

Recent case-law of the ECtHR on non-discrimination

SUMMARIES OF CASES (1 November 2016 – 1 November 2017)

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Gender

***Khamtokhu and Aksenchik v. Russia*, 24 January 2017 (GC), nos. 60367/08 and 961/11
ECLI:CE:ECHR:2017:0124JUD006036708**

Life sentences – gender – age – very weighty reasons – asymmetry – consensus

The applicants were sentenced to life imprisonment under Article 57 of the Russian Criminal Code, which provides that a sentence of life imprisonment may be imposed for certain particularly serious offences. The same provision prohibits life sentences from being imposed on women, persons under 18 when the offence was committed or over 65 when the verdict was delivered. In their applications to the ECtHR, the applicants alleged that, as adult males serving life sentences for criminal offences, they had been discriminated against as compared to other categories of convicts who were exempt from life imprisonment by operation of law. They relied on Article 5 (right to liberty and security) taken in conjunction with Article 14 (prohibition of discrimination).

The Court emphasised that Article 5 of the Convention did not preclude the imposition of life imprisonment, where such punishment is prescribed by national law. However, it considered the prohibition of discrimination enshrined in Article 14 extended beyond the enjoyment of the rights and freedoms which the Convention and the Protocols thereto require each State to guarantee. It applied also to those additional rights, falling within the general scope of any Convention Article, for which the State has voluntarily decided to provide. It followed that the case fell within the ambit of Article 5 § 1 for the purposes of the applicability of Article 14 taken in conjunction with that provision.

According to the Court, the applicants were in an analogous situation to all other offenders who had been convicted of the same or comparable offences. It could not be disputed that the exemption contained in the Russian legislation amounted to a difference in treatment on grounds of sex and age. The Court reiterated that the Contracting States enjoy a margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a difference in treatment. On the one hand, the Court repeatedly held that differences based on sex require particularly serious reasons by way of justification and that references to traditions, general assumptions or prevailing social attitudes in a particular country cannot, by themselves, be considered to amount to sufficient justification for a difference in treatment, any more than similar stereotypes based on race, origin, colour or sexual orientation. On the other hand, it was not the Court's role to decide what is the appropriate term of detention applicable to a particular offence or to pronounce on the appropriate length of detention or other sentence which should be served by a person after conviction by a competent court. An additional factor relevant for determining the extent to which the respondent State should be afforded a margin of appreciation is the existence or non-existence of a European consensus.

Taking these general principles into account, the Court held, firstly, that there was no reason to question the difference in treatment of the group of adult offenders to which the applicants belonged, who were not exempted from life imprisonment, as compared to that of juvenile offenders who were so exempted. Indeed, the exemption of juvenile offenders from life imprisonment was consonant with the approach that is common to the legal systems of all the Contracting States, without exception, namely the abolition of life imprisonment for offenders considered juveniles. The said exemption is also consistent with the recommendation of the Committee on the Rights of the Child to abolish all forms of life imprisonment for offences committed by persons below the age of 18 and with the UN General Assembly's Resolution inviting the States to consider repealing all forms of life imprisonment for such persons. Secondly, in so far as the applicants complained of being treated differently from offenders aged 65 or over, the Court saw no grounds for considering that the relevant

domestic provision excluding offenders aged 65 or over from life imprisonment had no objective and reasonable justification. The purpose of the provision in principle coincided with the interests underlying the eligibility for early release after the first twenty-five years for adult male offenders aged under 65, such as the applicants, noted in the Court's judgment in *Vinter*. Reducibility of a life sentence carried even greater weight for elderly offenders in order not to become a mere illusory possibility. Thirdly, in so far as the applicants felt aggrieved by being treated differently from adult female offenders of the same age group as theirs (18 to 65) and who were exempted from life imprisonment on account of their gender, the Court had taken note of various European and international instruments addressing the needs of women for protection against gender-based violence, abuse and sexual harassment in the prison environment, as well as the needs for protection of pregnancy and motherhood. The Government provided statistical data showing a considerable difference between the total number of male and female prison inmates. They also pointed to the relatively small number of persons sentenced to life imprisonment. It was not for Court to reassess the evaluation made by the domestic authorities of the data in their possession or of the penological rationale which such data purports to demonstrate. In the particular circumstances of the case, the available data, as well as the above elements, provided a sufficient basis for the Court to conclude that there existed a public interest underlying the exemption of female offenders from life imprisonment by way of a general rule. The Court mentioned that it therefore appeared difficult to criticise the Russian legislature for having established, in a way which reflected the evolution of society in that sphere, the exemption of certain groups of offenders from life imprisonment. Such an exemption represented, all things considered, social progress in penological matters.

The Court found that there was no violation of Article 14 of the Convention, taken in conjunction with Article 5, whether in respect of the difference in treatment on account of age, or in respect of the difference in treatment on account of sex (ten votes to seven). To the judgment, four concurring opinions were annexed (by Judges Sajó, Nußberger, Turković and Mits), a joint dissenting opinion of Judges Sicilianos, Møse, Lubarda, Mourou-Vikström, and Kucsko-Stadlmayer, and a dissenting opinion of Judge Pinto de Albuquerque.

***Talpis v. Italy*, 3 March 2017, no. 41237/14
ECLI:CE:ECHR:2017:0302JUD004123714**

Domestic violence – gender – indirect discrimination – burden of proof – reports by international organisations – statistical data

The applicant was a Romanian national who lived in Italy. On 2 June 2012 Ms Talpis complained to the police that her husband (A.T.), who was an alcoholic, had beaten her and her daughter. On arriving at the scene, the police officers found A.T. in the street in a drunken state and recorded the injuries sustained by Ms Talpis and her daughter in their incident report. Ms Talpis did not lodge a formal complaint and decided to hide in the cellar. On 19 August 2012 Ms Talpis was once again attacked by her husband with a knife, forcing her to follow him in order to have sexual relations with his friends. She asked a police patrol in the street for help; the officers fined A.T. for carrying a prohibited weapon and invited Ms Talpis to go home. She was then taken in by a welfare association for female victims of violence for three months, after which she had to leave for lack of available space and resources. According to Ms Talpis, she subsequently slept in the street, was accommodated for a time by a friend, and finally found a job as a care assistant and was able to rent a flat. On 5 September 2012 Ms Talpis lodged a complaint for bodily harm, ill-treatment and threats of violence, urging the authorities to take prompt action to protect her and her children. On 4 April 2013 she was questioned for the first time by the police and she modified her statements, mitigating the allegations. In August 2013 the complaint file concerning the allegations of ill-treatment of the family and threats of

violence was closed. In October 2015, however, A.T. was fined 2,000 euros for having caused actual bodily harm. On 25 November 2013 Ms Talpis once again called the police concerning an argument with her husband, who was taken to hospital in a state of intoxication. After his discharge from hospital, A.T. was asked for his identity papers at around 2.25 a.m. as he was walking along the street in a drunken state. He was given an on-the-spot fine and allowed to go home. At around 5 a.m., armed with a kitchen knife, A.T. entered the family apartment and attacked Ms Talpis. He stabbed his son, who had tried to separate his parents and who died of his injuries. A.T. also stabbed Ms Talpis in the chest several times as she was attempting to escape. In January 2015 A.T. was sentenced to life imprisonment for the murder of his son and the attempted murder of his wife, for carrying a prohibited weapon and for the ill-treatment of Ms Talpis and her daughter. He was also ordered to pay Ms Talpis damages. Ms Talpis complained of the failure of the Italian authorities in their obligation to provide protection against domestic violence that had led to the death of her son and her own attempted murder. Relying on Article 14 (prohibition of discrimination) in conjunction with Articles 2 and 3, Ms Talpis also complained that she had suffered discrimination as a woman on account of the inaction of the authorities.

The Court found that by failing to take prompt action on the complaint lodged by Ms Talpis, the national authorities had deprived that complaint of any effect, creating a situation of impunity conducive to the recurrence of the acts of violence, which had then led to the attempted murder of Ms Talpis and the death of her son. The authorities had therefore failed in their obligation to protect the lives of the persons concerned. The Court also found that Ms Talpis had lived with her children in a climate of violence serious enough to qualify as ill-treatment, and that the manner in which the authorities had conducted the criminal proceedings pointed to judicial passivity, which was incompatible with the Convention. Under Article 14, the Court held that the case showed that by underestimating, through their inertia, the seriousness of the violence in question the Italian authorities had essentially endorsed it. Ms Talpis had therefore been the victim, as a woman, of discrimination contrary to Article 14 of the Convention. The Court noted that the findings of the United Nations Special Rapporteur on violence against women, its causes and consequences, following his visit to Italy in 2012, those of the Committee for the Elimination of Discrimination against Women, and those of the National Bureau of Statistics, showed the extent of the problem of domestic violence in Italy and the concomitant discrimination against women. Consequently, the Court considered that Ms Talpis had provided evidence of that phenomenon, substantiated by undisputed statistical data demonstrating, first of all, that domestic violence primarily affected women and that despite the reforms implemented a large number of women were being murdered by their partners or former partners (femicide), and, secondly, that the socio-cultural attitudes of tolerance of domestic violence were alive and well. The Court accordingly held that the violence inflicted on Ms Talpis should be considered as being grounded on sex and that it consequently amounted to a form of discrimination against women. It therefore found a violation of Article 14 of the Convention combined with Articles 2 and 3 (five to two votes). Judge Eicke annexed a partly concurring, partly dissenting opinion to the judgment; Judge Spano annexed a dissenting opinion to it, in which he explained that in his view, there was insufficient evidence of institutional discrimination in Italy to ground a finding of a violation of Article 14.

