italian appeal court's judgment breached the presumed victim of gender-based violence's right to respect for private life and personal integrity

JUDGMENT IN THE CASE OF J.L. v. ITALY

(Application No. 5671/16)
27 May 2021

1. Principal Facts

The applicant, J.L., was born in 1986 and lived in Scandicci, in the Tuscany region of Italy. At the relevant time she was an art history and drama student.

In July 2008 the applicant lodged a complaint with the Italian authorities alleging that she was the victim of a gang rape that had taken place following an evening event in Florence, Italy on 25 July 2008. She claimed that at the end of the evening, to which she had been invited by one of the alleged assailants, L.L., she had been obliged to have sexual relations in a car with seven men while under the influence of alcohol.

In January 2013, the Florence Court convicted six of the seven men of having induced an individual in a state of physical and psychological weakness to perform or comply with acts of a sexual nature (an offence punishable under Article 609 *bis* 1, taken together with Article 609 *octies* of the Italian Criminal Code). All six men were acquitted of an additional charge of sexual violence (punishable under Article 609 *bis* 1). The seventh man was acquitted on both counts.

The judge at first instance refused to allow journalists present in the room to film the proceedings, while minutes of the trial show that the judge intervened repeatedly to prevent the defence lawyers from asking questions that the applicant had already addressed, were not relevant, or were of a strictly personal nature. The judge also allowed short recesses to allow the applicant to recover her composure.

The six convicted men lodged an appeal, which was heard by the Florence Court of Appeal (the "Court of Appeal"), which acquitted all six men in June 2015. The Court of Appeal held that the defendants should be acquitted on the grounds that the material element of the offence of sexual violence, characterised by the abuse of a state of inferiority of the victim, could not be made out. The

Court of Appeal considered that the numerous inconsistencies noted by the first-instance court in the applicant's account of events undermined her credibility in its entirety. For that reason, it considered that the first-instance court had been wrong to carry out what it considered a fragmented assessment of the applicant's various statements and to accept her credibility with regard to some of the facts.

In July 2015 the applicant asked the Italian public prosecutor's office to lodge an appeal on points of law, challenging the reasons given in the Court of Appeal's judgment. The public prosecutor's office declined to do so, and the judgment became final.

2. Decision of the Court

The applicant claimed that the Italian authorities had, during the criminal investigation and proceedings, failed to protect her right to private life and personal integrity in breach of Article 8 of the Convention. In addition, she claimed that she had been discriminated against on grounds of sex, alleging that the acquittal of her presumed assailants and the negative attitude of the national authorities during the criminal proceedings could be attributed to sexist bias, in breach of Article 14 taken together with Article 8 of the Convention.

Admissibility

The Government submitted that the applicant did not satisfy the status of 'victim' for the purposes of Article 8. The Court noted that this submission related in substance to the question of whether or not there had been an attack on the applicant's personal integrity and her right to respect for her private life. Accordingly, the Court decided to examine this objection alongside the substantive merits of the complaint.

Article 8

The applicant made various submissions regarding her Article 8 rights, primarily due to the 'continuous and unjustified interference' into her private life by the authorities throughout the criminal investigation and proceedings, in breach of the positive obligation under Article 8 to protect her as a female victim of sexual violence. She also argued that the Court of Appeal's judgment reproduced a 'restrictive and outdated' concept of sexual violence, in breach of principles set out in earlier jurisprudence of the Court.

The Court noted that the applicant was not alleging that the conduct of the investigation had been characterised by shortcomings and manifest delays or that the authorities had failed to carry out measures of judicial investigation. What she sought to demonstrate was that the manner in which the investigation and the trial had been conducted had been traumatising for her and that the authorities' attitude towards her had violated her personal integrity. The Court noted that she complained, in particular, about (a) the way in which she had been questioned throughout the criminal investigation and proceedings; and (b) the arguments on which the judges had relied in reaching their decisions in this case.

The Court noted that Article 8 imposes positive obligations to adopt penal provisions to criminalise and effectively punish non-consensual sexual acts, and to implement those provisions in practice by effective investigation and prosecution. Moreover, in the context of criminal proceedings, special protective measures may be taken to protect a victim, including adequate care for the victim during the criminal proceedings with the aim of protecting them from secondary victimisation. The issue before the Court was whether the applicant benefited from effective protection of her rights as a presumed victim, or whether the investigatory and prosecutorial mechanisms provided for under Italian criminal law were so deficient in this case to the point of violating the Government's Article 8 positive obligations.

With respect to the conduct of the preliminary criminal investigation, the Court considered that there had been no disrespectful or intimidating attitude on the part of the authorities, and that questions put to the applicant were relevant and intended to obtain a reconstruction of events taking account of her arguments and points of view, and allowing for the preparation of a thorough investigation file. While a difficult experience, the Court did not conclude that the manner of the interviews had exposed the applicant to unjustified trauma or a disproportionate interference with her intimate and private life.

With regard to the cross-examination, the manner in which a presumed victim of sexual offences is interviewed must strike a fair balance between protecting their personal integrity and the right to be heard. The Court noted that the defendants' legal counsel did not hesitate to undermine the applicant's credibility, and to ask questions about her family life, sexual orientation and intimate choices, in a manner sometimes unrelated to the facts. However, it noted that the judge at first instance took the step of prohibiting journalists present from filming the proceedings, and intervened to prevent defence counsel from asking redundant or personal questions unrelated to the facts, as well as allowing the applicant short recesses to recover her composure.

Accordingly, while the Court agreed that the proceedings were a painful ordeal for the applicant, it could not attribute responsibility for the distress caused to the public authorities prosecuting the case, nor did it consider that the personal integrity of the applicant had not been properly protected during the trial.

Turning to the content of the judicial decisions, the Court did not engage in an assessment of the facts *per se*, given that this was an area outside its competence. However, the Court did highlight several sections of the Court of Appeal's judgment which were, in its view, unjustified, "regrettable and irrelevant".

