

Recent case-law of the ECtHR in discrimination cases

SUMMARIES OF CASES (1 November 2015 – 1 November 2016)

Index

LGBTI rights (NB: homophobia is discussed separately)	3
Pajić v. Croatia, 23 February 2016, no. 68453/13	3
Sousa Goucha v. Portugal, 22 March 2016, no. 70434/12	3
Chapin and Charpentier v. France, 9 June 2016, no. 40183/07	4
Aldeguez Tomás v. Spain, 14 June 2016, no. 35214/09	4
Taddeucci and McCall v. Italy, 30 June 2016, no. 51362/09	5
Freedom to manifest one's religion	6
Ebrahimian v. France, 26 November 2015, no. 64846/11	6
Gender discrimination	6
Di Trizio v. Switzerland, 2 February 2016, no. 7186/09	6
Domestic violence	7
M.G. v. Turkey, ECtHR 22 March 2016, no. 646/10	7
Halime Kiliç v. Turkey, 28 June 2016, no. 63034/11	8
Discrimination based on disability or health status	9
Çam v. Turkey, 23 February 2016, no. 51500/08	9
Novruk and Others v. Russia, 15 March 2016, nos. 31039/11, 48511/11, 76810/12, 14618/13 and 13817/14	10
Guberina v. Croatia, 22 March 2016, no. 23682/13	11
Kocherov and Sergeyeva v. Russia, 29 March 2016, no. 16899/13	12
Discriminatory violence	12
<i>Homophobia</i>	12
Identoba and Others v. Georgia, ECtHR 12 May 2015, no. 73235/12	12
M.C. and A.C. v. Romania, 12 April 2016, no. 12060/12	13
<i>Racist violence / violence against Roma</i>	14
R.B. v. Hungary, 12 April 2016, no. 64602/12	14
Adam v. Slovakia, 27 July 2016, no. 68066/12	16
Right to stand for elections	17
Ofensiva Tinerilor v. Romania, 15 December 2015, no. 16732/05	17
Partei Die Friesen v. Germany, 28 January 2016, no. 65480/10	17
Pilav v. Bosnia and Herzegovina, 9 June 2016, no. 41939/07	18
Social security, social benefits and property rights	19
Fábián v. Hungary, ECtHR 15 December 2015, no. 78117/13	19
Di Trizio v. Switzerland, 2 February 2016, no. 7186/09	19
Mamatas and Others v. Greece, 21 July 2016, nos. 63066/14, 64297/14 and 66106/14	19

British Gurkha Welfare Society and Others v. the United Kingdom, ECtHR 15 September 2016, no. 44818/11.....	20
Substantive discrimination.....	21
Partei Die Friesen v. Germany, 28 January 2016, no. 65480/10	21
Guberina v. Croatia, 22 March 2016, no. 23682/13.....	22
Taddeucci and McCall v. Italy, 30 June 2016, no. 51362/09	22
Indirect discrimination.....	22
Di Trizio v. Switzerland, 2 February 2016, no. 7186/09	22
Biao v. Denmark, 24 May 2016 (Grand Chamber), no. 38590/10.....	22
Discrimination by association	24
Guberina v. Croatia, 22 March 2016, no. 23682/13.....	24
“Other status” / “personal status”	24
Fábián v. Hungary, 15 December 2015, no. 78117/13	24
Intensity of review and the very weighty reasons test	24
Qing v. Portugal, 5 November 2015, no. 69861/11	24
Ebrahimian v. France, 26 November 2015, no. 64846/11	25
Fábián v. Hungary, 15 December 2015, no. 78117/13	25
Çam v. Turkey, 23 February 2016, no. 51500/08	25
Guberina v. Croatia, 22 March 2016, no. 23682/13.....	25
Biao v. Denmark, 24 May 2016 (Grand Chamber), no. 3850/10	25
British Gurkha Welfare Society and Others v. the United Kingdom, ECtHR 15 September 2016, no. 44818/11.....	25

LGBTI rights (NB: homophobia is discussed separately)

Pajić v. Croatia, 23 February 2016, no. 68453/13

In Croatia, the possibility of obtaining a residence permit for family reunification is open to married or unmarried different-sex couples only. The Court finds that by excluding same-sex couples from its scope, the Aliens Act contained a difference in treatment based on the sexual orientation of the persons concerned. Admitting that in cases related to migration issues the margin of appreciation generally is a wide one, the Court also emphasises that discrimination based on sexual orientation requires very weighty reasons to be advanced in justification. The Court observes that the competent domestic authorities did not advance any such justification. Since a difference in treatment based solely or decisively on considerations regarding the applicant's sexual orientation amounts to a distinction which is not acceptable under the Convention, the Court unanimously finds a violation of Article 14 taken in conjunction to Article 8 ECHR.

Sousa Goucha v. Portugal, 22 March 2016, no. 70434/12

Sousa Goucha, a well-known Portuguese television host, publicly declared his homosexuality in 2008. In 2009, in a quiz during a late-night television show, the guests were asked to answer the following question: "Who is the best Portuguese female TV host?" The possible answers to the question included the name of three female television hosts and the applicant's; the latter being the "correct" one. A criminal complaint for defamation and insult was dismissed by the Portuguese courts, amongst others because "[t]he [applicant] is a public figure and so must be used to having his characteristics captured by comedians in order to promote humour; it being public knowledge that [the applicant's characteristics] reflect behaviour that is attributed to the female gender, such as his way of expressing himself, his colourful [feminine] clothes, and the fact that he has always lived in a world of women (see, for example, the programmes he has always presented on television)".

The Court observes that the joke included the applicant in a list of female hosts which, in the applicant's view, mixed his gender with his sexual orientation. It emphasises that sexual orientation is a profound part of a person's identity and that gender and sexual orientation are two distinctive and intimate characteristics. Any confusion between the two will therefore constitute an attack on one's reputation capable of attaining a sufficient level of seriousness for touching upon such an intimate characteristic of a person. Article 8 therefore applies to the present case. Nevertheless, the Court does not find a violation of Article 8 of the Convention (unanimously), as the freedom of expression in this case can reasonably be placed above the right to protection of reputation.

The Court then turns to the question whether the national courts have violated Article 14 by the quoted argument. The Court observes that the applicant himself has mentioned his sexual orientation in public and to the domestic courts. In addition the domestic courts have framed the impugned joke in the light of the applicant's external behaviour and the style of the talk show. In this context, according to the Court, it would have been difficult for the domestic courts to avoid referring to it in the analysis of the case. The Court further mentions that there was nothing to suggest that the Portuguese authorities would have arrived at different decisions had the applicant not been homosexual. The Court shows itself persuaded by the Government's argument that the relevant passages were "debatable" and "could have been avoided", but did not have discriminatory intent, so it does not find a violation of Article 14 taken together with Article 8.

Chapin and Charpentier v. France, 9 June 2016, no. 40183/07

The applicants are a same-sex couple who submitted a marriage application to the civil registry department in 2004. Although initially the marriage was performed and it was entered into the register of births, marriages and deaths, the public prosecutor brought proceedings to have the marriage annulled. The competent court indeed decided to annul the marriage, based on the relevant French legislation which stipulated that marriages could not be concluded between individuals of the same sex. The Court reiterates its earlier finding in *Schalk and Kopf v. Austria* to the effect that Article 12 ECHR does not impose an obligation on the States to grant same-sex couples access to marriage. Also under Article 14 taken together with Article 8, it holds that the State can restrict marriages to opposite-sex couples and it has some leeway as regards the choice for alternative institutes to legally recognise their relationship. At the relevant time the applicants had had the possibility of concluding a civil partnership (PACS), which already conferred a number of important rights and obligations (e.g. as regards tax, property and social protection) that were also attached to the institute of marriage. Given the margin of appreciation of the State, the Court finds that there is no need to provide for a more detailed examination of the differences and similarities between a PACS and marriage. The Court also notes that as of 17 May 2013, same-sex couples (including the applicants) have obtained access to marriage. Consequently, it does not find a violation of Article 8 taken together with Article 14.

Aldeguer Tomás v. Spain, 14 June 2016, no. 35214/09

The applicant cohabited with another man in a homosexual relationship from 1990 until the latter's death in 2002. He claimed social security allowances as a surviving spouse, arguing that he had cohabited with his deceased partner for many years. The National Institute of Social Security refused to grant the applicant a survivor's pension on the ground that since he had not been married to the deceased person, he could not legally be considered as his surviving spouse. In 2005 legislation legalising same-sex marriage entered into force. The applicant then raised the question before the national courts whether, based on this new legislation, he could claim a survivor's pension. This argument was dismissed because marriage was still a constitutive element to access any such social-security benefit. In addition, the court dismissed the applicant's argument that there was an unjustified difference in treatment, since the relevant legislation did provide for a possibility to offer a survivor's pension in cases where heterosexuals partners were unable to marry because of legal impediments, in particular the illegality of divorce until 1981 (which had the consequence that couples who had separated could not marry any new partner).