***Bălșan v. Romania*, 23 May 2017, no. 49645/09
ECLI:CE:ECHR:2017:0523JUD004964509**

Domestic violence – gender discrimination – vulnerability

On several occasions in 2007, the applicant was physically assaulted and threatened by her husband. The violence intensified in 2007 during their divorce proceedings and continued into 2008 when the divorce was finalised. She was assaulted by her husband in total eight times in this period, and sus-

tained injuries recorded in medical reports as requiring between two to a maximum of ten days' medical care. The applicant lodged complaints with the prosecutor's office and she sent a letter to the Hunedoara County police chief, in which she alleged that she had been the victim of repeated acts of violence by her husband, who often assaulted her in the presence of their children. She attached copies of the medical certificates drawn up after the incidents. The applicant reported that her ex-husband had been violent towards her throughout their marriage. The domestic violence continued, however, without the public prosecutor taking any action. The prosecutor's office attached to the Petroșani District Court decided not to press criminal charges against the husband, since he had concluded that, although N.C. had committed the crime of bodily harm, his actions had not created any danger to society, because he had been provoked by the victim, had no previous criminal record and was a retired person. Also the national courts held that the applicant had provoked the domestic violence and that it was not serious enough to come under the scope of the criminal law. Thus, as concerned the three incidents which occurred in 2007 the courts ultimately decided to acquit her husband of bodily harm; and as concerned the five incidents in 2008, the prosecuting authorities decided not to press charges.

The Court found that the manner in which Ms Bălșan's complaints had been dealt with by the authorities had not provided her with adequate protection against her husband's violence, in violation of Article 3. It thereby expressed grave concern about the authorities' findings that Ms Bălșan had provoked the domestic violence against her and their conclusion that it was not serious enough to fall within the scope of the criminal law. Such an approach, taken in a case where the domestic violence had not been contested, had deprived the national legal framework of its purpose and was inconsistent with international standards on violence against women and domestic violence in particular.

Having regard to the particular circumstances of this case and the nature and substance of the applicant's complaints, the Court further considered it appropriate to communicate of its own motion a complaint under Article 14 of the Convention read in conjunction with Article 3. The Court noted that the applicant's husband repeatedly subjected her to violence and allegedly threatened to kill her and that the authorities were well aware of what was going on. It concluded that the domestic authorities deprived the national legal framework of its purpose by their finding that the applicant provoked the domestic violence against her, that the violence did not present a danger to society and therefore was not severe enough to require criminal sanctions, and by denying the applicant's request for a court-appointed lawyer. In doing so, the domestic authorities also acted in a way that was inconsistent with international standards on violence against women and domestic violence in particular. Bearing in mind the particular vulnerability of victims of domestic violence, the Court considered that the authorities should have looked into the applicant's situation more thoroughly. As regards the general approach to domestic violence in Romania, the Court noted that official statistics showed that that type of violence is tolerated and perceived as normal by a majority of people and that a rather small number of reported incidents are followed by criminal investigations. Moreover, the number of victims of such violence had increased every year, the vast majority of them being women. Official data showed that as of 2017 a limited number of shelters was available nationwide for victims but that eight counties had no such shelter at all. The Court noted that these considerations were in line with previous findings by the CEDAW Committee, which found in 2006 that the general population might not be sufficiently aware of the extensive legal and policy framework developed by Romania for the elimination of discrimination against women and that women themselves might not be aware of their rights. In the Court's opinion, the combination of these factors demonstrated that the authorities did not fully appreciate the seriousness and extent of the problem of domestic violence in Romania and that their actions reflected a discriminatory attitude towards the applicant as a woman. The Court concluded that the violence suffered by the applicant could be regarded as gender-based violence, which was a form of discrimination against women. Despite the

adoption by the Government of a law and a national strategy on preventing and combating domestic violence, which the Court appreciated, the overall unresponsiveness of the judicial system and the impunity enjoyed by aggressors indicated that there was an insufficient commitment to take appropriate action to address domestic violence. The Court concluded that there was a violation of Article 14 of the Convention, read in conjunction with Article 3.

***Alexandru Enache v. Romania*, 3 October 2017, no. 16986/12
ECLI:CE:ECHR:2017:1003JUD001698612**

Gender discrimination – stay of imprisonment because of childcare – stronger bond between mother and child than between father and child – individualisation

The applicant, Alexandru Enache, was a Romanian national who was born in 1973 and lived in Bucharest (Romania). In December 2011, having been sentenced to seven years' imprisonment for embezzlement, Mr Enache was committed to prison. He lodged an application for a stay of execution of his sentence grounded on Article 453 § 1 of the former Code of Criminal Procedure (CPP). The article in question permitted mothers sentenced to prison to apply for stay of execution of sentence until their child had reached the age of one. The application lodged by Mr Enache, whose child was a few months old, was dismissed on the grounds that the provision in question had to be interpreted restrictively and that he could not request its application by analogy. Relying on Article 14 (prohibition of discrimination), essentially read in conjunction with Article 8 (right to respect for private and family life) and Article 1 of Protocol No. 12 to the Convention (general prohibition of discrimination), Mr Enache complained that he had been the victim of discrimination on grounds of sex as compared to female prisoners who had children under the age of one.

The Court determined that the complaint should only be assessed under Article 14 in conjunction with Article 8 of the Convention. It noted that Romanian law provided for two categories of prisoners with children under the age of one to be treated differently: women, who could apply for a stay of execution of sentence, and men, who were not entitled to such a measure. In that regard, the Court pointed out that it had already held, in a work-related context, that men were in a similar situation to women as regards parental leave and parental leave allowance. The present case was different from those concerning parental leave owing to its criminal nature and the margin of appreciation enjoyed by the State in implementing its criminal-law policies: the fact that a stay of execution of a prison sentence is a criminal-law matter made it fundamentally different from parental leave, which comes under labour law. A stay of execution of a prison sentence had the primary aim of safeguarding the best interests of the child, ensuring that it receives the appropriate attention and care during the first year of its life. However, even though there might be differences in their relationship with their child, both the mother and the father could provide such attention and care. Moreover, the Court observed that entitlement to a stay of execution continued until the child's first birthday, and therefore extended beyond the period following the mother's pregnancy and the birth itself. The Court therefore considered that Mr Enache could claim to be in a situation comparable to that of a female prisoner. In assessing the reasonableness of the difference in treatment, the Court considered it relevant that giving female prisoners the benefit of a stay of execution of sentence was not automatic and detailed assessments were made of requests for a stay. In addition, the Romanian legislation in force at the material time provided all prisoners, regardless of gender, with other channels for requesting a stay of sentence. Lastly, the Court had regard to the Government's claims that the aim of the legal provisions in question had been to take into account specific personal situations – including the female prisoners who were pregnant and the first year of the child's life – with particular regard to the special bonds between mother and child during that period. The Court held that that aim could be considered legitimate within the meaning of Article 14 of the Convention and that the arguments put

forward by the Government could not be deemed manifestly ill-founded or unreasonable. It was prepared to consider that in the specific field covered by the present case, those considerations could amount to a sufficient basis to justify the difference in treatment applied to Mr Enache. Indeed, motherhood presented specific characteristics which should be taken into account, in particular, by means of protective measures. Article 4 § 2 of the UN Convention on the Elimination of All Forms of Discrimination against Women expressly provides that the adoption by States Parties of special measures aimed at protecting maternity should not be considered discriminatory. That also applied to women who have been sentenced to imprisonment. Consequently, the Court considered that in view of the wide margin of appreciation afforded to the respondent State in this sphere there was a reasonable relation of proportionality between the means used and the legitimate aim pursued. Therefore, the impugned exclusion had not amounted to discrimination as prohibited under Article 14 read in conjunction with Article 8 of the Convention.

LGTBI

***Bayev and Others v. Russia*, 20 June 2017, nos. 67667/09 and 2 others
ECLI:CE:ECHR:2017:0620JUD006766709**

Demonstration – picketing – ‘homosexual propaganda’ – protection of good morals – interests of children – very weighty reasons – no legitimate aim

In various regions in Russia and later on the federal level, legislation was adopted which prohibited public activities aimed at the promotion of homosexuality among minors – so-called ‘homosexual propaganda’. In 2009 the first applicant held a static demonstration (‘picket’) in front of a secondary school, holding two banners which stated ‘Homosexuality is normal’ and ‘I am proud of my homosexuality’. He was charged with an administrative offence for doing so and fined about 34 Euros. In 2012 the second and the third applicants held a static demonstration in front of the children’s library in Arkhangelsk. The second applicant was holding a banner stating ‘Russia has the world’s highest rate of teenage suicide. This number includes a large proportion of homosexuals. They take this step because of the lack of information about their nature. Deputies are child-killers. Homosexuality is good!’ The third applicant was holding a banner stating ‘Children have the right to know. Great people are also sometimes gay; gay people also become great. Homosexuality is natural and normal’; it went on to list the names of famous people who had contributed to Russia’s cultural heritage and were believed to be gay. Both applicants were arrested and escorted to the police station, where administrative offence reports were drawn up. They were ordered to pay fines of about 50 Euros. On another date, the third applicant held a demonstration in front of the St Petersburg City Administration, holding up a banner with a popular quote from a famous Soviet-era actress Faina Ranevskaya: ‘Homosexuality is not a perversion. Field hockey and ice ballet are.’ He was arrested by the police and escorted to the police station, where an administrative offence report was drawn up and he was fined about 130 Euros. Relying on Article 10 (freedom of expression) and Article 14, the applicants complained about the ban on public statements concerning the identity, rights and social status of sexual minorities, alleging that it was discriminatory.