The Court particularly took issue with: (i) references to the red lingerie "shown" by the applicant in the course of the evening when the events took place; (ii) comments regarding her bisexuality, relationships and casual sexual relations prior to the events, particularly comments about her "non-linear life"; (iii) the Court of Appeal's view that the applicant had an "ambivalent attitude towards sex", particularly in light of her artistic decisions (such as appearing in a film alongside L.L., one of the defendants, in the role of a prostitute a few months prior to the events); and (iv) the Court of Appeal's remarks concerning the applicant's decision to lodge a complaint to "denounce" the defendants and to repudiate "a moment of fragility and weakness that was open to criticism".

The Court considered that the above arguments and considerations given by the Court of Appeal had been neither relevant for the assessment of the applicant's credibility, a matter which could have been examined in the light of the numerous objective findings of the investigation, nor decisive in resolving the case. Accordingly, it concluded that it could not be considered that that the interference with the applicant's private life and image was justified by the need to safeguard the defendants' rights of defence.

The positive obligations inherent in Article 8 to protect the alleged victims of gender-based violence also imposed a duty on the State to protect the image, dignity and private life of the victim, including through the non-disclosure of unrelated personal information and data. Accordingly, judicial freedom of expression must necessarily be limited by the obligation to protect the image and private life of litigants.

The Court noted reports by the UN and GREVIO on the elimination of discrimination against women in Italy, concluding that these reports demonstrated the persistence of stereotypes regarding the role of women in Italian society and the resistance of that society to the cause of sexual equality. Furthermore, the

language and arguments used by the Court of Appeal conveyed prejudices about the role of women in Italian society, and were likely to impede the effective protection of the rights of victims of gender-based violence, in spite of the existence of a satisfactory legislative framework in Italy.

Going further, the Court added that criminal prosecution and punishment play a crucial role in the institutional response to gender-based violence and in combatting gender inequality. It is therefore essential that judicial authorities avoid (i) reproducing gender stereotypes in court decisions, (ii) minimising gender-based violence and (iii) exposing women to "secondary victimisation" by using "guilt-inducing and moralising" language that discourages victims' trust in the justice system.

Accordingly, the Court concluded that while the Italian authorities had sought to ensure that the investigation and trial proceedings had been conducted in a manner compatible with their positive obligations under Article 8 of the Convention, the Court considered that the applicant's rights and interests under Article 8 had not been adequately protected, given the wording of the judgment delivered by the Florence Court of Appeal. Rejecting the Government's submission that the applicant did not qualify for victim status, it concluded that there had therefore been a violation of Article 8 of the Convention.

Article 14

The Court, in light of the reasoning and conclusions it had reached in respect of Article 8, deemed it unnecessary to examine whether there had been a violation of Article 14.

Article 41

The Court awarded the applicant damages of €12,000 in respect of non-pecuniary damage and €1,600 for costs and expenses.

The authorities' response to domestic violence incidents preceding the fatal shooting of the victim's son, by her husband and abuser, satisfied the positive obligations triggered under Article 2

GRAND CHAMBER JUDGMENT IN THE CASE OF KURT v. AUSTRIA

(Application no. 62903/15)
15 June 2021

1. Principal facts

The applicant, Ms Senay Kurt, was born in 1978 and lived in Unterwagram. She married E in 2003 and they had two children, A and B, born in 2004 and 2005 respectively.

In July 2010, the applicant reported to the police that her husband had beaten her. She alleged that this had been happening over several years. Pursuant to s. 38a of the Security Police Act, the authorities informed the applicant, via a leaflet, of the possibility of obtaining a temporary restraining order. Criminal proceedings were instituted, and E was convicted, in January 2011, of bodily harm and making dangerous threats.

The applicant filed for divorce on 22 May 2012. On the same day, she reported E to the police for rape and making dangerous threats three days prior. She reported that her husband's gambling addiction had resumed in February 2012. He had previously told her that if his addiction resumed, she could leave him. In contemplation of a possible separation, E's violent behaviour had intensified from March 2012, including near-daily threats ("I will kill you", "I will kill our children in front of you", I will hurt your brother's children if I am expelled to Turkey", and "I will hang myself in front of your parents' door") and culminating in the rape on 19 May 2012. The police took pictures, conducted an online search, and checked the firearms registry. All parties, including the children, were questioned by the police, who issued a barring and protection order pursuant to s. 38a of the Security Police Act.

On 25 May 2012, E went to A and B's school and asked A's teacher if he could speak to his son in private, to give him some money. A's teacher, who at that point did not know anything about the family circumstances, later found A in the school basement, having been shot in the head. His sister, B, had witnessed

the shooting but was uninjured. Later that morning, E was found dead in his car, having committed suicide by shooting himself. The police questioned several witnesses, including the applicant and B.

On 11 February 2014, the applicant instituted official liability proceedings. She contended that E should have been held in pre-trial detention on 22 May 2012 on the basis that there had been a real and immediate risk that he would reoffend against his family. Her claim was dismissed on 14 November 2014, with the St Pölten Regional Court holding that, taking into account the information available to the authorities at the time, there had not been an immediate risk to A's life. The applicant appealed, unsuccessfully, to both the Vienna Court of Appeal and the Supreme Court. The latter handed its judgment down on 16 June 2015.

2. Decision of the Court

The applicant complained that the domestic authorities had failed to comply with their positive obligations under Article 2 to protect her son's life. She further complained that she had been discriminated against as a woman, in contravention of Article 14 of the Convention. A Chamber of the Court found, on 4 July 2019, that there had been no violation of Article 2 under its substantive limb. It agreed with the domestic courts that, based on the information available at the time, the authorities had been entitled to conclude that the barring and protection order would be sufficient for the protection of the applicant and her children. Regarding the lack of a regulatory framework allowing such an order for childcare facilities, the Chamber found that there had been no discernible risk to the applicant's son's life when he was in school. The case was referred to the Grand Chamber at the applicant's request.

Article 2

The applicant argued that the *Osman v. the United Kingdom*[333] principles applied to incident-type situations, whereas her situation of ongoing abuse required a context-sensitive assessment as applied by the Court in *Talpis v. Italy*,[334] and *Volodina v. Russia*.[335] The key distinction she drew was between static threats and those which developed over time, with her own domestic violence situation falling into the latter category, hence the need to take account of the developing

[333] *Osman v. the United Kingdom*, Grand Chamber judgment of 28 October 1998, no. 23452/94.