The Court points out at the outset that Article 8 of the Convention does not guarantee as such a right to benefit from a specific social security scheme or a right to be granted a survivor's pension. It also notes, however, that the applicant formed a stable, same-sex, de facto union with his late partner for more than eleven years and their relationship fell within the notion of "private life" within the meaning of Article 8 of the Convention. Furthermore, while Article 8 does not address the issue of survivors' pensions, Spanish legislation expressly provided for such a right to spouses and to surviving partners of unmarried heterosexual couples who had been legally unable to marry. Consequently, the State, which went beyond its obligations under Article 8 in creating such a right – a possibility open to it under Article 53 of the Convention – cannot, in the application of that right, take discriminatory measures within the meaning of Article 14. In addition, the case falls within the ambit of Article 1 P1 ECHR.

The Court further observes that there are certain similarities between the situations taken in the abstract: a legal obstacle prevented same-sex couples such as that of the applicant and different-sex cohabiting couples from entering into marriage and benefitting from the legal effects attached to such institution; the unmarried partners had lived together as a couple, and one of the partners

had died before the entry into force of new legislation which removed the legal impediment to marriage. It also notes, however, that the impediment to marriage in the two situations is of a different nature. In the case of the applicant, he was unable to marry his partner due to the fact that the legislation in force at the relevant time (during his partner's lifetime) restricted the institution of marriage to different-sex couples. As regards different-sex couples who had been unable to marry before divorce was legalised in 1981, the impediment to marriage was based on the fact that one or both partners were at the relevant time still married to another person whom they could not divorce. The inability of a couple in that situation to marry before 1981 did not result from the sex or the sexual orientation of its members but from the fact that one or both partners were legally married to a third person and that divorce was not permitted at the time of the death of one of the partners. What was at stake was an impediment to remarriage which affected one or both partners, not an impediment to marrying: the specific factual and legal situation addressed by the 1981 legislation cannot be genuinely compared to the position of a same-sex couple who were ineligible for marriage in absolute terms, irrespective of the marital status of one or both of its members. In the Court's view, the difference in context and the difference in nature of the legal impediment to marriage make the situation of the applicant in 2005 fundamentally different from that of different-sex couples. Consequently, the applicant is not in a relevantly similar situation to that of a surviving partner of a different-sex couple who had been unable to marry because of an impediment to remarriage which had affected one or both members of the couple before 1981. It follows that there has been no discrimination and, therefore, no violation of Article 14 taken in conjunction with Article 8 of the Convention and Article 1 of Protocol No. 1.

Taddeucci and McCall v. Italy, 30 June 2016, no. 51362/09

The applicants are a same-sex couple who have been together since 1999; Taddeucci has the Italian nationality, while McCall is a national of New Zealand. They lived in New Zealand, where they were registered as an unmarried couple, until 2003, when they decided to settle in Italy. Initially McCall lived in Italy on the basis of a student's temporary residence permit. When he applied for a residence permit on family grounds, the permit was refused because the statutory conditions had not been fulfilled. The Italian court of cassation dismissed their appeal in final resort, since under the relevant Italian legislation, the concept of "family member" included only spouses, children under the age of majority, adult dependent children and dependent relatives. The possibility of the concept extending to unmarried partners also was excluded by the constitutional court's case-law. In accordance with its well-established case-law – in particular the *Schalk and Kopf v. Austria* case –, and given the durability of the applicants' relationship, the Court finds that their relationship can be regarded as family life under Article 8 ECHR. Since the refusal of the residence permit to McCall prevented the couple from living together in Italy, there is an interference with one of the core elements of this family life. The Court further notes that the case does not disclose direct discrimination based on sexual orientation, since heterosexual couples in the same position (i.e., cohabiting without being married) also would have been refused a residence permit. Nevertheless, the Court finds that the applicants' position is different in that – at the relevant time – there was no legal possibility for them to get married or obtain any other form of legal recognition of their relationship. The restrictive interpretation of the notion of "family member" therefore constituted, for homosexual couples alone, an insuperable obstacle to obtaining a residence permit on family grounds. The case therefore discloses a clear case of substantive unequal treatment, in the sense that the applicants – a homosexual couple – are treated in the same way as persons who find themselves in a clearly different position, since they have been able to make a conscious choice not to marry. To justify this equal treatment, Italy has pointed to the wide margin of appreciation enjoyed by the States to protect the traditional family and to decide whether or not homosexual couples should be given access to civil partnerships or similar legal institutions. The Court admits

that protection of the traditional family might constitute a legitimate aim for the purposes of Article 14, but it emphasises that very weighty reasons are required to justify discrimination based on sexual orientation. This is equally true for the situation where there is no direct or formal unequal treatment, but the State has failed to distinguish between couples who find themselves in a substantially different situation. The Court further observes that the discrimination is caused by the absence of a possibility for same-sex couples to have access to some form of legal recognition of their relationship, and it considers that the restrictive interpretation of the notion of “family member” has not taken due account of this impossibility and of the personal situation of the applicants. The Court notes that the Italian government has not contested the finding of the third party interveners that, on a global and on a European level, there is a significant trend towards treating same-sex partners as family members and towards recognition of their cohabitation. Given that the government has not presented any other legitimate aims that could be held to justify the discrimination, the Court finds a violation of Article 14, taken together with Article 8.

Freedom to manifest one’s religion

Ebrahimian v. France, 26 November 2015, no. 64846/11

The applicant in this case had a temporary job in a public hospital as a social worker. Her contract was not renewed because she refused to remove her veil, even after she had been reminded of her duty as a civil servant to not display her religious affiliation. Because of this refusal, the hospital authorities also started disciplinary proceedings against her.

The Court first addresses the question whether the non-renewal of the contract and the disciplinary proceedings were sufficiently foreseeable. It accepts that it could be clear from the importance of the general principles of religious neutrality and secularism (*laïcité*) for French law that displaying religious symbols and wearing religious apparel was not allowed for civil servants. The Court emphasises that *laïcité* is a legitimate aim that bears significant weight and importance in the French model. For that reason, and given the considerable lack of consensus on this issue within Europe, the Court allows a wide margin of appreciation. It considers that *laïcité* and the desire to provide for equality of treatment based on religion are sufficiently weighty to justify the prohibition on wearing a veil, even though the Court admits that there is an inevitable tension between the principle of *laïcité* and the principle of religious tolerance. The Court further observes that the applicant has had the benefit of the safeguards relating to disciplinary proceedings and remedies before the administrative courts. It concludes by six votes to one that there is no violation of Article 9 of the Convention. The Court does not mention Article 14 ECHR in its judgment.

Gender discrimination

Di Trizio v. Switzerland, 2 February 2016, no. 7186/09

The applicant worked as a full-time sales assistant, but in 2003 she had to stop doing so because of back problems. She applied to the Disability Insurance Office in St Gall for a disability allowance and was granted an allowance for 50% disability. In 2004 the applicant gave birth to twins, which increased her back problems and reduced her capacity to perform household tasks by 44.6%. Given the new situation the applicant found herself in, the disability allowance was recalculated on the basis of the so-called “combined method”. This method took into account that the applicant would be working less hours because of the birth of her children. Based on the applicant’s own estimations, it was presumed that she would work part-time (50%), dedicating the remainder of the time

to household tasks. The calculation of the basis for the disability allowance accordingly was as follows:

50% (remunerated activities): no loss, so $0.5 \times 0\% = 0\%$

50% (household activities): loss of 44.6%, so $0.5 \times 44\% = 22\%$

Total: $0\% + 22\% = 22\%$

Before the Court, the applicant claimed that the “combined method” was discriminatory as it disadvantaged couples where the mother wanted to earn part of the household income through part-time work. The Court considers that the case comes within the ambit of Article 8 ECHR as it concerns the organisation of family life, in particular because the loss of part of the allowance mainly proves to affect women who would like to continue working (albeit part-time) after the birth of their children. The combined method of calculation may affect the choices of the partners of dividing the household tasks, which clearly relates to matters of family life. Moreover, these choices are also closely related to private life issues. The Court further accepts the statistical evidence advanced by the applicant as disclosing a *prima facie* case of indirect discrimination, as it turns out that the application of the combined method in 97% of the cases concerns women and in 3% it concerns men. The Court accepts the Government’s argument that the aim of disability insurance was to insure individuals against the risk of becoming unable, owing to a disability, to engage in paid employment or perform routine tasks which they would have been able to perform had they remained in good health. The question is, however, whether the application of the combined method is a reasonable and proportionate means to achieve this particular aim and whether there are very weighty reasons to support the method of calculation. The Court observes that the method has been criticised on the national level for possibly being discriminatory and there are clear indications of a growing awareness that the combined method is no longer consistent with efforts to achieve gender equality in contemporary society. The Court is therefore not convinced that the difference in treatment is supported by a reasonable justification, and with a majority of 4-3 it finds a violation of Article 14 in combination with Article 8 ECHR. Judges Keller, Spano and Kjølbro maintain in their dissenting opinion that social benefits should not be brought within the scope or ambit of Article 8 ECHR and the case should have been declared inadmissible *ratione materiae* for that reason.