The Court held that the legislation and its enforcement constituted an interference with the applicants’ freedom of expression. The Russian government relied on moral imperatives and on popular support for the measures in question. They alleged that an open manifestation of homosexuality was an affront to the mores prevailing among the religious and even non-religious majority of Russians and was generally seen as an obstacle to instilling traditional family values. According to the Court, it needed to examine whether it was open to the Government to rely on the grounds of morals

in a case which concerned facets of the applicants' existence and identity, and the very essence of the right to freedom of expression. With regard to the issue of morals, the Government advanced the alleged incompatibility between maintaining family values as the foundation of society and acknowledging the social acceptance of homosexuality. The Court saw no reason to consider these elements as incompatible, especially in view of the growing general tendency to include relationships between same-sex couples within the concept of "family life". The Government had failed to demonstrate how freedom of expression on LGBT issues would devalue or otherwise adversely affect actual and existing "traditional families" or would compromise their future. In addition, the Court observed that it had consistently declined to endorse policies and decisions which embodied a predisposed bias on the part of a heterosexual majority against a homosexual minority. These negative attitudes, references to traditions or general assumptions in a particular country could not of themselves be considered by the Court to amount to sufficient justification for the differential treatment, any more than similar negative attitudes towards those of a different race, origin or colour. The legislation at hand was an example of such predisposed bias, which the Court found to be unambiguously highlighted by its domestic interpretation and enforcement, and embodied in formulas such as 'to create a distorted image of the social equivalence of traditional and non-traditional sexual relationships' and references to the potential dangers of 'creating a distorted impression of the social equivalence of traditional and non-traditional marital relations'. Even more unacceptable, in the Court's view, were the attempts to draw parallels between homosexuality and paedophilia. The Court took note of the Government's assertion that the majority of Russians disapprove of homosexuality and resent any display of same-sex relations. The Court noted that popular sentiment indeed may play an important role in the Court's assessment when it comes to the justification on the grounds of morals. However, it held that there is an important difference between giving way to popular support in favour of extending the scope of the Convention guarantees and a situation where that support is relied on in order to narrow the scope of the substantive protection. The Court reiterated that it would be incompatible with the underlying values of the Convention if the exercise of Convention rights by a minority group were made conditional on its being accepted by the majority. Were this so, a minority group's rights to freedom of religion, expression and assembly would become merely theoretical rather than practical and effective as required by the Convention. The Court therefore rejected the Government's claim that regulating public debate on LGBT issues may be justified on the grounds of the protection of morals.

Likewise, the Court rejected the Government's argument that the promotion of same-sex relationships had to be banned on the grounds that same-sex relationships posed a risk to public health and the demographic situation. The Government had not demonstrated that the applicants' messages advocated reckless behaviour or any other unhealthy personal choices. In any event, the Court considered it improbable that a restriction on potential freedom of expression concerning LGBT issues would be conducive to a reduction of health risks.

The Court found it equally difficult to see how the law prohibiting promotion of homosexuality or non-traditional sexual relations among minors could help in achieving the desired demographic targets, or how, conversely, the absence of such a law would adversely affect them. Population growth depended on a multitude of conditions, economic prosperity, social-security rights and accessibility of childcare being the most obvious factors among those susceptible to State influence. According to the Court, suppression of information about same-sex relationships was not a method by which a negative demographic trend may be reversed.

Finally, the Government's arguments focused on the need to shield minors from information which could convey a positive image of homosexuality, as a precaution against their conversion to a 'homosexual lifestyle' which would be detrimental to their development and make them vulnerable to abuse. They stressed the potential risk of minors being induced or forced into adopting a different sexual orientation which touched upon issues concerning the personal autonomy of minors and en-

croached upon the educational choices of their parents. The Court noted that the Russian Government's argument was inconsistent, since the restrictions on 'promotion' were not limited to specific situations. This was evidenced by the fact that one of the applicants was fined for a demonstration in front of the St Petersburg City Administration, a public place that was not specifically assigned to minors. In addition, in so far as the Government alleged a risk of exploitation and corruption of minors, referring to the latter's vulnerability, the Court upheld the applicants' objection to the effect that protection against such risks should not be limited to same-sex relationships; the same positive obligation should, as a matter of principle, be equally relevant with regard to opposite-sex relationships. As regards the applicants' alleged intrusion in the field of educational policies and parental choices on sex education, the Court observed that in staging their demonstrations the applicants did not seek to interact with minors, nor intrude into their private space.

The Court concluded that the legal provisions in question did not serve to advance the legitimate aim of the protection of morals, and that such measures were likely to be counterproductive in achieving the declared legitimate aims of the protection of health and the protection of rights of others. Given the vagueness of the terminology used and the potentially unlimited scope of their application, these provisions were open to abuse in individual cases, as evidenced in the three applications at hand. Above all, by adopting such laws the authorities reinforced stigma and prejudice and encourage homophobia, which was incompatible with the notions of equality, pluralism and tolerance inherent in a democratic society. The Court concluded that Article 10 had been violated.

The Court decided to deal also with the complaint made under Article 10 taken in conjunction with Article 14, although the parties presented essentially the same arguments as those they had made under Article 10. The Court reiterated that, with specific regard to differences in treatment based on sexual orientation, the Court had consistently held that the State's margin of appreciation was a narrow one; in other words, such differences required particularly convincing and weighty reasons by way of justification. The Court observed that the Code of Administrative Offences specifically banned 'promoting the attractiveness of non-traditional sexual relationships, creating a distorted image of the social equivalence of traditional and non-traditional sexual relationships', in concert with the Constitutional Court's position. The legislation at hand thus stated the inferiority of same-sex relationships compared with opposite-sex relationships. The Court noted that it had already found that the legislative provisions in question embodied a predisposed bias on the part of the heterosexual majority against the homosexual minority and that the Government had not offered convincing and weighty reasons justifying the difference in treatment. Based on these findings it concluded that there was also a violation of Article 14 of the Convention taken in conjunction with Article 10 of the Convention.

***Ratzenböck and Seydl v. Austria*, 26 October 2017, no. 28475/12
ECLI:CE:ECHR:2017:1026JUD002847512**

Different sex couple – access to registered partnership rather than marriage – very weighty reasons – common ground reasoning

The applicants, a different-sex couple, lodged an application to enter into a registered partnership under the Registered Partnership Act. Their application was refused on the basis that they did not meet the legal requirements; registered partnerships were exclusively reserved for same-sex couples. Their appeals were dismissed. The applicants complained, under Article 14 of the Convention taken in conjunction with Article 8, of discrimination based on their sex and sexual orientation on account of their exclusion from the registered partnership, claiming that marriage was not a suitable alternative for them.

The Court reiterated that it had repeatedly held that, just like differences based on sex, differences based on sexual orientation required ‘particularly convincing and weighty reasons’ by way of justification. The Court further noted that it had not yet had an opportunity to examine the question of differences in treatment based on sex and sexual orientation relating to the exclusion from a legal institution for recognition of a relationship from the viewpoint of a different-sex couple. It accepted that same-sex couples and different-sex couples are in principle in a relevantly similar or comparable situation as regards their general need for legal recognition and protection of their relationship. The exclusion of different-sex couples from the registered partnership had to be examined in the light of the overall legal framework governing the legal recognition of relationships. The registered partnership was introduced as an alternative to marriage in order to make available to same-sex couples, who remain excluded from marriage, a substantially similar institution for legal recognition. The Court mentioned that it had concluded in its earlier judgment in *Schalk and Kopf* that there was no indication that the respondent State had exceeded its margin of appreciation in its choice of rights and obligations conferred by the registered partnership and it noted that the institutions of marriage and the registered partnership are essentially complementary in Austrian law. There were only slight differences in material consequences. Moreover, the legal frameworks governing marriage and the registered partnership were further harmonised after the Court had adopted its judgment in the case of *Schalk and Kopf* and also after the applicants had lodged the present application, and to date no substantial differences remained. The applicants’ opposition to marriage was based on their view that a registered partnership is a more modern and lighter institution, but they had not claimed to have been specifically affected by any difference in law between those institutions. This being so, the Court considered that the applicants were not in a relevantly similar or comparable situation to same-sex couples. There was therefore no violation of Article 14 taken in conjunction with Article 8 of the Convention (five votes to two). Judge Mits annexed a concurring opinion to the judgment; Tsotsoria and Grozev wrote a joint dissenting opinion.