[334] *Talpis v. Italy*, judgment of 2 March 2017, no. 41237/14.

[335] *Volodina v. Russia*, judgment of 9 July 2019, no. 41261/17 (included as a summary in this publication).

context. She complained that the authorities' efforts had been focussed on protecting her, neglecting the risk posed to her children. Given the extensive list of risk factors of which she had informed the authorities, they had failed to take the necessary preventive measures, such as taking E into pre-trial detention. She further submitted that the authorities had failed to take into account the specific context of domestic violence and that the police had failed to make use of a specific risk assessment tool designed for domestic violence cases.

The Grand Chamber received interventions from numerous third-party interveners, including GREVIO, the European Human Rights Advocacy Centre (EHRAC) and Equality Now, the Federal Association of Austrian Centres for Protection from Violence, and other smaller groups. GREVIO, as the body mandated to monitor the Istanbul Convention, submitted that a gendered understanding of domestic violence (as per the Istanbul Convention) could only be achieved if the national authorities in charge of preventing the relevant offences and protecting the victims took account of the specific nature of domestic violence.

The Court reiterated the *Osman* test concerning States' positive obligations under Article 2. For a positive obligation to arise, it must be established that the authorities knew or ought to have known at the relevant time of the existence of a real and immediate risk to the life of an identified individual from the criminal acts of a third party and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk. Not every claimed risk to life can give rise to an obligation for the State to take preventative measures. Furthermore, any analysis under this test must take account of both the adequacy of the assessment of the risk and of the preventative measures taken.

The Court considered the various positive obligations which may arise under Article 2 in the context of domestic violence:

Whether the authorities acted immediately to the allegations of domestic violence

The authorities should act immediately, and with special diligence, in response to allegations of domestic violence. A failure to do so would undermine a complaint and create a situation of impunity. The Court noted that there were no delays in the present case. Furthermore, the police accompanied the applicant home after she reported her husband, to protect her from any initial reaction from him. One of the police officers was specially trained in handling domestic violence cases. As such, the authorities displayed the required special diligence in their immediate response to the applicant's allegations.

The quality of the risk assessment

The authorities are under a duty to carry out a lethality risk assessment which is autonomous, proactive and comprehensive. The first two terms refer to the requirement for the authorities to look beyond the victim's personal perception of the risk. While their perception is relevant, the authorities must not depend on the victim's statements alone. "Comprehensiveness" entails the use of checklists and standardised risk assessment tools to guarantee a complete analysis. Finally, the requirement of immediacy, as per the *Osman* test, obliges the authorities to consider the special features of domestic violence cases, such as a tendency to increase in frequency over time.

In the present case, the Court considered that the risk assessment was carried out autonomously and proactively. The police questioned all parties involved on the day they received the applicant's report, the applicant underwent a medical examination and the police further carried out an online search of the records regarding the previous barring and protection orders and temporary restraining orders and injunctions issued against E. They found that he had one previous conviction for domestic violence and had been issued with a barring and protection order two years earlier. The risk assessment tool was thorough, and considered major risk factors including the circumstances of the rape, E's history of violence and personal behaviour, as well as the fact that there were no firearms registered in E's name. Accordingly, the authorities had demonstrated that they had duly taken into account the domestic violence context of the instant case.

Turning to the threats, the Court noted that the authorities did not overlook the death threats made by E to the applicant. The public prosecutor was duly informed of the threats, enabling him to order further investigative steps and initiate criminal proceedings. As such, the Court found that the risk assessment carried out by the authorities as regards the applicant fulfilled the requirements of being autonomous, proactive and comprehensive.

Whether the authorities knew or ought to have known that there was a real and immediate risk to the life of the applicant's son

Having established, based on the information available to the authorities at the time, that there is a real and immediate risk to life, the positive obligation to take operational measures is triggered. The suitability of any measures taken is closely linked to the legal toolbox available to the authorities. This also includes

the availability of preventative measures such as coordinated support services for victims of domestic violence. Any preventative measures taken must be proportionate.

Regarding the issue of pre-trial detention, the Court stressed that, although the second limb of Article 5 § 1 (c) provides a distinct ground of detention independent of the existence of a reasonable suspicion of a person having committed an offence, this does not permit a general policy of prevention directed against individuals who are perceived by the authorities as being dangerous. For pre-trial detention under this provision to be justified, the authorities must convincingly show that the person concerned would in all likelihood have been involved in the concrete and specific offence, had its commission not been prevented by the detention.

On the basis of the evidence known to the authorities at the relevant time in the present case, the authorities concluded that the applicant was at risk of further violence and issued a barring and protection order against E under s. 38a of the Security Police Act. The Court considered that carrying out a separate risk assessment in respect of the children would not have changed the situation, given that they benefitted from the same protection as their mother, in the form of the barring and protection order. Concerning the applicant's submission that the authorities ought to have taken E into pre-trial detention, the Court found that E.'s threats were not deemed sufficiently serious or credible by the authorities to point to a lethality risk that would have justified pre-trial detention or other more stringent preventive measures than the barring and protection order.

The Court was critical of the weight placed on the calm demeanour of the applicant's husband towards the police, which can be misleading in a domestic violence context and should not be decisive in a risk assessment. However it did not consider that this factor was sufficient to alter the conclusion that there was no lethality risk posed to the children. As such, the Court agreed with the Government that, on the basis of what was known at the time, there were no indications of a real and immediate risk of further violence against the applicant's son outside of the areas for which the barring order had been issued.

Conclusion

Overall, the Court found that the authorities displayed the required special diligence in responding to the applicant's allegations of domestic violence. The risk assessment they conducted was autonomous, proactive and comprehensive which, although led them to issue a barring and protection order, did not indicate

a real and immediate lethality risk to the applicant's son. Accordingly, there had been no violation of Article 2.

Article 14

The applicant complained that by failing to protect her from domestic violence, the State had discriminated against her as a woman, in violation of Article 14. However, given that the applicant did not raise this complaint with the Court until her submissions to the Grand Chamber, it was submitted outside the six-month time limit provided for by Article 35 § 1. As such, the applicant's complaint under Article 14 was declared inadmissible.