Domestic violence

M.G. v. Turkey, ECtHR 22 March 2016, no. 646/10

The applicant, M.G., lodged a complaint against her husband with the public prosecutor in 2006, stating that she had fled from her home on account of the domestic violence to which she had been subjected from the beginning of her marriage in 1997. A report detailing M.G.’s injuries was drawn up by the institute for forensic medicine; she was referred to the psychiatric department of the Medical Faculty of Istanbul University, which also submitted a document to the prosecutor’s office, indicating that she was suffering from depressive disorder and chronic post-traumatic stress resulting from her experiences. The applicant’s request for a divorce was granted in 2007 and her children were placed under the protection of the social services. The family affairs court imposed preventive measures on M.G.’s ex-husband (including an order not to approach her or communicate with her), but only for a limited period of time. In 2012, 2013 and 2014, M.G. applied to the family affairs to extend the preventive measures. Although the court granted these requests, it was clear from a report by the foundation providing for refuge to M.G. and her children that she was still living under continual threat and her safety still was not guaranteed.

The Court observes that the medical files disclose that the applicant has suffered clear psychological and physical harm. It also has been established by the family affairs court that the applicant has been subjected to domestic violence. The Court therefore finds that there is no doubt that Article 3 ECHR applies to the facts of the case. Article 3 ECHR implies a positive obligation to prevent ill-treatment by third parties as well as to punish those responsible, when the authorities are aware of an concrete risk of such ill-treatment. The Court notes that in Turkey, there is no specific legislation criminalising domestic violence. In the applicant's case, moreover, she had to wait for five years before the public prosecutor decided to start criminal proceedings against the ex-husband. This is incompatible with the special diligence that would be required in cases on domestic violence, especially also in the light of the Istanbul Convention on domestic violence. This Convention imposes an obligation on the states parties to take legislative measures and to conduct judicial proceedings without undue delay. The Court further considers that it is the national authorities' obligation to take account of the precarious and vulnerable position of the victims of domestic violence. In this regard it is unacceptable that the applicant has had to wait for more than five years for a criminal procedure to be started, without there being any objective reason for such delay.

The Court further finds that only while M.G. was still married, the family affairs court had a clear legal basis to apply protection measures. When she was divorced, it was disputed whether she could actually benefit from such measures. Although the family affairs court interpreted the legislation in such a way that it could impose such measures to protect the applicant, the Court notes that this was based on a discretionary choice by the court. The Court admits that at the time the protective measures applied, the applicant had not been subjected to ill-treatment by her ex-husband, but it also notes that she continued to live in fear, anxiety and uncertainty. The Court therefore unanimously concludes that Turkey has failed to comply with its positive obligations under Article 3 ECHR.

In relation to the complaint under Article 14 read in conjunction with Article 3 ECHR, the Court mentions that in *Opuz* it has already found that a State's failure to protect women against domestic violence breaches their right to equal protection under the law. It also emphasises that, under Article 3 of the Istanbul Convention, the term "violence against women" is to be understood as a violation of human rights and a form of discrimination against women. In this connection, it notes that, in the circumstances of the present case, the general and discriminatory judicial passivity in Turkey is such as to create a climate that is conducive to domestic violence. Equally, the Court considered that, until the entry into force of new legislation, the legislative framework in force did not guarantee to divorced women the protection measures against their former spouses. In consequence, the Court unanimously concludes that there has been a violation of Article 14, taken together with Article 3 of the Convention.

Halime Kılıç v. Turkey, 28 June 2016, no. 63034/11

In 2008, the applicant's daughter, Fatma Babatlı, lodged a complaint against her husband (S.B.) stating that she had been repeatedly assaulted by him. She requested application of protection measures and an order to remove her husband from the home. These requests were granted by the Family Court. In the same year, Fatma Babatlı lodged two further complaints and the Family Court issued two further injunctions. The Criminal Court, however, rejected the request that he be placed in pre-trial detention. After a fourth complaint, Fatma Babatlı was killed by her husband, who also killed himself. The Court notes that the Family Court has acted to protect Fatma Babatlı, but it also finds that there were delays in the delivery of the orders. These deprived her of the benefit of immediate protection, despite this being necessary in her situation; this was proved by the fact that between the issuance and delivery of the orders, she was again assaulted. Moreover, whilst S.B. clearly had been shown to represent a danger, the Criminal Court had refused to place

him in pre-trial detention, without assessing the risks thereof for Fatma Babatlı. The Court also concludes that in failing to punish S.B.'s failure to comply with the injunctions, the authorities had deprived them of any effectiveness. The Court further notes the lack of shelters for women in Turkey at the relevant time, as well as the lack of information given to Fatma Babatlı regarding the available facilities. The national authorities thereby have not sufficiently taken account of her particularly precarious and vulnerable psychological, physical and material situation, nor of their obligation to offer her appropriate support. The Court therefore concluded that there had been a violation of Article 2 ECHR.

In relation to the complaint under Article 14 taken together with Article 2 ECHR, the Court mentions that in defining and delineating the notion of discrimination against women, it also needs to take account of provisions of specialised legal instruments regarding violence against women. In particular, the Court notes that Article 3 of the Istanbul Convention understands the notion of "violence against women" as a violation of human rights and as a form of discrimination against women. The Court also notes that since its earlier judgment in the *Opuz* case, many legislative and political initiatives have been taken in Turkey to fight against violence against women, including the ratification of the Istanbul Convention. The facts of the current case took place, however, before these reforms were made. Also considering reports of Human Rights Watch and of CEDAW, and based on statistical information about the number of women who have lost their lives through violence, the Court finds it sufficiently established that there is a *prima facie* case of insufficient protection of women against violence, which continues to exist in the Turkish society. In the circumstances of the case, the Court observes that the daughter of the applicant has been a victim of violence and threats by her husband, a situation of which the authorities were aware. Based on its findings under Article 2 about the shortcomings of the protection offered by the authorities, it concludes that there was a complete denial by the national authorities of the gravity of the domestic violence as well as of the particular vulnerability of the victims of such violence. Regularly turning a blind eye to such violence, the authorities have created a climate that is conducive to such violence. It therefore finds a violation of Article 14, taken together with Article 2.s

Discrimination based on disability or health status

Çam v. Turkey, 23 February 2016, no. 51500/08

In 2004 Ms Çam, who is blind, passed the entrance examination for the Turkish National Music Academy. As part of the enrolment procedure, a commission drew up a medical report concluding that she could attend lessons in the sections of the music academy where eyesight was not required. Declaring that none of the sections of the academy could be considered as not requiring eyesight, the music academy asked the chief medical officer of the hospital to draw up a fresh report in order to clarify whether Ms Çam was capable of attending lessons at the music academy. Based on this report the academy decided to reject Ms Çam's request for enrolment.

The Court examines the case under Article 14 ECHR in conjunction with the right to access to education as protected by Article 2 of Protocol No. 1. It considers that it is important to interpret that provision in the light of the UN Disability Convention. The Court finds it clear that Ms Çam's blindness in fact was the sole motive to refuse her to enrol in the music academy, even though the rules of procedure did not exclude blind persons and all applicants were required to provide certificates. The Court holds that reasonable accommodation may be required to take account of the different needs of pupils. Although the national authorities are generally better placed than it is itself to estimate which measures may be called-for, it is important that States take due account of the particular vulnerability of children with a disability.

The Court observes that in this case the national authorities have done nothing to identify the needs of the applicant, nor have they tried to search for facilities to accommodate the special needs of a blind pupil; they simply directly refused to enrol her. The Court finds that such lack of effort is not acceptable, and that the applicant has been deprived of possibility to follow an education at the music school. Unanimously, it therefore finds a violation of Article 14 taken together with Article 2 of Protocol No. 1.

Novruk and Others v. Russia, 15 March 2016, nos. 31039/11, 48511/11, 76810/12, 14618/13 and 13817/14

The applicants in this case all have migrated to Russia, where they have married or they are living together with a partner (in the case of applicant V.V., a same-sex partner). In all cases, at some point a residence permit has been refused or the applicants' presence in Russia has been declared undesirable, because they could not show that they were HIV-negative.

After the ECtHR's judgment in *Kiyutin v. Russia* (ECtHR 10 March 2011, no. 2700/10), the Russian Constitutional Court has held that the relevant HIV Prevention Act is incompatible with the Russian Constitution and it has required that the federal legislation should be amended. In response a draft law has been introduced that makes a number of changes, but this legislation is not applicable to the facts of the current cases.

The Court deals with the cases under Article 8 taken in conjunction with Article 14, as the applicants all had well-established family life and/or private life in Russia and the difference in treatment is based on their health status, which is a status that is covered by Article 14.