Ethnic origin and race

***Škorjanec v. Croatia*, 28 March 2017, no. 25536/14
ECLI:CE:ECHR:2017:0328JUD002553614**

Discriminatory violence – racist motive – discrimination by association – procedural positive obligations

The applicant and her partner, Š.Š., who was of Roma origin, were assaulted by two individuals who uttered anti-Roma insults immediately preceding and during the attack. The applicant was treated as a witness in the criminal case and not as a victim alongside her partner, because she was not a Roma and the insults were related to the Roma origin of her partner only. In the Convention proceedings the applicant alleged a failure by the domestic authorities to effectively discharge their positive obligations in relation to a racially motivated act of violence against her in breach of Articles 3 and 14.

The Court noted that the Croatian legal framework included a special provision for hate crime as an aggravating form of other criminal offences. Thus, the Croatian legal system provided adequate legal mechanisms to afford an acceptable level of protection to the applicant in the circumstances. However, the Court also emphasised that where any evidence of racist verbal abuse comes to light in an investigation, it must be checked. If confirmed, a thorough examination of all the facts should be undertaken in order to uncover any possible racist motives. Likewise, it held that under the Convention the obligation on the authorities to seek a possible link between racist attitudes and a given act of violence existed not only with regard to acts of violence based on the victim’s actual or perceived

personal status or characteristics but also with regard to acts of violence based on the victim's actual or perceived association or affiliation with another person who actually or presumably possesses a particular status or protected characteristic. Indeed, the Court stressed that some hate-crime victims are chosen not because they possess a particular characteristic but because of their association with another person who actually or presumably possesses the relevant characteristic. This connection may take the form of the victim's membership of or association with a particular group, or the victim's actual or perceived affiliation with a member of a particular group through, for instance, a personal relationship, friendship or marriage.

In the case in issue, the prosecuting authorities confined their investigation and analysis to the hate-crime element of the violent attack against Š.Š. They failed to carry out a thorough assessment of the relevant situational factors and the link between the applicant's relationship with Š.Š. and the racist motive for the attack on them. Indeed, the police lodged a criminal complaint only with regard to the attack on Š.Š., treating the applicant merely as a witness, although she had also sustained injuries in the course of the same attack while in his company. The Court could not but note that the prosecuting authorities' insistence on the fact that the applicant herself was not of Roma origin and their failure to identify whether she was perceived by the attackers as being of Roma origin herself, as well as their failure to take into account and establish the link between the racist motive for the attack and the applicant's association with Š.Š., resulted in a deficient assessment of the circumstances of the case. This was sufficient for the Court to conclude that there has been a violation of Article 3 under its procedural aspect in conjunction with Article 14 of the Convention.

Disability

***Kacper Nowakowski v. Poland*, 10 January 2017, no. 32407/13
ECLI:CE:ECHR:2017:0110JUD003240713**

Disability – reasonable accommodation – no need to investigate measure under Article 14

In August 2005 Mr Nowakowski, who was deaf and mute, married A.N., who also has a hearing impairment. The couple had a son in 2006. They divorced in 2007; the domestic courts ruled that their son, at the time 11 months old, was to reside with his mother and that Mr Nowakowski was allowed to see his son for two hours every week. Mr Nowakowski did not object to these arrangements. However, in August 2011, when his son had reached the age of almost five, Mr Nowakowski applied to the courts for an extension of his contact rights in order to strengthen their ties. He notably requested that the contact take place without the mother and away from her home, on account of her attempts to undermine him during visits and the generally unfriendly atmosphere. The courts ultimately refused Mr Nowakowski's request in November 2012, finding that it would not be in his son's best interests. Mr Nowakowski complained about the dismissal of his application for an extension of contact with his son, maintaining that the child's best interests had demanded a broader perspective than the one adopted by the domestic courts. He also alleged that the dismissal of his request for increased contact had been solely on the ground of his disability and had been highly discriminatory. He relied on Article 8 (right to respect for private and family life) and Article 14 (prohibition of discrimination) of the European Convention.

The Court emphasised the problems caused in the applicant's case as a result of the animosity between the parents. However, even though the parents' strained relationship had admittedly not made the courts' task an easy one, they should nonetheless have taken measures to reconcile the parties' conflicting interests. In trying to find solutions to the problems in the case, the national courts had also failed to envisage measures adapted to Mr Nowakowski's disability, such as obtaining

expert evidence from specialists familiar with the problems faced by those with hearing impairments. Indeed, in their decisions the courts had relied on expert reports which had focused on the communication barrier between father and son instead of reflecting on the possible means of overcoming it.

In conclusion, the Court was of the view that the national courts had not taken all appropriate steps to facilitate Mr Nowakowski's contact with his son, in violation of Article 8. In view of its analysis under that Article and the violation found, the Court considered that in the circumstances of the present case it was not necessary to examine any further complaint under Article 14 of the Convention, read in conjunction with Article 8 of the Convention. In their separate opinions, Judge Sajó and Judge Motoc criticised the Court for not examining the complaint (also) under Article 14.

***Saumier v. France*, 12 January 2017, no. 74734/14**

ECLI:CE:ECHR:2017:0112JUD007473414

Comparability – occupational disability – negligence

Ms Saumier had become ill as a result of her employer's negligence and been unable to obtain full compensation for the damage she suffered. The Créteil Social Security Tribunal had recognised her as having a work-related illness. Because of the employers negligence, it increased the amount of her annual disability pension. In a separate set of proceedings, Ms Saumier in addition claimed compensation in respect of all the damage suffered, in an amount of about 1.2 million Euro. In a judgment of 21 September 2011 the Créteil Social Security Tribunal awarded Ms Saumier the sum of about 745,000 Euro, but upon appeal, the Paris Court of Appeal, overturned the judgment in so far as it had awarded compensation in respect of the impact on the applicant's occupation, her permanent functional impairment, the need for permanent assistance by a third person and the non-pecuniary damage arising from a progressive illness. Relying on Article 14, taken together with Article 1 of Protocol No. 1 (protection of property), Ms Saumier complained of the fact that, unlike victims of negligence under the ordinary law, victims of work-related accidents or occupational diseases caused by their employer's negligence were not eligible for compensation in respect of all the damage sustained.

The Court observed that employees who had suffered an accident at work or contracted an occupational disease as a result of negligence by their employer were not in an analogous or comparable situation to that of individuals who had sustained physical injury or damage to health as a result of negligence by persons who were not their employer. The relationship between an employer and his or her employee was contractual and governed by a specific set of rules which were clearly distinguishable from the general rules governing relations between individuals. The French rules governing liability in case of accidents at work and occupational diseases were thus very different from those applicable under the ordinary law in that they were not based on proof of negligence, a causal link between the negligence and the damage, and the judge's decision, but on solidarity and automaticity. Compensation for the damage incurred by the employee on account of inexcusable negligence by the employer supplemented the damages automatically received by the former, which also distinguished the employee's situation regarding the position under the ordinary law. Accordingly, the situation of an employee who had suffered an accident at work or contracted an occupational disease was not the same as that of an individual who had suffered damage occurring in a different context. The Court therefore concluded that there had been no violation of Article 14 of the Convention taken in conjunction with Article 1 of Protocol No. 1.

Nationality, residence and citizenship

***A.H. and Others v. Russia*, 17 January 2017 (GC), nos. 6033/13 and others
ECLI:CE:ECHR:2017:0117JUD000603313**

Adoption – accessory character – nationality – very weighty reasons test

The applicants were forty-five nationals of the United States of America ('the US applicants') who had started proceedings for the adoption of children from Russia between 2010 and 2012. They had complied with the requirements set by the United States authorities, having obtained favourable appraisals of their living and financial conditions and their suitability to adopt a child. In most cases the US applicants received a positive decision from the Russian authorities regarding both the impossibility of placing the child in a Russian family and their suitability to become adoptive parents. By the end of 2012 most of the US applicants had completed all the requisite steps of the adoption procedure prior to submitting the adoption application to a court. However, on 21 December 2012 the Russian State Duma adopted Federal Law no 272-FZ that, inter alia, banned the adoption of Russian children by nationals of the United States. The law entered into force on 1 January 2013. Adoption proceedings were halted in respect of those US applicants who had not submitted an adoption application to a court before the entry into force of Law no. 272-FZ. In respect of those US applicants who had submitted an adoption application to a court but had not attended a hearing before the entry into force of Law no. 272-FZ, the courts discontinued the adoption proceedings, relying on Law no. 272-FZ. Some of the applicants appealed. Their appeals were dismissed. Applications for adoption submitted by US nationals after 1 January 2013 were rejected on procedural grounds, with similar reference to Law no. 272-FZ. After spring 2013 some of the prospective adoptive children were transferred for adoption by different families or placed in foster families. The law has been described as a response to the 'Magnitsky Act' passed by the United States Congress in November/December 2012 and signed by the US President on 14 December 2012. The Magnitsky Act imposed sanctions on the Russian officials who were thought to be responsible for the death of Sergei Magnitsky, a lawyer who had exposed alleged large-scale tax fraud involving State officials and subsequently died in custody. The Magnitsky Act prohibited the Russian officials from entering the United States and using the United States' banking system. The Russian authorities' response involved the passing of a similar act in respect of United States nationals. However, Section 4 § 1 of Law no. 272-FZ also introduced a ban on the adoption of Russian children by United States nationals. The introduction of that provision was prompted by the death in 2008 of Dima Yakovlev, a Russian toddler adopted by United States nationals. He was left alone for nine hours strapped in his adoptive father's car after the latter forgot to take him to his day-care centre. The father was eventually acquitted of involuntary manslaughter. This news created a stir in the Russian media and resulted in the highlighting of a number of abuse cases involving Russian children adopted by United States nationals, leading to calls from certain Russian authorities to restrict or end adoptions by US nationals. Relying on Article 8 (right to respect for private and family life), the applicants complained that, given that they had been at an advanced stage of the adoption procedure and a bond had already been formed between the prospective parents and the children, the application of the adoption ban to them had been an unlawful and disproportionate interference with their family life. Relying on Article 14 taken in conjunction with Article 8, they complained that the ban had discriminated against the prospective parents on the grounds of their US nationality.