No violation of Article 4 of Protocol No. 7 for the duplication of proceedings in the context of domestic violence

JUDGMENT IN THE CASE OF GALOVIĆ v. CROATIA

(Application no. 45512/11)
31 August 2021

1. Principal Facts

The applicant, Mr Miljenko Galović, was a Croatian national born in 1957. From October 2006 to November 2008, he was found guilty of five minor offences of domestic violence under the Protection against Domestic Violence Act by the Zagreb Minor Offences Court. These incidents involved offences against his wife, son and two daughters, one of which was a minor. On 17 November 2008, the applicant was sentenced to thirty days' imprisonment for verbally insulting his wife and daughter, threatening to kill his wife and causing injury to her head. The Minor Offences Court revoked the applicant's previous suspended sentence and imposed a sentence of 112 days' imprisonment in total.

Subsequently, the applicant was indicted before the Zagreb Municipal Criminal Court. The indictment included four counts of domestic violence and one count of child neglect and abuse as defined in the Criminal Code, perpetrated in the period between February 2005 and November 2008. On 14 July 2009, the applicant was found guilty of those charges and was sentenced cumulatively to five years' imprisonment.

Subsequently, the applicant lodged a request for review of the judgment, which was accepted by the Supreme Court and remitted back to the County Court. On 12 February 2010, the County Court notified the applicant and his officially appointed defence lawyer that the appeal session was scheduled for 16 February 2010. The applicant complained that four days' notice was insufficient for him to prepare a defence and contact a lawyer. The appeal session took place as scheduled, but the applicant and his officially appointed defence lawyer were not present.

On 17 February 2010, the applicant lodged a request to review the 16 February 2010 judgment. He argued, *inter alia*, that: he did not have sufficient notice and time to prepare a defence, neither his lawyer nor himself were invited to attend the session and that the conviction constituted a second conviction for the same

offence. On 27 April 2010, the Supreme Court dismissed the request for review and the claim that the applicant had been tried twice for the minor offence of 17 November 2008 in his indictment proceedings.

2. Decision of the Court

The applicant complained that during domestic proceedings, he had not had adequate time for the preparation of his defence and could not defend himself either in person or with the assistance of a lawyer contrary to Article 6 §§ 1 and 3(b) and (c). Furthermore, he argued that he had not been given an opportunity to attend his proceedings contrary to Article 6 §§ 1 and 3(c). He also complained that he was tried for the same offence twice, in violation of Article 4 of Protocol No. 7.

Article 6

The Court regarded the applicant's complaints concerning his right to adequate time to prepare a defence and right to legal representation as closely connected and examined the issues together under Article 6 §§ 1 and 3 (b) and (c). The applicant complained that the four days' notice of his appeal proceedings was insufficient for him to prepare a defence and hire a lawyer. The Court held that he had already benefited from the services of his chosen lawyer and had sufficient time to prepare his defence, given that the applicant had already put forward his defence before the investigating judge, at trial before the first instance court and in three additional written defence submissions. Furthermore, the national courts had given the applicant sufficient opportunity to hire another lawyer. Accordingly, the Court found no violation of Article 6 §§ 1 and 3 (b) and (c).

Regarding the applicant's absence from the appeal court's session, the applicant argued that there had been a breach of his right to defend himself in person. The Court concluded there had been a violation of Article 6 §§ 1 and 3(c) in line with similar previous case law against Croatia on this issue.

Article 4 of Protocol No. 7

The applicant complained that he had been punished twice for the same offence by judgments of the Minor Offences Court and the Municipal Court. The Court assessed whether there had been a violation of Article 4 of Protocol No. 7 with regard to: whether the proceedings were criminal in nature, whether the offences for which the applicant was prosecuted were the same, and whether there was duplication of proceedings.

In consideration of whether the proceedings were criminal, the Court held that both the minor-offence proceedings and the proceedings on indictment were "criminal" in nature for the purposes of Article 4 of Protocol No. 7.

In deciding whether the two offences were the "same", the Court focused its inquiry on facts which could constitute a set of concrete factual circumstances involving the same defendant that are inextricably linked together and are used in order to secure a conviction or institute criminal proceedings. The applicant was first convicted in minor offence proceedings in respect of five separate incidents of domestic abuse, including an incident in November 2008. Subsequently, the State issued proceedings on indictment, which included four counts of domestic violence in the period between February 2005 and November 2008, thus covering the same period the minor offences were committed. The Court noted that while the proceedings on indictment made specific mention of the facts of the November 2008 incident, the proceedings also contained additional facts not encompassed in the minor offence proceedings, such as domestic violence towards the applicant's daughter and son. The very fact that the proceedings on indictment included the November 2008 incident was testament to the persistence of the applicant's conduct, which had been sanctioned on numerous occasions in the minor offence proceedings and now had reached the threshold of seriousness to be considered under indictment. Accordingly, the Court accepted that the facts in the proceedings on indictment included identical facts to that of the minor offences.

The Court then considered whether there had been a duplication of proceedings, noting that Article 4 of Protocol No. 7 does not itself preclude dual proceedings provided that certain conditions are fulfilled. These conditions include no duplication of trial or punishment and that the proceedings are "sufficiently closely connected in substance and in time". The material factors to determine whether there was a sufficiently close connection in substance include: whether the different proceedings pursue complementary purposes and address, *in concreto*, different aspects of the social misconduct, whether dual proceedings was a foreseeable consequence of the same impugned conduct, whether the relevant proceedings were conducted in a manner to avoid additional disadvantage from duplication of proceedings, and whether the sanction imposed in the proceedings that became final first was taken into account in those that became final last, such as an offsetting mechanism to ensure any penalties imposed are proportionate.

In considering these conditions and factors, the Court reiterated that States are under a positive obligation under Articles 3 and 8 of the Convention to provide

and maintain an adequate legal framework affording protection against acts of domestic violence. It observed that domestic violence is rarely a one-off incident, and usually encompasses cumulative and interlinked physical, psychological, sexual, emotional, verbal and financial abuse of a close family member or partner transcending circumstances of an individual case. The recurrence of successive episodes of violence within personal relationships or closed circuits represents the particular context and dynamics of domestic violence. The Court reaffirmed that domestic violence should be understood as a particular form of a continuous offence as part of which individual incidents form a wider pattern.