In its assessment of the justification for this difference in treatment, the Court reiterates its findings in *Kiyutin v. Russia*, in which it has already found that people living with HIV are a vulnerable group and that the State should be afforded only a narrow margin of appreciation in choosing measures that single out this group for differential treatment on account of their health status. The Court also notes a marked improvement since its judgment in *Kiyutin* in the situation of people living with HIV as regards restrictions on their entry, stay and residence in a foreign country. It observes that the progress has been most significant at the European level: in the wake of the *Kiyutin* judgment, Armenia and Moldova brought their legislation into compliance with the Court's findings and abolished HIV-specific travel restrictions, while Andorra and Slovakia clarified that they did not apply any such restrictions. As matters currently stand, Russia is the only member State of the Council of Europe and one of sixteen States world-wide that enforces deportation of HIV-positive non-nationals. Since the expulsion of HIV-positive individuals does not reflect an established European consensus, and has no support in other member States, the Court finds that Russia is under an obligation to provide a particularly compelling justification for the differential treatment. Based on the same reasons as provided in *Kiyutin*, which mainly relate to the lack of any objective reasons to support the Russian policy, the Court rejects the arguments provided by the Russian government as unfounded. In relation to applicant V.V., the Court also stresses that that the alleged risk of unsafe behaviour on his part amounts to nothing more than conjecture and is not supported with facts or evidence. Although the national courts have performed a comprehensive balancing exercise in some of the cases, their judgments had no practical effect and gave no relief to the applicants.

In sum, the Court unanimously finds that, in the light of the overwhelming European and international consensus geared towards abolishing the outstanding restrictions on entry, stay and residence of HIV-positive non-nationals who constitute a particularly vulnerable group, the respondent Government have not advanced compelling reasons or any objective justification for their differential treatment for health reasons.

The applicant owns a flat in Zagreb situated on the third floor of a residential building, where he lived with his wife and two children. Three years after he had bought the flat, in 2003, the applicant's wife gave birth to their third child. The child was born with multiple physical and mental disabilities. In 2006 the applicant bought another house, because the building in which his flat was situated had no lift and for that reason did not meet the needs of his disabled child and his family. He submitted a tax exemption request to the tax authorities, relying on a possibility of tax exemption for a person who was buying a flat or a house in order to solve his or her housing needs. This request was dismissed because the original flat was sufficiently large to accommodate all family members, it complied with hygienic and technical requirements and it had sufficient infrastructure in terms of electricity, water and access to public utilities.

The Court notes that this case concerns a matter of taxation and it therefore falls within the scope of Article 1 of Protocol 1, read in conjunction with Article 14 ECHR. The Court notes that the case concerns a situation in which the applicant did not allege discriminatory treatment related to his own disability but rather his alleged unfavourable treatment on the basis of the disability of his child, with whom he lives and for whom he provides care. In this connection the Court reiterates that the application of Article 14 has not been limited to characteristics which are personal in the sense that they are innate or inherent. In the light of the nature of the rights which Article 14 seeks to safeguard, it follows that Article 14 of the Convention also covers instances in which an individual is treated less favourably on the basis of another person's status or protected characteristics.

In the Court's view, there can be no question that the applicant's flat in Zagreb severely impaired his son's mobility and consequently threatened his personal development and the ability to reach his maximum potential, making it extremely difficult for him to fully participate in the community and children's educative, cultural and social activities. The Court therefore finds that by seeking to replace the flat in question by buying a house that was adapted to the needs of his family, the applicant was in a comparable position to any other person who was replacing a flat or a house by buying another real property equipped with, in the words of the relevant domestic tax legislation, basic infrastructure and technical accommodation requirements. There is no doubt that the competent domestic authorities failed to recognise the factual specificity of the applicant's situation and adopted an over-restrictive position. Therefore, the question arises whether the same treatment of the applicant as that of any other buyer of real property had an objective and reasonable justification.

The Court notes that by adhering to the requirements set out in the UN Disability Convention, Croatia undertook an obligation to take into consideration its relevant principles, such as reasonable accommodation, accessibility and non-discrimination against persons with disabilities with regard to their full and equal participation in all aspects of social life. In the case of the applicant, however, the domestic authorities gave no consideration to these international obligations. In particular in the absence of the relevant evaluation of all the circumstances of the case by the competent authorities, the Court does not find that they provided an objective and reasonable justification for their failure to take into account the inequality pertinent to the applicant's situation when making an assessment of his tax obligation. The Court therefore unanimously finds that there has been a violation of Article 14 of the Convention in conjunction with Article 1 of Protocol No. 1. Having regard to that finding, the Court considers that it is not necessary to examine separately whether, in this case, there has also been a violation of Article 1 of Protocol No. 12 to the Convention.

The first applicant has a mild mental disability. Between 1983 and January 2012 he lived in a neuropsychological care home, where he met and married Ms N.S., who also resided there and who was deprived of her legal capacity because of her mental disability. Upon the birth of their child (the second applicant), N.S. was hospitalised and the child was placed in a children's home. The applicant was registered as her father and he gave consent for her stay at the children's home until it became possible for him to take care of her. The first applicant maintained regular contact with his daughter. He would visit her regularly, spend time with her, take her for walks and buy her books, toys and clothes. In February 2012, on the basis of a medical assessment, the first applicant was discharged from the care home and moved into the flat where he is currently living. Although he now wants to take care of his daughter himself, the domestic authorities have refused him to obtain custody because of his mental disability and because his taking care of his daughter would not be in the child's best interests.

The Court examines the case under Article 8 ECHR. It is not persuaded that the domestic courts convincingly demonstrated that the second applicant's transfer into the first applicant's care would be stressful for her to the extent that it made it necessary for her to remain in public care. In the Court's view, the national authorities chose a formalistic approach, simply endorsing the position of the representative of the children's home and silently ignoring all evidence and arguments to the contrary. It does not appear that they made any meaningful attempt to analyse the first applicant's emotional and mental maturity and ability to care for his daughter in the light of the adduced evidence and with due regard to all of the elements it revealed. The domestic courts' reference to the first applicant's diagnosis was not a "sufficient" reason to justify a restriction of his parental authority, nor was the domestic courts' reference to Ms N.S.'s legal status a sufficient ground for restricting the first applicant's parental authority. The Court unanimously finds that there has been a violation of Article 8 of the Convention on that account.

Under Article 14, the first applicant complained that the restriction on his parental authority had been discriminatory as it had been imposed because of his mental disability and had only been motivated by the authorities' prejudice against people with mental disabilities. The Court observes that in its examination of the Article 8 complaint, it has already analysed the reasons, including the first applicant's mental health, advanced by the domestic courts to restrict his parental authority. In view of the Court's analysis under that Article and the violation found, it does not consider it necessary to determine whether the domestic courts' decisions thereby discriminated against the first applicant in breach of Article 14, read in conjunction with Article 8 of the Convention. In her dissenting opinion, judge Keller objects to this, since in her view, the stereotyped line of reasoning is a fundamental aspect of the case.

Discriminatory violence

Homophobia

The applicants – an LGBT organisation and a number of individuals – gathered in 2012 to mark the International Day against Homophobia with a march. The LGBT marchers at some point were met there by a hundred or more counter-demonstrators, who were particularly aggressive and verbally offensive. The counter-demonstrators blocked the marchers' way, made a human chain and encircled the marchers in such a way as to make it impossible for them to pass. The marchers were

subjected to threats of physical assault and to insults, accused of being “sick” and “immoral” people and “perverts”. At that moment, the police patrol cars which had been escorting the marchers from the Tbilisi City Hall suddenly distanced themselves from the scene. The aggression towards the LGBT marchers continued to escalate and after approximately twenty to thirty minutes, the counter-demonstrators resorted to physical attack by pushing and punching the marchers.

The Court examines the complaints of the individual applicants under Article 3. It finds that they all have become the target of hate speech and aggressive behaviour. Given that they were surrounded by an angry mob that outnumbered them and was uttering death threats and randomly resorting to physical assaults, and that a clearly distinguishable homophobic bias played the role of an aggravating factor, the situation was one of intense fear and anxiety. The aim of that verbal – and sporadically physical – abuse was evidently to frighten the applicants so that they would desist from their public expression of support for the LGBT community. The Court notes that the applicants’ feelings of emotional distress must have been exacerbated by the fact that the police protection which had been promised to them in advance of the march was not provided in due time or adequately. The treatment therefore reached the threshold of severity within the meaning of Article 3 taken in conjunction with Article 14 of the Convention (six votes to one).

Having regard to the reports of negative attitudes towards sexual minorities in some parts of the society, as well as the fact that the organiser of the march specifically warned the police about the likelihood of abuse, the Court holds that the law-enforcement authorities failed to comply with their compelling positive obligation to protect the demonstrators. The Court further considers that it was essential for the relevant domestic authorities to conduct the investigation in the specific context of discrimination based on sexual orientation and gender identity as a bias motive and aggravating circumstance. For that reason, it should have taken all reasonable steps with the aim of unmasking the role of possible homophobic motives for the events in question. The Court considers that without such a strict approach from the law-enforcement authorities, prejudice-motivated crimes would unavoidably be treated on an equal footing with ordinary cases without such overtones, and the resultant indifference would be tantamount to official acquiescence to or even connivance with hate crimes. The Court thus concludes by six votes to one that in the present case there has been a breach of the respondent State’s positive obligations under Article 3 taken in conjunction with Article 14 of the Convention.

In addition, the Court finds that the domestic authorities failed to ensure that the march, which was organised by the first applicant and attended by the thirteen individual applicants, could take place peacefully by sufficiently containing homophobic and violent counter-demonstrators. In view of those omissions, the Court concludes unanimously that the authorities also fell short of their positive obligations under Article 11 taken in conjunction with Article 14 of the Convention.