The Court decided to assess the case based on Article 8 taken in conjunction with Article 14. Although the provisions of Article 8 do neither guarantee either the right to found a family or the right to adopt, nor the mere desire to found a family, Article 14 applies also to those additional rights, falling within the general scope of any Convention Article, for which the State has voluntarily decided to

provide. The Court considered that the additional right to apply for adoption and subsequently have a fair treatment of the respective application, granted by Russia at the relevant time, which the US applicants sought to exercise, falls within the general scope of Article 8 of the Convention as pertaining to their 'private life'. The Court further noted that in the cases in question the US applicants alleged that they had been discriminated against in the exercise of this right on the grounds of their nationality. The latter was a concept covered by Article 14 of the Convention. Hence, the facts of the cases fell within the ambit of Article 8 of the Convention, and Article 14 of the Convention taken in conjunction with Article 8 was applicable in the case insofar as the complaint concerned the US applicants.

The Court further found that there was a difference between the treatment of US applicants and that of other foreign nationals who were candidates for intercountry adoption of Russian children on the grounds of the nationality of the former. Very weighty reasons would have to be put forward before the Court could regard a difference in treatment based exclusively on the ground of nationality as compatible with the Convention. In this regard, the Court accepted that the measure aimed to protect the children's interests and encouraged adoption at national level, which constituted legitimate aims. Given that (i) the adoption proceedings in the cases at hand were instituted at the time when applying for intercountry adoption was expressly permitted by Russia and (ii) they were pending at the time of introduction of the ban on adoption by virtue of Law no. 272-FZ, the Court considered that the Russian government failed to show that there were compelling or very weighty reasons to justify the blanket ban applied retroactively and indiscriminately to all prospective adoptive parents from the United States, irrespective of the status of the adoption proceedings already started and their individual circumstances. It constituted a disproportionate measure in relation to the aims stated by the Government.

The Court therefore concluded that the difference in treatment was discriminatory in breach of Article 14 in conjunction with Article 8. Having regard to its finding under Article 14 of the Convention taken in conjunction with Article 8, the Court further considered that it was not necessary to examine whether, in this case, there had been a violation of Article 8 of the Convention taken alone.

***K2 v. the United Kingdom*, 7 February 2017 (decision), no. 42387/13
ECLI:CE:ECHR:2017:0207DEC004238713**

Deprivation of citizenship – terrorism suspect – national residents vs. non-national residents

The applicant was born in Sudan. He arrived in the United Kingdom as a child and was granted indefinite leave to remain as the minor dependent of a refugee, namely his father. In 2000 he became a naturalised British citizen. In 2009, the applicant left the United Kingdom. He contended that he went directly to Sudan; however, according to the Secretary of State for the Home Department's open statement before the Special Immigration Appeal Tribunal (SIAC), the Security Service assessment was that he first travelled with two extremist associates to Somalia, where he engaged in terrorism-related activities linked to Al-Shabaab, a jihadist terrorist group based in East Africa, before travelling on to Sudan. In 2010, the Secretary of State notified the applicant of her intention to make an order depriving him of his British citizenship on the ground that to do so would be conducive to the public good. K2 complained that the decisions to deprive him of his British citizenship and exclude him from the United Kingdom had violated his rights under Article 8 (right to private and family life). He further complained under Article 14 read together with Article 8 that he had been treated differently from British citizens considered a threat to national security who did not hold a second nationality; and from non-national residents who enjoyed a suspensory appeal against the revocation of leave to remain in the United Kingdom.

Although an arbitrary denial or revocation of citizenship might in some circumstances raise an issue under Article 8, because of its impact on the private life of an individual, the Court found that no such issue arose in the present case. The Home Secretary at the time had acted swiftly and diligently, and in accordance with the law. K2 had had a statutory right to appeal and access to judicial review but the UK courts had rejected his claims after giving them a comprehensive and thorough examination. In addition, the Court recalled that in assessing the decision to deprive the applicant of his British citizenship, it must apply a standard of ‘arbitrariness’, which was a stricter standard than that of proportionality. Bearing this in mind, and having regard to the above considerations, it concluded that the decision was not ‘arbitrary’. For that reason, the Court considered that the case was manifestly ill-founded and must be rejected in accordance with Article 35 § 3(a).

The Court rejected the first non-discrimination complaint for procedural reasons, since the applicant had not argued that he was treated differently from a British citizen who posed a threat to national security in the proceedings before the national courts.

As for the second discrimination complaint, i.e. that he was treated differently from a non-national resident – the Court considered that the applicant was not denied an in-country right of appeal because he was a British citizen; rather, the reason was that he did not have an in-country appeal against the decision to deprive him of his citizenship. The reason for this was that he was not present during the judicial review proceedings, because he had already left the United Kingdom of his own volition when the impugned decisions were taken. A non-national resident who had his leave to remain cancelled while out of the country would also not be permitted to return for the purposes of an appeal. For that reason, the Court considered that the Article 14 complaint based on this ground must be rejected as manifestly ill-founded pursuant to Article 35 § 3(a) of the Convention.

***Gouri v. France*, 28 February 2017, no. 41069/11
ECLI:CE:ECHR:2017:0228DEC004106911**

Residence – personal status – no comparability

The applicant was an Algerian national, who was living in Algeria. In 1999 she was granted a disabled widow’s pension backdated to 1 April 1993. In 2006 she applied for the payment of a supplementary disability allowance with retroactive effect from 1 April 1993. The Loiret Sickness Insurance Department dismissed her application on the ground that she did not satisfy the requirement of residence in France. Relying on Article 14 (prohibition of discrimination) taken together with Article 1 of Protocol No. 1 (protection of property) Ms Gouri argued that the imposition of a residence requirement for receipt of a supplementary disability allowance was discriminatory.

The Court considered that an individual’s place of abode was one aspect of his or her personal status and thus constituted a ground of discrimination prohibited by Article 14 of the Convention. The question was then whether Ms Gouri was in a similar situation to that of individuals living in France and receiving the allowance in question. The allowance pursued the goal of guaranteeing a minimum level of income to individuals residing in France, taking account of the cost of living in the country. A French national residing abroad was not entitled to the allowance any more than a foreign national abroad. There had thus been no discrimination against Ms Gouri, who lived in Algeria and was thus not in a situation comparable to that of people living in France. The Court declared the case inadmissible in pursuant to Article 35 § 3(a).

***Ndidi v. the United Kingdom*, 14 September 2017, no. 41215/14
ECLI:CE:ECHR:2017:0914JUD004121514**

Expulsion – difference between nationals and non-nationals – comparability – exhaustion of domestic remedies

Mr Ndidi arrived with his mother in the UK aged two. He had an escalating history of offending from the age of 12, with periods spent in institutions for young offenders. He was released in March 2011, aged 24, and served with a deportation order. All his appeals were unsuccessful. When he lodged his complaint with the Court, he was awaiting deportation, pending an application to the Nigerian authorities for a valid travel document. In his complaint to the Court Mr Ndidi alleged in particular that his deportation would constitute a disproportionate interference with his right to respect for his family and private life (Article 8 ECHR), notably with his son who was born in 2012 to a British national with no connection to Nigeria.

The Court found that his deportation would not constitute a disproportionate interference with his right to respect for his family and private life. The facts of the applicant's case undoubtedly required careful scrutiny, given the length of his residence in the United Kingdom, his ongoing relationship with his son and other family members there, and his limited ties to his home country. Nevertheless, having regard to his long and escalating history of offending, continuing beyond his attaining the age of majority, the Court saw no grounds upon which the decision of the domestic authorities can be impugned. In addition, the applicant complained under Article 14 of the Convention, read together with Article 8, that he had been treated differently, without justification, from both a foreign criminal sentenced to less than four years' imprisonment, who could benefit from exceptions in paragraphs 399 and 399A of the Immigration Rules, and a British national sentenced to more than four years' imprisonment, who could not be deported.

Insofar as the applicant sought to argue that he had been treated differently from a foreign national offender sentenced to less than four years' imprisonment, he could not be said to have exhausted domestic remedies within the meaning of Article 35 § 1 of the Convention, since he did not raise this argument either expressly or in substance before the domestic courts.

By contrast, the applicant had raised the complaint that he was treated differently from a British national sentenced to more than four years' imprisonment in substance in his application for permission to appeal and his application for judicial review. The Court found that it was not necessary for it to decide whether he has thereby exhausted domestic remedies within the meaning of Article 35 § 1 of the Convention, however, since it already found in other expulsion cases that non-nationals cannot be compared to nationals who have a right of abode in their own country and cannot be expelled from it. Accordingly, the Court considered that the Article 14 complaint based on this ground must be rejected as manifestly ill-founded pursuant to Article 35 § 3(a) of the Convention.