In light of this, the Court affirmed the integrated dual process the State implemented to regulate domestic violence. The first process was to punish a single act of domestic violence, which did not amount to another criminal offence. This was sanctioned as a minor offence with the purpose of providing a prompt reaction to an incident. The second process was to bring criminal charges for domestic violence, which is a continuous offence seeking to address ongoing violence in a comprehensive manner. The Court viewed these two processes as in the general interest of promptly and adequately reacting to domestic violence.

The Court found that dual proceedings should have been foreseeable to the applicant. Given the applicant's repeated violent behaviour towards his family members, it was foreseeable that this conduct would entail consequences such as minor offence proceedings as well as criminal proceedings for continuous and repeated behaviour of domestic violence.

The Court also concluded that the applicant had not suffered a disadvantage in the duplication of proceedings. The criminal court had adequately engaged with the minor offence judgments, for example by choosing to hear from certain witnesses again. This ensured that the applicant's Article 6 rights had been safeguarded by the State. Furthermore, both the minor offence proceedings and proceedings on indictment had applied the principle of deduction, ensuring that the penalties imposed on the applicant were proportionate to the seriousness of the offence concerned.

Finally, the Court placed the timing of the dual proceedings in the specific context of domestic violence, emphasising the need for domestic criminal law systems to effectively deal with individual and aggregate offences of domestic violence. Here, the State had intervened both in isolated incidents and in the continuous offence of domestic violence and any disadvantage ensued for the applicant in these parallel proceedings was negligible. The Court was satisfied

that the dual proceedings were sufficiently connected in time to form a coherent and proportionate whole. This enabled the State to punish the individual acts committed by the applicant and his pattern of behaviour in an effective, proportionate and dissuasive manner.

Accordingly, the Court held that there had been no violation of Article 4 of Protocol No. 7.

Article 41

The Court awarded the applicant €1,500 in respect of non-pecuniary damage.

Lack of effective investigation into acts of online violence in the context of domestic violence was contrary to Article 8

JUDGMENT IN THE CASE OF VOLODINA v. RUSSIA (No. 2)

(Application no. 40419/19)
14 September 2021

1. Principal facts

The applicant, Ms Valeriya Igorevna Volodina, was a Russian national born in 1985. She secured a legal change of name in August 2018, meaning the name on the present application was no longer the one she used.

In November 2014 the applicant began a relationship with S., an Azerbaijani national. After their separation in 2015, S. threatened her with death or bodily injuries; he abducted and assaulted her on several occasions. The applicant brought a complaint to the European Court of Human Rights in *Volodina v Russia*, where the Court found that the domestic authorities failed to protect her from repeated acts of domestic violence contrary to Article 3 and failed to put in place specific measures to combat gender-based discrimination against women contrary to Article 14.[336]

In June 2016, the applicant complained to the police that her name, personal details and intimate photographs had been used for creating fake social media profiles. Classmates of her twelve-year-old son and his class teacher had been added as friends. Her brother made a statement to the police reporting that S. had admitted to hacking the applicant and sending obscene messages from her account. The police claimed that they were unable to locate S.

On 7 November 2016, the police declined to initiate criminal proceedings on the grounds that the information had been made public on social media rather than in the media. The supervising prosecutor set aside the decision as unlawful since S. had not been interviewed. On 2 May 2017, the police again declined to open a criminal case, citing that there was no indication S. had collected or disseminated the information. On 1 February 2018, the supervising solicitor annulled the decision and directed the police to locate and interview S., to

[336] *Volodina v Russia*, judgment of 9 July 2019, appl. no. 41261/17 (included as a summary in this publication)

examine his electronic devices and records of his phone calls to the applicant. On 6 March 2018, the police opened a criminal investigation.

In February, March, and September 2018, new fake profiles in the applicant's name appeared on VKontakte and Instagram. The profiles used her intimate photographs and personal details. On 13 August and 19 September 2018, the applicant complained to the police that S. had sent her death threats via social media and internet messenger. On 3 January 2019, the police refused to open a criminal case on the grounds that the threats had not been "real". On 28 September 2018, the applicant petitioned to the investigator to seek an order prohibiting certain forms of conduct. On 18 October 2018, the investigator refused the request on the grounds that the measure could only be applied to suspects in "exceptional circumstances". The decision was upheld on appeal.

On 12 December 2018, the applicant complained to the District Court that the police had not responded to her report of a tracking device she had found in her bag two years previously. On 26 December 2018, the Court found no fault with the police. In February 2019, her appeal against the decision was dismissed.

In January 2019, the police suspended the investigation into fake social media profiles. The decision was upheld as lawful by the Regional Court in August 2019. On 14 September 2019, the police refused to open a criminal investigation into the tracking device, citing that there was no objective evidence incriminating S. On 14 October 2020, the police closed the criminal case concerning the fake social media profiles, even though they had established that S. had created fake profiles in the applicant's name and had published nude photos of her without her consent. On 13 October 2020, S. filed a motion to discontinue the proceedings because the limitation period had expired. The motion was granted.

2. Decision of the Court

The applicant submitted that she had been the victim of repeated acts of online violence, including revenge porn, cyber harassment, and cyber-stalking. She complained that the Russian authorities had failed to fulfil their positive obligations under Article 8 to secure respect for her private life by providing effective protection against online violence, preventing further online violence and by carrying out an effective investigation.

Article 8

The concept of private life under Article 8 includes a positive obligation on the State to protect a person's physical and psychological integrity even if the danger comes from private individuals. Acts of cyber violence, cyber harassment and malicious impersonation have been categorised as forms of violence against women, capable of undermining their physical and psychological integrity. In the context of domestic violence, it is often partners that are the likely perpetrators of acts of cyber-stalking or surveillance. States have a positive obligation to establish and apply effectively a system punishing all forms of domestic violence and to provide sufficient safeguards for the victims.