M.C. and A.C. v. Romania, 12 April 2016, no. 12060/12

In 2006 the applicants participated in the annual gay march in Bucharest. At the end of the march, the applicants left the area using the routes and means of transport recommended by the authorities in the guidelines prepared by the organisers for march participants. As recommended in the same leaflet, they wore no distinctive clothing or badges that would identify them as having participated in the march. After boarding a metro train, they were attacked by a group of six young men and a woman wearing hooded sweatshirts. The attackers approached the victims directly and started punching them and kicking their heads and faces. They also swung from the metal bars above their heads, kicking their victims. During the attack they kept on shouting: “You poofs go to the Netherlands!”.

In view of the applicants’ allegations that the violence perpetrated against them had homophobic overtones which had been completely overlooked by the authorities in the investigation, the Court finds that the most appropriate way to proceed would be to subject the complaints to a sim-

ultaneous dual examination under Articles 3 and 8 taken in conjunction with Article 14 of the Convention. The Court considers that the aim of the physical and verbal abuse was probably to frighten the applicants so that they would desist from their public expression of support for the LGBTI community. The applicants' feelings of emotional distress must have been exacerbated by the fact that, although they followed to the letter the instructions issued by the organisers of the march in order to avoid becoming victims of aggression and had no distinctive marks on them, they were attacked because of their participation in the gay march and thus because they were exercising rights guaranteed by the Convention. The Court further acknowledges that the LGBTI community in Romania finds itself in a precarious situation, being subject to negative attitudes towards its members. In that light, the Court concludes that the treatment to which the applicants were subjected and which was directed at their identity and must necessarily have aroused in them feelings of fear, anguish and insecurity was not compatible with respect for their human dignity and reached the requisite threshold of severity to fall within the ambit of Article 3 taken in conjunction with Article 14 of the Convention.

The Court holds that the investigation was tainted by periods of inactivity and that insufficient investigative steps were taken, thereby allowing the statute of limitation to come into play. In addition, the Court considers that the authorities did not take reasonable steps with the aim of examining the role played by possible homophobic motives behind the attack. The necessity of conducting a meaningful inquiry into the possibility of discrimination motivating the attack was indispensable given the hostility against the LGBTI community in Romania and in the light of the applicants' submissions that hate speech, that was clearly homophobic, had been uttered by the assailants during the incident. The Court considers that without such a rigorous approach from the law-enforcement authorities, prejudice-motivated crimes would inevitably be treated on an equal footing with cases involving no such overtones. The resultant indifference would be tantamount to official acquiescence to, or even connivance with, hate crimes. Moreover, without a meaningful investigation, it would be difficult for the respondent State to implement measures aimed at improving the policing of similar peaceful demonstrations in the future, thus undermining public confidence in the State's anti-discrimination policy. The Court accordingly unanimously finds a violation of Article 3 (procedural limb) of the Convention read together with Article 14 of the Convention.

According to the majority of the Court this means that there is no need to examine the complaint that the police intentionally protracted the investigations for homophobic motives and the allegations made under Articles 8 of the Convention and 1 of Protocol No. 12 to the Convention. At this point, partly dissenting judge Kūris disagrees.

Racist violence / violence against Roma

R.B. v. Hungary, 12 April 2016, no. 64602/12

The applicant, who is of Roma origin, lives in a Hungarian village of 2,800 people, about 450 of whom are of Roma origin. On 6 March 2011 the Movement for a Better Hungary, a right-wing political party, held a demonstration in the village. Between 1 and 16 March 2011, in connection with the demonstration, the Civil Guard Association for a Better Future and two right-wing paramilitary groups organised marches in the Roma neighbourhood. During the demonstration and the marches, there was a considerable police presence. The applicant complains about being intimidated by some of the participants in the marches. One of them was yelling that he would build a house in the Roma neighbourhood "out of their blood"; he stepped towards the fence swinging an axe towards the applicant, but was held back by one of his companions. Upon a criminal complaint

lodged by the applicant against “unknown perpetrators”, the police opened an investigation on charges of violent harassment. The police later discontinued the proceedings on the grounds that harassment was punishable only if directed against a well-defined person, and that criminal liability could not be established on the basis of threats uttered “in general”.

The Court subjects the applicant’s complaints to a simultaneous dual examination under Article 3 taken in conjunction with Article 14 of the Convention. It mentions that the primary issue in respect of this complaint is whether the applicant’s treatment at the hands of the protestors constituted ill-treatment within the meaning of Article 3. If it did not, then the issue of whether the respondent Government fulfilled its obligations under that provision taken together with Article 14 will not arise. The Court emphasises that the applicant admitted that she has not suffered physical injury at the hands of Mr S.T. or any other person participating in the marches on 10 March 2011, and that her complaint was based on the psychological effect which the conduct of Mr S.T. had had on her and other members of the Roma minority. In the light of the evidence before it, the Court accepts that the behaviour of those participating in the marches was premeditated and motivated by ethnic bias. It also notes that the marches continued for about two weeks after the incident in question and were designed to cause fear among the Roma minority. Nonetheless, in the Court’s view the seriousness of the threats was not comparable to that in other cases, such as *Begheluri* (see above), where the threats directed against members of the religious community were accompanied by searches, severe beatings, robbery and a series of humiliating and intimidating acts. The Court also notes that, although the right-wing groups were present in the applicant’s neighbourhood for several days, they were continuously monitored by the police. As it appears from the case file, no actual confrontation took place between the Roma inhabitants and the demonstrators. The utterances and acts were openly discriminatory and performed in the context of marches with intolerant overtones, but in the Court’s view, they were not so severe as to cause the kind of fear, anguish or feelings of inferiority that are necessary for Article 3 to come into play. For that reason, the Court rejects (by a majority) the applicant’s complaint about the authorities’ failure to fulfil their positive obligations under Article 3 read in conjunction with Article 14 of the Convention as being manifestly ill-founded.

The Court continues to investigate the complaint under Article 8 ECHR, mentioning that in the past it has already accepted that an individual’s ethnic identity must be regarded as an aspect of a person’s identity. In particular, any negative stereotyping of a group, when it reaches a certain level, is capable of impacting on the group’s sense of identity and the feelings of self-worth and self-confidence of members of the group. It is in this sense, the Court finds, that it can be seen as affecting the private life of members of the group. Turning to the circumstances of the present case, the Court notes that the applicant, who is of Roma origin, felt offended and traumatised by the allegedly anti-Roma rallies in the predominantly Roma neighbourhood and, in particular, the racist verbal abuse and attempted assault. For the Court, the central issue of the complaint is that the abuse that occurred during ongoing anti-Roma rallies was directed against the applicant for her belonging to an ethnic minority. This conduct necessarily affected the applicant’s private-life, in the sense of ethnic identity, within the meaning of Article 8 of the Convention. Although there may be positive obligations under Article 8 to secure respect for private life, even in the sphere of relations between individuals between themselves, the Court emphasises that this is an area in which Contracting States enjoy a wide margin of appreciation in determining the steps to be taken to ensure compliance with the Convention, with due regard to the needs and resources of the community and of individuals. The Court also stresses, however, that the increasingly high standard being required in the area of the protection of human rights and fundamental liberties requires greater firmness in assessing breaches of the fundamental values of democratic societies. Moreover, in the Court’s view, in situations where there is evidence of patterns of violence and intolerance against an ethnic minority, the positive obligations require a higher standard of States to

respond to alleged bias-motivated incidents. Having regard to the specific and substantiated allegations made by the applicant during the investigation and the factual circumstances of the incident, the competent authorities had evidence at their disposal suggesting a racist motive for the verbal violence directed against the applicant. However, the legal provisions, as in force at the material time, provided no appropriate legal avenue for the applicant to seek remedy for the alleged racially motivated insult. In the Court's view, in the present case the criminal-law mechanisms available in Hungary did not provide adequate protection to the applicant against an attack on her integrity and the manner in which they were implemented in the instant case showed that they were defective to the point of constituting a violation of the respondent State's positive obligations under Article 8 (six votes to one).

By contrast, in regard to the way in which the authorities acted to prevent any violations of Article 8 from occurring during the rallies, the Court finds that the response of the police to the events as they unfolded was reasonable in the circumstances and not incompatible with the authorities' duty under Article 8. The impugned operational decision of the police about the manner in which it maintained order and security during the marches fell within the ambit of legitimate police discretion.

In his dissenting opinion to the case, judge Wojtyczek argues that Article 3 should not have been declared inadmissible, but examined on the merits, since ethnic discrimination is a matter of utmost concern. He also objects to the qualification of the case as one concerning Article 8. In his view, ethnic identity should not be protected by Article 8, as it is protected – to some extent – by certain other provisions of the Convention, in particular Article 3 and Article 14.