Unlawful birth

***Mitziinger v. Germany*, 9 February 2017, no. 29762/10
ECLI:CE:ECHR:2017:0209JUD002976210**

Unlawful birth – inheritance rights – very weighty reasons – dynamic interpretation

Ms Mitziinger was the natural and only daughter of her father, who recognised paternity in 1951. She lived in the former German Democratic Republic until 1984, while her father lived in the Federal Republic of Germany with his wife. Ms Mitziinger and her father corresponded regularly during that

period and she visited him and his wife every year between 1954 and 1959. After moving to Bavaria in 1984 with her husband and daughter, she visited her father regularly until 2007. He died in 2009. Directly after her father's death, Ms Mitzinger applied to the Memmingen District Court for the right to administer her father's estate. She asserted that she needed this power as her father's wife had dementia, and that she was a statutory heir. The court dismissed her application. As Ms Mitzinger had been born before 1 July 1949, she was excluded under section 12(10)(2) of the Children Born outside Marriage (Legal Status) Act from any statutory entitlement to her father's estate and from the right to financial compensation. Nor was she entitled to receive any copies of documents about the estate. The applicant complained that as a child who had been born outside marriage she had been unable to assert her inheritance rights and that there had thus been a violation of Article 14 of the Convention taken in conjunction with Article 8.

The Court considered that the aim pursued by maintaining the impugned provision, namely the preservation of legal certainty and the protection of the deceased and his family, was arguably a legitimate one. However, having regard to the evolving European context in this sphere, which the Court could not neglect in its necessarily dynamic interpretation of the Convention, the aspect of protecting the 'legitimate expectations' of the deceased and their families must be subordinate to the imperative of equal treatment between children born outside and within marriage. The Court further considered it to be decisive that the applicant's father recognised her and that they had remained in contact. Thus, the applicant was not a descendant whose existence was unknown to her father's wife. The Court also noted that the deceased had no direct descendants apart from the applicant. Furthermore, European case-law and the national legislative reforms had shown a clear tendency towards eliminating all discrimination regarding the inheritance rights of children born outside marriage. In addition, the Court observed that the applicant brought inheritance-related claims before the domestic courts in 2009, directly after her father's death. The proceedings the applicant brought were still pending before the Federal Constitutional Court at the time of the delivery of the judgment in *Brauer*, in which the Court found that inequality of inheritance rights on the grounds of birth outside marriage was incompatible with the Convention in a case comparable to that of the applicant. That was sufficient to arouse justified doubts as to whether the applicant would be excluded from any claims to her father's estate. Finally, the Court considered it relevant that the national courts had excluded the applicant from any statutory entitlement to the estate, without affording her any financial compensation. Accordingly, there had been a violation of Article 14 taken in conjunction with Article 8.

***Wolter and Sarfert v. Germany*, 23 March 2017, nos. 59752/13 and 66277/13
ECLI:CE:ECHR:2017:0323JUD005975213**

Unlawful birth – inheritance rights – very weighty reasons – cut-off date

Following the death of their natural fathers, the applicants applied to be recognised as heirs to their fathers' estates. However, the applicable German law stated that children born out of wedlock prior to 1 July 1949 were not entitled to inherit. The German courts rejected the applicants' claims because their parents had been born before the cut-off date of 1 July 1949 and they had died before the cut-off date of 28 May 2009. The applicants complained that the rulings by the German courts meant that they had been discriminated against as children born outside of marriage when compared to children born within marriage. They relied in particular, in substance, on Article 14 taken in conjunction with Article 1 of Protocol No. 1 (protection of property).

The Court considered that the member States of the Council of Europe attached great importance to the question of equality between children born in and out of wedlock as regards their civil rights. Very weighty reasons would accordingly have to be advanced before a difference of treatment on the grounds of birth outside marriage could be regarded as compatible with the Convention. The Court

accepted that the protection of acquired rights could serve the interests of legal certainty, which is part of the concept of the rule of law and thus an underlying value of the Convention. Furthermore, the States had the right to enact transitional provisions where they adopt a legislative reform with a view to complying with their obligations under the Convention. In the instant case the Court's task was thus to establish whether the application of an inflexible cut-off date struck a reasonable relationship of proportionality between the means employed and the legitimate aim pursued. In this regard, a fair balance had to be struck by the domestic authorities between the various interests involved, namely the interests of the deceased's family on the one hand and those of the children born outside marriage on the other hand.

In this regard, the Court noted that Germany amended its legislation following the Court's judgment in the case of *Brauer* and reformed the rules of its inheritance law. The Court welcomed that measure, but it considered that it still had to ascertain whether the strict application of the cut-off date by the domestic authorities in the special circumstances of the present cases struck a fair balance between the competing interests involved. Having assessed the facts of the case, it concluded that, while in the case of the second applicant the family members of the deceased might not have known of the existence of another potential heir, all the other factors in the proportionality test heavily weighed in favour of the applicants. The only factors which rendered the applicants ineligible to a statutory portion of their fathers' estates were, firstly, that they had been born outside marriage before 1 July 1949 and, secondly, that their fathers had died before 28 May 2009. Having regard to the paramount importance of eliminating all differences in treatment between children born within and outside marriage, the domestic courts' arguments based on legal certainty, though being a weighty factor, were not sufficient to override the applicants' claims to a share in their fathers' estate under the specific circumstances. There was therefore a violation of Article 14 of the Convention taken in conjunction with Article 1 of Protocol No. 1.

Age

***Khamtokhu and Aksenchik v. Russia*, 24 January 2017 (GC), nos. 60367/08 and 961/11
ECLI:CE:ECHR:2017:0124JUD006036708**

Life sentences – gender – age – very weighty reasons – asymmetry – consensus
See [above](#).

Freedom to manifest one's religion

***Lupeni Greek Catholic Parish and Others v. Romania*, 29 November 2016 (GC), no. 76943/11
ECLI:CE:ECHR:2016:1129JUD007694311**

Religion – access to court – no real disadvantage caused by a difference in treatment

The case concerned a request for the restitution of a place of worship that had belonged to the Greek Catholic Church and was transferred during the totalitarian regime to the ownership of the Orthodox Church. The applicants' claim for restitution was dismissed by the Romanian courts in application of a special law establishing the criterion of the wishes of the worshippers in the communities in possession of the properties, who had refused in the present case to return the properties in question. Before the Court, the applicants primarily raised a number of complaints relating to the restrictions on their access to a court and the disrespect for the principle of legal certainty. In addition, they criti-

cised the national courts for not deciding their case under ordinary law, but instead in accordance with criterion of ‘the wishes of the worshippers in the community in possession of the property’.

Regarding the complaint in relation to access to court, the Court held that the applicants had not been deprived of the right to obtain a decision on the merits of their claims. By contrast, it did find a violation of Article 6 § 1 on account of the breach of the principle of legal certainty, which had related successively to the question of access to a court and to that of the applicable substantive law, and which had affected a large number of persons bringing judicial proceedings. Under Article 14 (prohibition of discrimination) read in conjunction with Article 6 § 1, the applicants alleged that they had experienced discrimination compared with other Greek Catholic parishes confronted with the same situation, since – in similar cases – some domestic courts ruling on actions for recovery of possession brought by other Greek Catholic parishes had applied the ordinary law without taking into consideration the worshippers’ wishes. The Court considered that this complaint essentially pertained to its assessment of compliance with the principle of legal certainty. It decided that this complaint therefore did not warrant a separate examination under Article 14.

The applicants also alleged that they had been discriminated against in comparison with the Orthodox parish, since, in their view, the relevant legislation in practice favoured the Orthodox parish. The Court reiterated that it had held in relation to Article 6 that there was no restriction on the right of access to a court. In the absence of any such restriction, the Court considered that it had not been shown that the criterion of the worshippers’ wishes created a difference in treatment between the Greek Catholic parishes and the parishes of the Orthodox Church in the exercise of their right of access to a court. Admittedly, the conditions imposed by the substantive law were clearly such as to have an impact on the outcome of the proceedings. However, given that the applicants, like the Orthodox parish, enjoyed access to domestic courts which had full jurisdiction to apply and interpret the domestic law and which exercised a review that was sufficiently wide to satisfy the requirements of Article 6 § 1, this factor did not create a difference in treatment between the two parties to the proceedings in terms of access to a court. Thus, for the purposes of Article 14 of the Convention, the Court did not discern a difference in treatment between the applicants and the defendant in respect of the possibility of applying to the courts and obtaining a judicial decision on the action to recover possession of the place of worship. That fact was sufficient for the Court to find that there had not been a violation of Article 14 of the Convention taken together with Article 6 § 1 in the present case.