The non-consensual publication of the applicant's intimate photos, the creation of social media profiles which purported to impersonate her, and her tracking with the use of a GPS device clearly brought the applicant into the remit of Article 8. These acts had interfered with the enjoyment of her private life, causing anxiety, distress and insecurity. The main question to be determined was whether the authorities, once aware of the interference with her rights, had discharged their obligations under Article 8 to take sufficient measures to put an end to that interference and prevent it from recurring.

The Court first examined whether the State had put in place an adequate legal framework to protect the applicant from acts of cyberviolence, focusing specifically on the manner in which the legal framework was applied to the applicant. The Court had previously determined in *Volodina v. Russia* that the existing Russian legal framework failed to meet the requirements inherent in the State's positive obligation to establish and apply effectively a system punishing all forms of domestic violence.

The Court considered that the existing legal framework equipped the Russian authorities with the means to investigate the acts of cyberviolence of which the applicant was the victim. However, it noted that Russia was one of the few remaining CoE States whose legislation did not provide measures of protection against domestic violence, such as "restraining" or "protection" orders. The State's civil law mechanism did not include rigorous monitoring of the perpetrator's compliance with the terms of an injunction capable of ensuring the victim's safety from the risk of recurrent abuse. In addition, the Court found that the State's criminal orders prohibiting certain conduct did not offer sufficient protection to victims of domestic violence in the applicant's situation. The Court applied its finding in the first *Volodina* case to the present complaint, concluding that the

State authorities did not consider at any point what could and should be done to protect the applicant from recurrent online violence. The response of the State authorities was manifestly inadequate and through their inaction and failure to take deterrence measures, they allowed the threats, harassment and assault of the applicant by S. to continue with impunity.

The Court then assessed the manner in which the authorities conducted an investigation into the applicant's reports. An effective investigation must be prompt and thorough, with the authorities taking all reasonable steps to secure evidence. Special diligence is required in domestic violence cases and the specific nature of domestic violence must be taken into account in the conduct of the domestic proceedings. The investigation into fake social media profiles and the dissemination of the applicant's intimate photos only resulted in a criminal charge being brought almost two years after the applicant had first reported the fake profiles. Before that, the police sought to dispose hastily of the matter on formal grounds, citing lack of jurisdiction or lack of an offence instead of making a serious and genuine attempt to establish the circumstances of the applicant's complaints. The Court stressed that States are responsible for delays, whether attributable to the conduct of the judicial authorities or structural deficiencies in the judicial system.

The Court dismissed the Government's argument that the delay to investigate the applicant's case was because S. was unavailable for questioning. The Court suggested that the police authorities should have made use of their extensive search powers as well as acted in good faith to secure forensic evidence of the alleged offences, including the identification of phone numbers and Internet addresses which had been used to create the fake profiles and upload the applicant's photos. The two-year delay in opening the investigation resulted in a loss of time and undermined the authorities' ability to secure evidence relating to the acts of cyberviolence.

The investigation which was conducted from 2018 onwards was not expeditious or thorough. The Court criticised the slow pace of the investigation, which took nearly a year to obtain information about the Internet address of the fake accounts and two years to interview the applicant. The "pre-investigation inquiry" into other offences, such as the tracking device found in the applicant's bag, did not lead to any criminal case being opened. The authorities also failed to investigate the online death threats the applicant received in August and September 2018. As in the first *Volodina* case, the Court found that the police would arbitrarily raise the bar for evidence required to launch criminal proceedings, claiming that

death threats had to be "real and specific" in order to prosecute. Furthermore, the authorities failed to consider how these incidents could be connected to the physical assaults the applicant also reported.

The slow pace of the authorities' investigation resulted in the prosecution becoming time barred and the criminal case being discontinued. The Court reaffirmed that violations to conduct an effective investigation can be found where proceedings are ended by prescription allowing the perpetrators to escape liability. By failing to conduct the proceedings with the requisite diligence, the Court found that the State bore responsibility for its failure to ensure the perpetrator of acts of cyberviolence be brought to justice. The impunity shed doubt on the ability of the State's machinery to produce a sufficient deterrent effect to protect women from cyberviolence.

The Court found that even though the State had a legal framework that could prosecute acts of cyberviolence, of which the applicant was a victim, the manner in which the authorities handled the matter – notably the reluctance to open a criminal case and the slow pace of the investigation – disclosed a failure to discharge their positive obligations. Accordingly, the Court found a violation of Article 8.

Article 41

The Court awarded the applicant €7,500 in respect of non-pecuniary damage, in addition to €5,386.46 for costs and expenses.

Domestic authorities' failure to adequately apply the legal framework to protect a woman from bullying and harassment suffered at work as a result of her whistle-blowing violated Article 8

JUDGMENT IN THE CASE OF ŠPADIJER v. MONTENEGRO

(Application no. 31549/18)
9 November 2021

1. Principal Facts

The applicant was born in 1978 and lived in Podgorica, Montenegro. From September 1998, she worked as a prison guard in the Institute for the Execution of Criminal Sanctions. At the relevant time, she was covering the position of head of shift in the women's prison. In January 2013, the applicant reported five of her colleagues for indecent behaviour at work on New Year's Eve. As established later in disciplinary proceedings, two male guards had entered the women's prison and one of them had had "physical contact" with two inmates.

Following her report, the applicant experienced incidents of bullying and harassment at work, for instance a colleague spat at her and said: "here is the stinking bitch, if she would only lose 50 kilos she might look acceptable". Further incidents occurred outside work, such as the applicant's car being smashed and damaged. In August 2013, the applicant requested her employer to initiate proceedings for her protection against bullying, complaining of continuous insults and humiliation at work which were causing health problems. In September 2013, she asked the inspection authority, prison management and the mediator in charge of proceedings for bullying in the workplace to deal with her request. On 6 November 2013, the mediator dismissed her request as unfounded.