Adam v. Slovakia, 27 July 2016, no. 68066/12

In 2010, the applicant (of Romani origin and 16 years old at the time) was arrested on suspicion of mugging a 12 year old boy. According to the applicant, he was slapped in the face by the police officers questioning him; according to the government, there had been no ill-treatment. Although the Court finds it established that he had a swollen cheek, it is uncertain how this came about. Given the observations made by the parties and based on the the available evidence, the Court considers that the explanation offered by the government of the events underlying the applicant's allegations is plausible. It therefore cannot be concluded that the applicant was exposed to treatment contrary to Article 3 of the Convention. By contrast, the Court does conclude that the various shortcomings of the investigation, coupled with the sensitive nature of the situation related to Roma at the relevant time, are sufficient to conclude that the authorities have not all that could have been reasonably expected of them to investigate the applicant's allegations of ill-treatment. It therefore finds a violation of the procedural limb of Article 3 ECHR.

The applicant has also submitted that his ethnic origin was a decisive factor in the ill-treatment he had suffered. The Court acknowledges the seriousness of these allegations and, again, it notes the sensitive nature of the situation related to Roma in Slovakia at the relevant time. It also notes the vagueness and general nature of the applicant's allegations, however, and it observes that they comprise no individual elements imputable to the officers involved in the applicant's case. The Court therefore finds that the applicant has failed to make a *prima facie* case that his treatment during his detention and the subsequent investigation into it was discriminatory. For that reason, this part of the application is manifestly ill-founded.

Right to stand for elections

Ofensiva Tinerilor v. Romania, 15 December 2015, no. 16732/05

The applicant organisation ("Youth Initiative") is an association established under Romanian law in 2004 with the aim of representing the interests of Romanian citizens of Polish origin. The Romanian authorities refused to register the applicant association's list of candidates for the parliamentary elections. Under Article 14 ECHR in conjunction with Article 3 of Protocol No. 1 (the right to elections), the applicant association claims that it had been disadvantaged in comparison to organisations representing the interests of minority groups of Polish origin who already had obtained a seat in Parliament since, in contrast to the latter organisations, the applicant organisation had to prove its identification with the Polish community. The Court held that this difference in treatment is objectively justified, as the legislation has the aim to ensure that all associations participating in the elections as representatives of a certain minority group, actually benefit from a certain degree of support by that group. For groups already having a seat in Parliament, such support may be presumed. It follows from this that this part of the complaint is manifestly ill-founded.

Secondly, the applicant objects to the fact that in order to be allowed to participate in the elections, parties representing a minority need to obtain a number of signatures of a minimum of 15% of those registered voters who have declared their affiliation to the relevant minority, whilst other political parties can participate as soon they have obtained 25,000 signatures in total (which generally is much less than 15% of the registered voters). The Court observes that the two different regulations pursue different objectives. The overall minimum of signatures aims to ensure that a political party is sufficiently representative at the national level; in this regard, 'representative' relates to the number of citizens who would like to see their interests represented by certain political party. By contrast, the percentage required for a national minority has the objective of avoiding certain cases of fraud, taking into account certain specific advantages offered to national minorities. This complaint therefore is also manifestly ill-founded.

Partei Die Friesen v. Germany, 28 January 2016, no. 65480/10

The applicant party claims to represent the interests of the Frisian minority in Germany. It limits its political activities to the Land of Lower Saxony (Niedersachsen) where the East Frisians traditionally settle. Under the Electoral Law of Lower Saxony, parliamentary seats are attributed only to parties which obtain a minimum threshold of 5% of the total of votes validly cast. In 2007, the applicant party asked to be granted an exemption from the minimum threshold for the upcoming elections, but this request was refused. In the 2008 elections, the applicant party attained an overall total of 10,069 votes, amounting to approximately 0.3% of all votes validly cast. The applicant party complains that the application of the 5% threshold violates its right to participate in elections without being discriminated against.

The Court reiterates that Article 14 does not prohibit a member State from treating groups differently in order to correct "factual inequalities" between them; indeed, in certain circumstances a failure to attempt to correct inequality through different treatment may in itself give rise to a breach of the Article. Regarding participation in elections of the *Länder*, the Court notes that there was no obligation under constitutional law applicable in Lower Saxony to exempt parties of national minorities from electoral thresholds regarding elections in the Land. The Court also observes that the situation of the applicant party is basically similar to the situation of other parties which concentrate on the representation of numerical small interest groups defined by criteria such as age, religious belief and profession. The disadvantages in the electoral process is therefore based on the chosen concept of only representing the interests of a small part of the population, for which a Contracting State in general cannot be held responsible. Nevertheless, in the Court's view,

it remains to be determined whether the applicant party has been discriminated against in its capacity as a party representing a national minority, that is whether, under the Convention, national minority parties should be treated differently to other special interest parties.

The Court observes that the Framework Convention on National Minorities puts an emphasis on the participation of national minorities in public affairs. However, the possibility of exemption from the minimum threshold is merely presented as one of many options in this context and no clear and binding obligation derives from the Framework Convention to exempt national minority parties from electoral thresholds. The States party to the Framework Convention enjoy a wide margin of appreciation in how to approach the Framework Convention's aim of promoting the effective participation of persons belonging to national minorities in public affairs as stipulated in Article 15.

Consequently, the Court takes the view that, even interpreted in the light of the Framework Convention, the Convention does not call for a different treatment in favour of minority parties in this context. The Court therefore unanimously finds that there has been no violation of Article 14 of the Convention read in conjunction with Article 3 of Protocol No. 1.

Pilav v. Bosnia and Herzegovina, 9 June 2016, no. 41939/07

The applicant lives in Srebrenica, a town in the Republika Srpska (one of the two constituent entities of Bosnia and Herzegovina). He has declared himself as a Bosniac (one of the country's "constituent peoples") and he has held several elected and appointed political positions in the Republika Srpska. In 2006, the applicant submitted his candidacy for the 2006 elections to the Presidency of Bosnia and Herzegovina, but his candidacy was dismissed. The reason for this was that he did not live in Bosnia and Herzegovina, but in the Republika Srpska.

In line with its earlier judgment in *Sejdić and Finci* the Court finds that Article 1 of Protocol No. 12 is applicable to elections to the Presidency of Bosnia and Herzegovina. It also holds that in earlier judgments, it has already found that a similar constitutional precondition amounted to a discriminatory difference in treatment. The Court observes that this case is different in that the applicant, having declared himself as affiliated to one of the "constituent people", has a constitutional right to participate in elections to the Presidency. However, in order effectively to exercise this right he is required to leave his home and move to the Federation of Bosnia and Herzegovina. Therefore, while, unlike the applicants in *Sejdić and Finci*, the present applicant is theoretically eligible to stand for election to the Presidency, in reality, as long as he lives in the Republika Srpska he cannot use this right. As such, a residence requirement is not disproportionate or irreconcilable with the underlying purposes of the right to free elections. Enjoyment of the right to vote and to stand for election may depend on the nature and degree of the links that existed between the individual applicant and the legislature of the particular country. However, the Court notes that in this case, the applicant lives in Bosnia and Herzegovina. In that connection, the Court observes that the Presidency of Bosnia and Herzegovina is a political body of the State and not of the Entities. Its policy and decisions affect all citizens of Bosnia and Herzegovina, whether they live in the Federation, the Republika Srpska or Brčko District. Therefore, although the applicant is involved in political life in the Republika Srpska, he is also clearly concerned with the political activity of the collective Head of State. As the Court has already held in *Sejdić and Finci*, no justification can be found for the difference in treatment in the need to maintain the fragile situation of peace in Bosnia and Herzegovina. The Court accordingly finds a violation of Article 1 of Protocol No. 12.

Social security, social benefits and property rights

Fábián v. Hungary, ECtHR 15 December 2015, no. 78117/13

While the applicant was already in receipt of an old-age pension, he took up employment with a Budapest District Municipality as a civil servant, as of 1 July 2012. On 1 January 2013 an amendment to the Pension Act entered into force, according to which the disbursement of those old-age pensions whose beneficiaries are simultaneously employed within certain categories of the public sector will be suspended for the duration of their employment. No such restriction was put in place in respect of those who are in receipt of an old-age pension while being employed within the private sector. In application of this new rule, on 2 July 2013 the disbursement of the applicant's pension was suspended.

The Court is satisfied that the pension right in question is a pecuniary right for the purposes of Article 1 of Protocol No. 1. The subject matter of the case thus falls within the ambit of that provision. As the applicant was denied payment of that pension on the ground of being simultaneously employed in the public sphere – which can be considered as “other status” covered by Article 14 – that provision is applicable.

In the Government's submissions, the legitimate aim pursued by the legislation underlying the differential treatment in question is to protect the public purse. The Court considers that – even if it only concerned a limited number of pensioners – the measure was indeed capable of reducing the public spending to some extent and for that reason the aim referred to by the Government can be accepted as legitimate. However, the Court observes that the Government have not put forward any convincing argument – indeed, no reasons at all – for limiting the scope of the amendment to those categories of State employees which are enumerated in the law, rather than including all public employments. From the perspective of reducing public expenditure, the Court cannot see any justification for this difference in treatment and accepts that the exempted State employees are in fact in a situation analogous to that of the applicant. Moreover, as regards the other limb of the alleged discrimination, that is, difference in treatment between the public and the private sphere, the Court considers that while it is true that only the former group is susceptible to receiving double income from public sources, the core argument put forward by the Government (namely, that no State pension should be paid to persons who, employed, do not need a substitute for salary) should in fact equally hold true for those retirees who then take up employment in the private sphere, earning a salary. The Court therefore finds the arguments put forward by the Government unpersuasive. It unanimously finds that there has been a breach of Article 14 of the Convention read in conjunction with Article 1 of Protocol No. 1. This case has been accepted for referral to the Grand Chamber on 2 May 2015.