***Klein and Others v. Germany*, 6 April 2017, nos. 10138/11 and 3 others
ECLI:CE:ECHR:2017:0406JUD001013811**

Freedom of religion – church taxes – exemption system – jurisdiction – wide margin of appreciation

The first applicant’s wife was a member of the Protestant Church, which under German law was a public-law entity authorised to levy church taxes. The first applicant was not himself a member of the Church. For the tax assessment period of 2008 the couple opted for a joint tax assessment. They received a tax bill which included a special church fee (a form of church tax) for the first applicant’s wife of EUR 2,220. Since the wife’s income was below the minimum taxable amount that sum was calculated as a proportion of her living expenses, which in turn were calculated on the basis of the spouses’ joint income. The amount of EUR 2,220 was offset against a tax reimbursement owed to the first applicant leaving a balance in his favour of EUR 1,203. Before the Court, the first applicant complained, inter alia, under Article 9 and 14 of the Convention that he had been compelled to pay the special church fee levied on his wife without himself being a member of that church.

Under Article 9, the Court first considered that the German legislation brought about a situation where the first applicant was subjected to his wife’s financial obligations towards her church without himself being a member of it. This caused an interference with the negative aspect of the applicant’s

rights under Article 9 of the Convention. In relation to the assessment of the justification advanced by the German government, the Court emphasised that a certain margin of appreciation should be left to the state, also because there was no common European standard governing the financing of churches or religions. When balancing, on the one hand, the first applicant's right to negative freedom of religion and, on the other hand, the public interest in the efficient collection of taxes, including church tax, it had regard to the fact that it was in the first place the decision of the first applicant and his spouse to make a joint tax declaration which led to the two separate tax claims being handled together in administrative terms. That decision required the State to engage in a more complicated tax assessment and put into motion the rather technical process of offsetting credits against debits. It could therefore be regarded as an administrative mechanism to set the final amount of tax the spouses had to pay after they decided to be taxed together. This administrative mechanism could be undone by setting in practise a further mechanism, namely that of the settlement notice. These considerations enabled the Court to conclude that, taking into account the wide margin of appreciation, the domestic authorities had adduced relevant and sufficient reasons to justify the church tax system.

The first applicant further complained that the special church fee as levied by the Protestant Church of the Land of Baden-Württemberg, his wife's church, discriminated against him when compared with married couples where one spouse did not belong to a church and the other one belonged to a religious community without the right to levy church taxes. He alleged that it was only in his case that a special church fee was levied in accordance with the church member's living expenses. He relied on Article 9 of the Convention taken in conjunction with Article 14. The Court notes that the first applicant – other than his complaint under Article 9 of the Convention (see paragraph 69 above) – did not complain that the offsetting of his tax reimbursement claim against the claims of his wife's church discriminated against him, but only that the fact that his income was taken into account by the church when calculating his wife's church fee was discriminatory. The Court, having regard to the submissions made by the first applicant and to the fact that the church fee had been levied on his wife and not on him, considered that he had not shown that this specific complaint fell within the ambit of Article 9 of the Convention. Thus, Article 14 of the Convention was not applicable.

Freedom of assembly and of expression

***Lashmankin and Others v. Russia*, 7 February 2017, nos. 57818/09 and 14 others
ECLI:CE:ECHR:2017:0207JUD005781809**

Freedom to demonstrate – picketing – political opinion

In this case, 23 applicants from different parts of Russia alleged that local authorities had imposed severe restrictions on peaceful assemblies planned by them, without any proper justification. With the exception of the last, in each case the applicants submitted a formal notice to the appropriate local authority, notifying it of their intention to hold an event. However, the authorities refused to approve its location, time or manner of conduct. In some cases where the authorities proposed alternative locations, times or manner of conduct, the applicants allege that the authorities' proposals did not answer the purpose of their assembly. Some applicants complained about the general ban on holding public events in the vicinity of court buildings. Other applicants complained about the automatic and inflexible application of the time-limits for notification of public events without taking into account that it was impossible to comply with the time-limit because of public holidays or spontaneous nature of the event. Lastly, several applicants complained about the exceptionally drastic security measures during their public event, in particular that the square where their event was held was fenced off by police vans to make it invisible to the general public. The applicants complained under

Article 13 of the Convention in conjunction with Article 11 of the Convention that they did not have an effective remedy against the alleged violations of their freedom of assembly. In this regard, the Court found a violation of the Convention. In addition, the applicants complained that the restrictions imposed by the authorities on the location, time or manner of conduct of public events breached their right to freedom of expression and to peaceful assembly, guaranteed by Articles 10 and 11 of the Convention respectively. Some of the applicants also complained under Article 14 of the Convention taken in conjunction with Articles 10 and 11 that they had been discriminated against on the grounds of their political opinion or sexual orientation.

The Court found that in each application, the authorities did not give relevant and sufficient reasons for their proposals to change the location, time or manner of conduct of the applicants' public events. These proposals were based on legal provisions which did not provide for adequate and effective legal safeguards against arbitrary and discriminatory exercise of the wide discretion left to the executive and which did not therefore meet the Convention 'quality of law' requirements. There had therefore been a violation of Article 11 of the Convention interpreted in the light of Article 10 of the Convention in each application. In its reasoning, the Court paid attention to the fact that the authorities sometimes used their reference to safety and national security risks selectively to restrict anti-government public assemblies; that it often used it in an arbitrary and discriminatory way; and often no similar restrictive measures had been taken during official public events.

Having regard to this reasoning and the Courts finding under Article 11, the Court considered that it was not necessary to examine separately the applicants' complaint under Article 14 of the Convention taken in conjunction with Articles 10 and 11.

***Bayev and Others v. Russia*, 20 June 2017, nos. 67667/09 and 2 others
ECLI:CE:ECHR:2017:0620JUD006766709**

Demonstration – picketing – 'homosexual propaganda' – protection of good morals – interests of children – very weighty reasons – no legitimate aim
See [above](#).

Social security, social benefits and property rights

***Gouri v. France*, 28 February 2017, no. 41069/11
ECLI:CE:ECHR:2017:0228DEC004106911**

Residence – personal status – no comparability
See [above](#).

***Fábián v. Hungary*, 5 September 2017 (GC), no. 78117/13
ECLI:CE:ECHR:2017:0905JUD007811713**

Pensions – social security – difference between civil servants and employees in private companies – wide margin of appreciation – comparability

In 2012 the applicant, who was already in receipt of an old-age pension, took up employment as a civil servant. In 2013 an amendment to the Pension Act 1997 entered into force suspending the payment of old-age pensions to persons simultaneously employed in certain categories of the public sector. The amendment did not apply to pensioners working in the private sector. As a consequence, the payment of the applicant's pension was suspended. His administrative appeal against that deci-

sion was unsuccessful. In the Convention proceedings, the applicant complained of an unjustified and discriminatory interference with his property rights. In a judgment of 15 December 2015 a Chamber of the Court held, unanimously, that there had been a violation of Article 4 of the Convention in conjunction with Article 1 of Protocol No. 1. In particular, the Chamber held that the Government's arguments to justify the difference in treatment between publicly and privately employed retirees were unpersuasive and thus not based on any 'objective and reasonable justification'. In 2016 the case was referred to the Grand Chamber at the Government's request.

The Grand Chamber decided to deal with the case under Article 1 of Protocol No. 1 taken alone. Bearing in mind the wide margin of appreciation of the State in the field of social security and pensions, the Court found no reason to doubt that the prohibition on the simultaneous disbursement of salaries and pensions to which the applicant was subjected served the general interest of the protection of the public purse. As submitted by the Government and not disputed by the applicant, the suspension of pension payments at issue was, *inter alia*, also part of a package of measures aimed at assuring the long-term sustainability of the Hungarian pension system and reducing public debt. In assessing the balance struck between these general interests and the requirement of the protection of the individual's fundamental rights, the Court noted at the outset that the issue arose in the particular context of a social-security scheme. Such schemes were an expression of a society's commitment to the principle of social solidarity with its vulnerable members. The Court further reiterated that the funding methods of public pension schemes varied considerably from one Contracting State to another, as did the emphasis on the principle of solidarity between contributors and beneficiaries in national pension systems. In examining whether the national authorities acted within their margin of appreciation in the instant case, the Court had particular regard to the extent of the loss of benefits, whether there was an element of choice, and the extent of the loss of means of subsistence. It concluded that, based on its factual assessment, a fair balance was struck between the demands of the general interest of the community and the requirements of the protection of the applicant's fundamental rights, and that he was not made to bear an excessive individual burden. Accordingly, there was no violation of Article 1 of Protocol No. 1 taken alone.