On 20 November 2013, the applicant instituted civil proceedings against her employer, complaining that her personal and professional integrity had been violated by the incidents of bullying. On 10 February 2015, a week before the domestic court was due to rule on the civil proceedings, the applicant was assaulted by an attacker who inflicted several blows on her neck, back, elbow and thighs, and told her: "be careful what you're doing". On 19 February 2015, the Court of First Instance ruled against the applicant in civil proceedings. The court considered that the events complained of did not amount to bullying because they lacked the necessary frequency. This judgment was upheld by the High

Court and the Supreme Court respectively. The Constitutional Court dismissed the applicant's constitutional appeal.

2. Decision of the Court

The applicant complained under Articles 3 and 6 of the Convention of a violation of her psychological integrity caused by continuous active and passive bullying at work, and of the failure of the domestic bodies to protect her from it. However, owing to the Court's characterisation of the factual allegations and legal arguments, the Court examined the case under Article 8 of the Convention.

Article 8

The Court reaffirmed that the essential object of Article 8 is to protect individuals against arbitrary interference by public authorities. There are also additional positive obligations inherent in the respect for private life, which include the adoption of measures in the sphere of relations between individuals themselves. The concept of private life includes a person's physical and psychological integrity, thus States have a duty to protect the physical and moral integrity of an individual from other persons. To ensure compliance with this duty, States must maintain and apply an adequate legal framework to afford protection against acts of violence by private individuals, including in the context of harassment at work. The Court considered that whistle-blowing by an applicant regarding the alleged unlawful conduct of his or her employer required special protection in certain circumstances.

The Court observed that the relevant domestic law provided possibilities for the applicant to seek protection against harassment at work. There were no indications that those possibilities were inherently inadequate or insufficient to provide the requisite protection against incidents of harassment. However, these available remedies should function in practice.

The Court first examined the proceedings initiated by the applicant. The Court found that the mediation proceedings were non-compliant with the relevant legislation, since they were neither initiated nor completed within the statutory time limits. Furthermore, the mediator had overstepped his statutory competence by examining whether the applicant's request was well-founded, since there was no legislation authorising him to do so. In regard to the civil claim, the applicant did not receive protection because the courts required proof of the incidents every week for six months. Despite the Contracting State enjoying

a margin of appreciation in devising protection mechanisms for harassment at work, the Court found the approach inadequate. Complaints regarding bullying should be thoroughly examined on a case-by-case basis, in light of the particular circumstances and context of each case. There may be circumstances where incidents are less frequent, but still amount to bullying or vice versa.

The Court also noted that the relevant case law in Montenegro was scarce and not settled in relation to the element of frequency of occurrence of bullying needed to bring a claim. Although the incidents examined in the applicant's case might not have amounted to bullying, the domestic courts only examined a selection of them, while several incidents complained of remained unexamined. The Court stressed the failure of the authorities to consider the context of the applicant's claim, which alleges that the acts of harassment were in response to her reporting the alleged illegal activity of her colleagues, with the aim of silencing and punishing her. In the Court's view, States' positive duty under Article 8 to effectively apply laws against serious harassment takes on a particular importance where such harassment may have been triggered by "whistle-blowing" activities.

In addition to incidents at work, the applicant's car had been damaged, and she was assaulted by an attacker who inflicted blows to her neck and back. The relevant domestic criminal legal framework provided sufficient protection in respect of such assaults. However, the Court found that the State prosecutor had not issued a decision in over eight and six years respectively in response to the applicant's criminal complaints, thereby effectively preventing the applicant from bringing private charges. In addition, the Constitutional Court made no reference to the prosecutor's failure to deal with the applicant's criminal complaints.

Due to the above, the Court considered the manner in which the civil and criminal law mechanisms had been implemented, in particular the lack of assessment of all the incidents in question and the failure to take account the potential whistle-blowing context, had been defective. Accordingly, there had been a violation of the State's positive obligations under Article 8.

Article 41

The Court awarded the applicant €4,500 in respect of non-pecuniary damage and €1,000 for costs and expenses.

Failure to protect a Georgian woman from domestic violence perpetrated by her former partner, who used his position as a police officer to seek impunity for his behaviour, and failure to conduct an effective investigation into her murder violated the procedural and substantive aspects of Article 2 in conjunction with Article 14

JUDGMENT IN THE CASE OF A AND B v. GEORGIA

(Application No. 73975/16)
10 February 2022

1. Principal Facts

The first applicant A, born in 1972, was the mother of C, a woman born in 1994 who was murdered in 2014 by her partner, D, after giving birth to their son, applicant B, in 2013.

On the year of her seventeenth birthday, C was kidnapped for marriage by D, a police officer with whom she cohabited from December 2011 until June 2012. Following episodes of domestic abuse, C, who was then two months pregnant with B, went back to her parents' house. Following constant harassment against herself and her family, C filed several complaints with the police against D. However, D referred to his official status as a police officer indicating he would avoid punishment in connection with his behaviour. Following an altercation over child support payments in 2013, D beat up C in her parent's house. The police were contacted, and three officers, all of whom were acquaintances of D, arrived at the scene of the incident and did not impede him from interfering in the interview of C. One of the officers told C that wife-beating was commonplace. Without interviewing D, the officers drew up an inaccurate report of the incident, making no attempt to stop D when he forced C to sign it amid threats to kill her. Following the interview, one officer threatened to fine C if she contacted them again without a valid reason, as they were busy with more serious matters and could not afford wasting time with minor family altercations.

In 2014, after an interview with the investigative authorities in relation to new episodes of domestic violence, C was approached by D who had been stalking her in the street and after starting a new altercation, shot her five times at close range with his service pistol, killing her instantly. A criminal case was then opened against D, who alleged honour killing in his defence. On 17 April 2015, D was found guilty of premeditated murder of a family member and sentenced to eleven

years imprisonment. The conviction did not refer to the possible role of gender-based discrimination in the commission of the crime.

In parallel to the criminal proceedings against D, the applicants pursued two legal actions, the first of which involved criminal complaints seeking redress for the authorities' failure to protect C. Despite several inquiries with the authorities, the applicants received little response to their complaints, being informed only that a criminal investigation into the negligence of the police officers was pending. The second initiative consisted of a civil action against the Ministry of the Interior and the Chief Public Prosecutor's Office claiming compensation for the damage caused by the lack of measures taken to put an end to the violent behaviour of D. On 24 July 2015, a judgment by the Tbilisi City Court allowed the claim in part and awarded the applicants compensation (approximately €7,000) for the lack of adequate investigations into the incidents involving C.