Di Trizio v. Switzerland, 2 February 2016, no. 7186/09

See [above](#) – indirect discrimination based on gender as a result of calculation method for disability allowance.

Mamatas and Others v. Greece, 21 July 2016, nos. 63066/14, 64297/14 and 66106/14

The applicants in this case are about 6000 Greek individuals who held state bonds with values between 10,000 and 1.5 million Euro. In the context of the economic crisis and in the light of the conditions the IMF and the EU have set for loans and investments, institutional investors have agreed on a ‘haircut’ on their shares – a reduction in the nominal value of their shares and an adjusted mode of reimbursement of the remainder – and the compensations they could expect in return. On the other hand, the private individuals holding bonds to a total of some 1% of the overall public debt did not take part in those negotiations, the Greek and European authorities having

declared that they were not concerned by the measures. In December 2011, however, the IMF invited the Greek authorities to bring in all their individual creditors as well. They were forced in an agreement according to which their old bonds were exchanged for new ones worth 53.5% less in terms of nominal value. The Court finds that, given the wide margin of appreciation and the pressing public interest, there is no violation of the property rights protected by Article 1 of the First Protocol to the ECHR.

The applicants have also claimed that they have been unduly treated in the same way as legal entities and institutional investors, who found themselves in an incomparable position. The Court decides not to answer the question whether indeed the case discloses substantive discrimination, as it holds the measures to be justified for other reasons. In particular, it notes that it would have been problematic and difficult to distinguish between natural and legal persons, between professional and non-professional investors, or between small investors and larger ones – especially given that some of the applicants, as private individuals, had invested considerable sums in the bonds. Such distinctions invariably would have led to unfair over- or underinclusiveness of the measures. In addition, the Court takes account of the government's argument that an announcement that certain bonds would be exempted from the operation would have resulted in a mass transfer of bonds into the exempted categories. Such a transfer might even have led to the bankruptcy of the Greek State. Finally, the Court takes into consideration that the operation needed to be carried out very quickly. The exigencies of the situation would have made it very difficult to draw very precise and careful distinctions between different groups. Accordingly, the Court finds that there is no violation of Article 14 ECHR taken in conjunction with Article 1 of Protocol No. 1.

British Gurkha Welfare Society and Others v. the United Kingdom, ECtHR 15 September 2016, no. 44818/11

Nepalese Gurkha soldiers have served the Crown since 1815, initially as soldiers in the (British) Indian Army. Today, they form the Brigade of Gurkhas ("the Brigade"), in which only Nepali nationals are eligible for service. Gurkha soldiers are required to retire after fifteen years' service, subject to the possibility, dependent on rank, of one or more yearly extensions. Historically, Gurkha soldiers were discharged to Nepal and it was presumed that they would remain there during retirement. On 1 July 1997, however, the Brigade's home base moved to the United Kingdom. In 2004 the immigration rules were changed to permit Gurkha soldiers with at least four years' service who retired on or after 1 July 1997 to apply for settlement in the United Kingdom. Approximately 90 per cent of the 2,230 eligible Gurkha soldiers have since applied successfully to settle in the United Kingdom with their qualifying dependants. Gurkhas are traditionally entitled to a pension under the Gurkha Pension Scheme ("GPS"), while non-Gurkha soldiers retiring from the British Army are entitled to pensions under the Armed Forces Pensions Scheme ("AFPS"). In 2007, however, the United Kingdom formulated the Gurkha Offer to Transfer ("GOTT"), which enabled Gurkha soldiers who retired on or after 1 July 1997 to transfer from the GPS to the AFPS. Nearly all serving Gurkhas elected to transfer to the AFPS (only 0.3 per cent elected to remain in the GPS). Of those who had retired, but remained eligible for transfer, approximately three per cent elected to remain in the GPS.

The first applicant is a non-governmental unincorporated association that acts on behalf of 399 former members of the Brigade. The other applicants are former Gurkha soldiers who have retired before 1 July 1997 and therefore are not entitled to the newly accrued benefits. The Court decides not to answer the question whether the first applicant has standing as a victim, even though it acknowledges that it is an organisation representing the actual victims of the alleged violation, rather than an organisation that has suffered a violation itself. Furthermore, the Court observes that the applicants have complained about a discrimination based on race, while this ground has not been pleaded before the national courts. For that reason, and especially because race and

national origin are clearly distinct grounds demanding a different assessment, it declares this aspect of the complaint inadmissible for non-exhaustion of domestic remedies. The Court further notes that it is clear that Gurkha soldiers were treated differently from other soldiers in the British Army, yet the Government and the applicants have submitted different views and different reports as to whether the difference really constitutes a disadvantaged position for the applicant. The Court finds, however, that already in 2004 the Secretary of State for Defence had conceded that Gurkhas generally were 'clearly' wronged under the GPS, so it should be accepted that the different pension benefit profiles of the Gurkhas were less advantageous. Furthermore, although Gurkhas and British soldiers originally clearly had not been in an analogous position, their situation has significantly changed over time and by the date of the GOTT in 2007, it should be accepted that they were in a relevantly similar situation. Although the Court mentions that normally in cases of discrimination based on nationality it applies a very weighty reasons test, it notes that it must be mindful of the wide margin usually allowed to the State under the Convention when it comes to general measures of economic or social strategy. It emphasises that this is particularly so where an alleged difference in treatment resulted from a transitional measure forming part of a scheme for the enhancement of a benefit which was carried out in good faith in order to correct an inequality. The Court further notes that in changing the legislation, the authorities had been faced with a decision: whether to allow the transfer to the AFPS of pension rights accrued in respect of all years of service on a year-for-year basis; whether to allow only the transfer of pension rights accrued in respect of all years of service on an actuarial basis; or to find a middle ground. The Court notes that it would appear that the first option was rejected for financial reasons, while the second option was rejected because it would have undervalued those years of service acquired at a time when the historical assumption that the Gurkhas would retire to Nepal no longer held good. Consequently, the authorities opted for the third approach. The Court finds choice reasonable, and it holds that the selection of 1 July 1997 as a "cut-off point" was not arbitrary as it represented the change of the home basis of the Brigade. Finally, it notes that the majority of Gurkhas settled in the UK and that the purpose of an armed forces pension scheme (either under the AFPS or GPS) is not to enable the soldier to live without other sources of income following retirement from the army. Instead, they are expected to continue to be economically active and have other sources of income. For those reasons, it holds unanimously that the difference in treatment was objectively and reasonably justified.

Finally, the Court notes that the applicants have complained about age discrimination, holding that older Gurkhas were treated differently from younger ones. The Court recalls that it has recognised that age might constitute "other status" for the purposes of Article 14 of the Convention, but it also notes that it has not, to date, suggested that discrimination on grounds of age should be equated with other "suspect" grounds of discrimination. Moreover, the differential treatment, which also flows from the decision to value only service after 1 July 1997 on a "year-for-year" basis, must be regarded as objectively and reasonably justified for the reasons given in relation to the applicants' complaint concerning discrimination on grounds of nationality. For that reason, the Court unanimously does not find a violation of Article 14 taken together with Article 1 of Protocol No. 1.

Substantive discrimination

Partei Die Friesen v. Germany, 28 January 2016, no. 65480/10

See [above](#) – no violation of Article 14 by not making an exemption to the minimum threshold in parliamentary elections for a political party representing the interests of a national minority.

Guberina v. Croatia, 22 March 2016, no. 23682/13

See [above](#) – the State is obliged to apply a tax exemption for special housing needs in respect of a father who is taking care of a severely disabled child.

Taddeucci and McCall v. Italy, 30 June 2016, no. 51362/09

See [above](#) – violation of Article 8 taken in conjunction with Article 14 by not reading the notion of ‘family member’ in relation to a residence permit based on family reasons as extending to unmarried partners, not even for same-sex partners for whom there is no possibility of legal recognition of their relationship.

Indirect discrimination

Di Trizio v. Switzerland, 2 February 2016, no. 7186/09

See [above](#) – a calculation method for disability allowances which affects 97% of women constitutes a *prima facie* case of indirect discrimination; no sufficient justification has been provided to continue the use of this method.

Biao v. Denmark, 24 May 2016 (*Grand Chamber*), no. 38590/10

In Denmark, at the relevant time (2003) family reunion could be granted under the Aliens Act only if both spouses were over 24 years old and their aggregate ties to Denmark were stronger than the spouses’ attachment to any other country (the so-called ‘attachment requirement’). On that ground permission for family reunion was refused to the applicant, who had entered Denmark in 1993 (when he was 22 years old), who had obtained a permanent resident permit in 1997 and who acquired Danish citizenship in 202. He met the relevant requirements for naturalisation, which included a period of residence longer than nine years, age, general conduct and language proficiency. The applicant wanted to marry a 24-year old Ghanaese national. Just after the refusal of permission, the Aliens Act was amended so that the attachment requirement was lifted for persons who had held Danish citizenship for at least 28 years (the so-called ‘28-year rule’). Persons born or having arrived in Denmark as small children could also be exempted from the attachment requirement, provided they had resided lawfully there for 28 years. Before the Court, the applicant submitted that the 28-year rule resulted in a, unjustified difference in treatment between two groups of Danish nationals: namely those born Danish nationals and those, like the applicant, who acquired Danish nationality later in life, and also Danish nationals of Danish ethnic origin and Danish nationals of other ethnic origin. In its judgment of 25 March 2014, the Chamber found unanimously that there had been no violation of Article 8 taken alone, but the Grand Chamber now holds differently. The Grand Chamber notes that the Government has acknowledged that the 28-year rule treats Danish nationals differently, depending on how long they have been Danish nationals. If the person has been a Danish national for 28 years, the exception to the “attachment requirement” applies. If the person has not been a Danish national for 28 years, it does not. The main question to be answered for the Court is whether this difference in treatment amounts to an indirect discrimination based on ethnic origin. This requires an examination of whether the manner in which the 28-year rule is applied in practice has a disproportionately prejudicial effect on persons who, like the first applicant, acquired Danish nationality later in life and who were of an ethnic origin other than Danish. In the proceedings before the Grand Chamber, the Court invited the Danish Government to indicate how many persons had benefited from the 28-year rule and how many of those were Danish nationals of Danish ethnic origin, but the Government was unable to produce the specific information requested by the Court. Nevertheless, the Court finds that it can

in the present case conclude that all Danish-born nationals benefit from the 28-year rule, as well as non-Danish aliens who had lawfully resided in Denmark for 28 years or more. By contrast, most if not all persons who had acquired Danish nationality later in life would not benefit from the rule. Thus, the 28-year rule had the indirect effect of favouring Danish nationals of Danish ethnic origin, and placing at a disadvantage, or having a disproportionately prejudicial effect on persons who, like the first applicant, acquired Danish nationality later in life and who were of an ethnic origin other than Danish. The Court therefore holds that the burden of proof must shift to the Government to show that the difference in the impact of the legislation pursued a legitimate aim and is the result of objective factors unrelated to ethnic origin. Having regard to the fact that no difference in treatment based exclusively or to a decisive extent on a person's ethnic origin is capable of being justified in a contemporary democratic society and a difference in treatment based exclusively on the ground of nationality is allowed only on the basis of compelling or very weighty reasons, the Court also holds that it falls to the Government to put forward compelling or very weighty reasons unrelated to ethnic origin if such indirect discrimination is to be compatible with Article 14 taken in conjunction with Article 8 of the Convention. As for the justification, the Court notes that the aim of the 28-year rule was to ensure that Danish expatriates would be able to obtain family reunion in Denmark since this group had been unintentionally and unfairly disadvantaged by the tightening of the attachment requirement introduced in 2002. It also had the aim of immigration control and improving integration. The Court considers that this justification is based on rather speculative arguments, in particular as to the time when, in general, it can be said that a Danish national has created such strong ties with Denmark that family reunion with a foreign spouse has a prospect of being successful from an integration point of view. The answer to this question cannot, in the Court's view, depend solely on the length of nationality, whether for 28 years or less; instead, it may also depend on other elements that may determine one's ties to Denmark. The Court also finds that some of the arguments advanced by the Government reflect negatively on the lifestyle of Danish nationals of non-Danish ethnic extraction, for example in relation to their "marriage pattern", which, according to the Government, "contributes to the retention of these persons in a situation where they, more than others, experience problems of isolation and maladjustment in relation to Danish society. The pattern thus contributes to hampering the integration of aliens newly arrived in Denmark". In this connection, the Court reiterates that it has already held in relation to gender discrimination that general biased assumptions or prevailing social prejudice in a particular country do not provide sufficient justification for a difference in treatment. The Court finds that similar reasoning should apply to discrimination against naturalised nationals. Finally, the Court emphasises that this case must be considered in the light of changing conditions in the States Parties and the evolving convergence as to the standards to be achieved. In this connection it refers, amongst others, to the European Convention on Nationality, which aims at eliminating discrimination based on nationality and against naturalised persons, as well as to the lack of similar measures in other European States and the lack of such discrimination in EU law on family reunification. In conclusion, having regard to the very narrow margin of appreciation in the present case, the Court finds that the Government have failed to show that there were compelling or very weighty reasons unrelated to ethnic origin to justify the indirect discriminatory effect of the 28-year rule. For that reason it holds with 12 votes to 5 that there has been a violation of Article 14 read in conjunction with Article 8 of the Convention in the present case.

Discrimination by association

Guberina v. Croatia, 22 March 2016, no. 23682/13

See [above](#) – Article 14 of the Convention also covers instances in which an individual is treated less favourably on the basis of another person's status or protected characteristics (in this case the disability of the applicant's son).

"Other status" / "personal status"

Fábián v. Hungary, 15 December 2015, no. 78117/13

See [above](#) – denial of payment of a pension on the ground of being simultaneously employed in the public sector can be considered as 'other status' covered by Article 14.

Intensity of review and the very weighty reasons test

Qing v. Portugal, 5 November 2015, no. 69861/11

In 2010, criminal proceedings were initiated in Portugal against the applicant, her husband and others on allegations of aiding illegal immigration, money laundering and forgery. The public prosecutor issued an arrest warrant against her, because of the risk of her absconding. The public prosecutor thereby noted that she is a Chinese national and, once confronted with the seriousness of the facts attributed to her, she could flee from Portugal to her home country. For the same reason, the investigating judge remanded the applicant in custody for the duration of the investigation.

Amongst other complaints, the applicant complains before the Court that the order to detain her on remand had been based on her foreign nationality, and was thus discriminatory. The Court considers that this complaint falls to be examined under Article 14, taken together with Article 5 § 1 (c) of the Convention. The Court mentions that in principle a wide margin of appreciation applies in questions of prisoner and penal policy, yet the Court must exercise close scrutiny where there is a complaint that domestic measures have resulted in detention which was arbitrary or unlawful. Moreover, it notes that very weighty reasons would have to be put forward for the Court to regard a difference in treatment based exclusively on the grounds of nationality as compatible with the Convention. It continues to hold that, even assuming that a distinction was made on the grounds of the applicant's nationality, it cannot ignore the particular aims of her pre-trial detention and the existence of "relevant" grounds which may justify its application differently to her co-defendants in the proceedings. The fact that the applicant was a Chinese national was used for assessing the risk of her obstructing the investigation and absconding, but it was only one of the factors which determined her detention. The domestic court also took account of, for example, the seriousness of the charges and the fact that the crimes investigated had been committed by an international criminal group of which the applicant was allegedly its leader in Portugal. Given the fact that she was a Chinese national and suspected of aiding Chinese illegal immigration, it would have been difficult for the domestic courts to avoid referring to her nationality, which was linked to the practice of the alleged crimes and an important factor for assessing the risk of her absconding. Having analysed all the factors concerning the applicant's situation, the domestic courts considered that her pre-trial detention would be proportionate and adequate to prevent the criminal proceedings from being frustrated or impeded. Consequently, the Court considers that the domestic courts'

analysis was based on relevant factors and cannot be seen as arbitrary or discriminatory. In the light of these findings, therefore, it cannot be said that the applicant was discriminated against on account of her nationality while in pre-trial detention. The Court unanimously finds that the case does not disclose a violation of Article 14 taken together with Article 5 §1 (c) of the Convention.

Ebrahimian v. France, 26 November 2015, no. 64846/11

See [above](#) – no very weighty reasons test applied to a case of non-renewal of contract because of wearing a veil.

Fábián v. Hungary, 15 December 2015, no. 78117/13

See [above](#) – although this is a social security case (whereby the ECtHR normally leaves a wide margin of appreciation) and there is no ‘suspect’ ground of discrimination, the Court’s justification review is rather strict.

Çam v. Turkey, 23 February 2016, no. 51500/08

See [above](#) – very weighty reasons test not expressly mentioned in case on reasonable accommodation for disability in case on access to education

Guberina v. Croatia, 22 March 2016, no. 23682/13

See [above](#) – in case on reasonable accommodation for disability in relation to housing and tax exemptions, Court both mentions that a wide margin is usually allowed in cases on general measures of economic and social strategy and that the State must have very weighty reasons to restrict the fundamental rights of a particularly vulnerable group in society. The Court does not expressly determine the resulting scope of the margin of appreciation.

Biao v. Denmark, 24 May 2016 (Grand Chamber), no. 3850/10

See [above](#) – the Court applies the very weighty reasons test to indirect discrimination based on ethnic origin in a case where Danish nationals born in Denmark are treated differently from Danish nationals not born in Denmark.

British Gurkha Welfare Society and Others v. the United Kingdom, ECtHR 15 September 2016, no. 44818/11

See [above](#) – no very weighty reasons test for nationality based discrimination in relation to social benefits and economic measures; no recognition of age as a suspect ground.