2. Decision of the Court

The applicants complained that the domestic authorities had violated Article 14 of the Convention (prohibition of discrimination) taken together with Articles 2 (right to life) and 3 (prohibition of torture) by failing to protect C from domestic violence and failing to conduct an effective criminal investigation into the circumstances contributing to her death.

Admissibility

The Court found that the case should be examined from both the substantive and procedural aspects of Article 2 in conjunction with Article 14. It further held that the question of whether the applicants had lost their status as victims on the basis of the outcome of the domestic proceedings was linked to the issue of the effectiveness of the investigation and should be examined with the merits of the complaint.

Article 2 in conjunction with Article 14

Having regard to the applicants' allegations that the authorities' double failure – the lack of protection of their next of kin from domestic violence and the absence of an effective investigation into the law enforcement authorities' inaction – stemmed from their insufficient acknowledgment of the phenomenon of discrimination against women, the Court decided to subject the complaints to a simultaneous dual examination under Article 2 taken in conjunction with Article

14. It emphasised that the issue was not directly about the violent actions of D, but rather about the authorities' response, or a lack thereof, to his actions and to C and her family's complaints prior to and after her murder.

Considering first the procedural aspects of Article 2, the Court noted that in cases concerning possible responsibility of State officials for deaths occurring as a result of alleged negligence, Article 2 does not necessarily require the provision of a criminal law remedy in every case. However, in exceptional circumstances only an effective criminal investigation would be capable of satisfying the procedural positive obligation, e.g. where a life was lost or put at risk because of the conduct of a public authority that went beyond an error of judgment or carelessness.

Looking at the State's substantive positive obligations under Articles 2 and 14, the Court emphasised that a State's failure to protect women against domestic violence breaches their right to equal protection before the law and that this failure need not be intentional. General and discriminatory judicial passivity creating a climate conducive to domestic violence would amount to a violation of Article 14.

Turning to the facts of the case, the Court found that the inactivity and negligence of the authorities went beyond a mere error of judgement or carelessness, bearing in mind this was one of the main reasons why the domestic abuse was allowed to escalate and culminate in C's murder. The authorities knew, or ought to have known, the high level of risk faced by her if they failed to discharge their duties properly. Therefore, when considering the various remedies, the most pertinent were the criminal proceedings instituted against the police officers and public prosecutors. However, the competent investigative authority neither made an attempt to establish responsibility on the part of the police officers for their failure to respond properly to the multiple incidents of gender-based violence nor deem it necessary to grant the applicants victim status. No disciplinary inquiry into the police's alleged inaction was even opened, and no steps were taken to train the police officers in question on how to respond properly to allegations of domestic violence in the future. As for the public prosecutors, no response was received whatsoever – the applicants repeatedly sought but failed to receive information from the investigative authority on this aspect of their criminal complaint.

In the light of the indices pointing to possible gender-based discrimination as at least partly informing the response of law enforcement and the fact that they permitted the alleged perpetrator to participate in the questioning of the victim of the alleged domestic abuse, there was a pressing need to conduct a meaningful

investigation into the response of law enforcement officials and their inaction. The fact that the alleged perpetrator of the violence of the abuse was a member of law enforcement himself, and that the threats he had used against the victim and her family referred to this fact and what he considered to be his impunity, rendered the need for a proper investigation all the more pressing.

Finally, the Court also noted the insufficiency of the redress offered by the criminal prosecution of the perpetrator and civil proceedings brought by the applicants. D's trial and conviction did not involve any examination of the possible role of gender-based discrimination in the commission of the crime, and whilst it was undoubtedly positive that the domestic courts acknowledged the law-enforcement authorities' failure to take measures aimed at putting an end to the gender-based discrimination and protect C's life, they did not expand their scrutiny to the question of whether the official tolerance of incidents of domestic violence might have been conditioned by the same gender bias. Hence, there had been a violation of the procedural limb of Article 2 read in conjunction with Article 14.

Considering then the substantive aspect of Article 2, the Court noted that in this case there was clearly a lasting situation of domestic violence, with no doubt about the immediacy of the danger to the victim. The police failed to display the requisite special diligence and committed major failings in their work such as inaccurate, incomplete or even misleading evidence gathering and not attempting to conduct a proper analysis of what the potential trigger factors for the violence could be. Shortcomings in the gathering of evidence in response to a reported incident of domestic violence can result in an underestimation of the level of violence actually committed, can have deleterious effects on the prospects of opening a criminal investigation and even discourage victims of domestic abuse, who are often already under pressure from society, from reporting an abusive family member to the authorities in the future.

The relevant domestic authorities did not resort to the various temporary restrictive measures in respect of alleged abusers which the domestic legislative framework provided for. The victim was never advised by the police of her procedural rights and measures of protection available to her. Whilst the law-enforcement authorities were perfectly aware that D was using various attributes of his official position to commit abuse against C, not only did the police not put an end to that demonstration of ultimate impunity and arbitrariness, they, on the contrary, allowed the alleged abuser to participate in the questioning of his victim and soon after promoted the abuser to a higher police rank. The Court found this aspect of the case to be particularly troubling as Member States are

expected to be all the more stringent when investigating and punishing their own law-enforcement officers for the commission of serious crimes, because what is at stake is not only the issue of the individual criminal-law liability of the perpetrators but also the State's duty to combat any sense of impunity felt by the offenders by virtue of their very office, and maintain public confidence in and respect for the law-enforcement system.

Hence, the Court referred to the case as a vivid example of how official inaction in the face of domestic violence can create a climate conducive to a proliferation of episodes of gender-based discrimination, and held that there had been a violation of the substantive positive obligations under Article 2 of the Convention read in in conjunction with Article 14.

Article 41

The Court awarded the applicants €35,000 in respect of non-pecuniary damage.

UK Government

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The preparation of this publication has been supported by the Konrad Adenauer Foundation - Rule of Law Programme SEE and the UK Government. Views presented in the publication do not necessarily reflect the official position of the Konrad Adenauer Foundation and UK Government.