The Court continued to address the complaint under Article 14 of the Convention read in conjunction with Article 1 of Protocol No. 1. It considered that the nature of a violation alleged under Article 14 required that a complaint brought under this heading should provide at least an indication of the person or group of persons in comparison with whom the applicant claims he or she was treated differently, as well as of the ground of the distinction that was allegedly applied. The complaint should thus contain the parameters required to define the scope of the issue to be examined by the Court. In this regard, the Court noted that the allegation raised in the present case concerning the difference in treatment between various categories of State employees in receipt of an old-age pension was not mentioned in any communication received from the applicant. Consequently, it concluded that this part of the application was introduced outside the six-month time-limit and was therefore inadmissible pursuant to Article 35 §§ 1 and 4 of the Convention. This was different, however, for the complaint that the applicant, as a person in receipt of an old-age pension and working in the civil service, was treated differently from recipients of an old-age pension working in the private sector. In this regard, the Court emphasised that the national authorities were in principle better placed than the international judge to appreciate what is in the public interest on social or economic grounds, and the Court therefore would generally respect the legislature's policy choice unless it would be 'manifestly without reasonable foundation'. The Court further reiterated that a difference in treatment could raise an issue from the point of view of the prohibition of discrimination as provided for in Article 14 of the Convention only if the persons subjected to different treatment were in a relevantly similar situation. As a general starting-point the Court considered that the Contracting Parties, by necessity, enjoyed wide latitude in organising State functions and public services, including such matters as regulating access to employment in the public sector and the terms and condi-

tions governing such employment, in the context of their obligations under the Convention. For institutional and functional reasons, employment in the public sector and in the private sector could typically be subject to substantial legal and factual differences, not least in fields involving the exercise of sovereign State power and the provision of essential public services. As a result, it could not be assumed that the terms and conditions of employment, including the financial ones, or the eligibility for social benefits linked to employment, would be similar in the civil service and in the private sector, nor could it therefore be presumed that these categories of employees will be in relevantly similar situations in this regard. In light of these general considerations, the Court concluded that in Hungary, employment in the civil service and employment in the private sector were treated as distinct categories. Moreover, the applicant's specific profession within the civil service was difficult to compare with any in the private sector and no relevant comparisons were suggested by him. Finally, as regards his employment relationship, the State did not function only as regulator and standard-setter but was also his employer. Taking all these aspects of the present case into account, the Court found that the applicant had not demonstrated that, as a member of the civil service whose employment, remuneration and social benefits were dependent on the State budget, he was in a relevantly similar situation to pensioners employed in the private sector. It followed that there was no discrimination and, therefore, no violation of Article 14 taken in conjunction with Article 1 of Protocol No. 1.

Domestic violence

***Talpis v. Italy*, 3 March 2017, no. 41237/14
ECLI:CE:ECHR:2017:0302JUD004123714**

Domestic violence – gender – indirect discrimination – burden of proof – reports by international organisations – statistical data

See [above](#).

***Bălşan v. Romania*, 23 May 2017, no. 49645/09
ECLI:CE:ECHR:2017:0523JUD004964509**

Domestic violence – gender discrimination – vulnerability

See [above](#).

Racial violence

***Škorjanec v. Croatia*, 28 March 2017, no. 25536/14
ECLI:CE:ECHR:2017:0328JUD002553614**

Discriminatory violence – racist motive – discrimination by association – procedural positive obligations

See [above](#).

Accessory character Article 14

***A.H. and Others v. Russia*, 17 January 2017 (GC), nos. 6033/13 and others
ECLI:CE:ECHR:2017:0117JUD000603313**

Adoption – accessory character – nationality – very weighty reasons test

See [above](#).

***Khamtokhu and Aksenchik v. Russia*, 24 January 2017 (GC), nos. 60367/08 and 961/11
ECLI:CE:ECHR:2017:0124JUD006036708**

Life sentences – gender – age – very weighty reasons – asymmetry – consensus

See [above](#).

***Klein and Others v. Germany*, 6 April 2017, nos. 10138/11 and 3 others
ECLI:CE:ECHR:2017:0406JUD001013811**

Freedom of religion – church taxes – exemption system – jurisdiction – wide margin of appreciation

See [above](#).

Reasonable accommodation

***Kacper Nowakowski v. Poland*, 10 January 2017, no. 32407/13
ECLI:CE:ECHR:2017:0110JUD003240713**

Disability – reasonable accommodation – no need to investigate measure under Article 14

See [above](#) – although the ECtHR did not deal with the complaint under Article 14, elements of reasonable accommodation played a role in its reasoning in relation to Article 8 ECHR (private and family life).

Comparability

***Saumier v. France*, 12 January 2017, no. 74734/14
ECLI:CE:ECHR:2017:0112JUD007473414**

Comparability – occupational disability – negligence

See [above](#) – employees who had suffered an accident at work or contracted an occupational disease as a result of negligence by their employer were not in an analogous or comparable situation to that of individuals who had sustained physical injury or damage to health as a result of negligence by persons who were not their employer.

***Khamtokhu and Aksenchik v. Russia*, 24 January 2017 (GC), nos. 60367/08 and 961/11
ECLI:CE:ECHR:2017:0124JUD006036708**

Life sentences – gender – age – very weighty reasons – asymmetry – consensus

See [above](#) – male and female prisoners in principle find themselves in a comparable position, but there may be differences that are sufficient to justify that only women are excluded from lifelong sentences.

***Gouri v. France*, 28 February 2017, no. 41069/11
ECLI:CE:ECHR:2017:0228DEC004106911**

Residence – personal status – no comparability

See [above](#) – no comparability for the purposes of a social security allowance for someone living in Algeria as compared to someone living in France

***Ndidi v. the United Kingdom*, 14 September 2017, no. 41215/14
ECLI:CE:ECHR:2017:0914JUD004121514**

Expulsion – difference between nationals and non-nationals – comparability – exhaustion of domestic remedies

See [above](#) – non-nationals cannot be compared to nationals who have a right of abode in their own country and cannot be expelled from it.

***Fábián v. Hungary*, 5 September 2017 (GC), no. 78117/13
ECLI:CE:ECHR:2017:0905JUD007811713**

Pensions – social security – difference between civil servants and employees in private companies – wide margin of appreciation – comparability

See [above](#) – civil servants and employees working in the private sector are not relevantly comparable for the purposes of pension legislation.

***Alexandru Enache v. Romania*, 3 October 2017, no. 16986/12
ECLI:CE:ECHR:2017:1003JUD001698612**

Gender discrimination – stay of imprisonment because of childcare – stronger bond between mother and child than between father and child – individualisation

See [above](#) – in a work-related context, men are in a similar situation to women as regards parental leave and parental leave allowance; however, it must be accepted that there may be special bonds between mother and child during the first year of the latter's life.

Discrimination by association

Škorjanec v. Croatia, 28 March 2017, no. 25536/14
ECLI:CE:ECHR:2017:0328JUD002553614

Discriminatory violence – racist motive – discrimination by association – procedural positive obligations
See [above](#).

Intensity of review and the very weighty reasons test

A.H. and Others v. Russia, 17 January 2017 (GC), nos. 6033/13 and others
ECLI:CE:ECHR:2017:0117JUD000603313

Adoption – accessory character – nationality – very weighty reasons test
See [above](#) – narrow margin of appreciation in relation to nationality based discrimination.

Khamtokhu and Aksenchik v. Russia, 24 January 2017 (GC), nos. 60367/08 and 961/11
ECLI:CE:ECHR:2017:0124JUD006036708

Life sentences – gender – age – very weighty reasons – asymmetry – consensus
See [above](#) – very weighty reasons should normally be advanced, but in this case, for lack of consensus, the margin of appreciation should be wide.

K2 v. the United Kingdom, 7 February 2017 (decision), no. 42387/13
ECLI:CE:ECHR:2017:0207DEC004238713

Deprivation of citizenship – terrorism suspect – national residents vs. non-national residents
See [above](#) – wide margin of appreciation in relation to nationality based on residence.

Mitzinger v. Germany, 9 February 2017, no. 29762/10
ECLI:CE:ECHR:2017:0209JUD002976210

Unlawful birth – inheritance rights – very weighty reasons – dynamic interpretation
See [above](#) – very weighty reasons are required to justify discrimination based on birth out of wedlock.

Wolter and Sarfert v. Germany, 23 March 2017, nos. 59752/13 and 66277/13
ECLI:CE:ECHR:2017:0323JUD005975213

Unlawful birth – inheritance rights – very weighty reasons – cut-off date
See [above](#) – very weighty reasons are required to justify discrimination based on birth out of wedlock.

***Klein and Others v. Germany*, 6 April 2017, nos. 10138/11 and 3 others
ECLI:CE:ECHR:2017:0406JUD001013811**

Freedom of religion – church taxes – exemption system – jurisdiction – wide margin of appreciation
See [above](#) – wide margin of appreciation in relation to exemption system for church taxes.

***Bayev and Others v. Russia*, 20 June 2017, nos. 67667/09 and 2 others
ECLI:CE:ECHR:2017:0620JUD006766709**

Demonstration – picketing – ‘homosexual propaganda’ – protection of good morals – interests of children – very weighty reasons – no legitimate aim
See [above](#) – very weighty reasons are required to justify discrimination based on sexual orientation

***Fábián v. Hungary*, 5 September 2017 (GC), no. 78117/13
ECLI:CE:ECHR:2017:0905JUD007811713**

Pensions – social security – difference between civil servants and employees in private companies – wide margin of appreciation – comparability
See [above](#) – wide margin of appreciation in relation to a pension scheme.

***Alexandru Enache v. Romania*, 3 October 2017, no. 16986/12
ECLI:CE:ECHR:2017:1003JUD001698612**

Gender discrimination – stay of imprisonment because of childcare – stronger bond between mother and child than between father and child – individualisation
See [above](#) – no attention is paid to the intensity of review, but from the standards applied it appears that a wide margin of appreciation is left to the respondent State.

***Ratzenböck and Seydl v. Austria*, 26 October 2017, no. 28475/12
ECLI:CE:ECHR:2017:1026JUD002847512**

Different sex couple – access to registered partnership rather than marriage – very weighty reasons – common ground reasoning
See [above](#) – very weighty reasons should normally be advanced, but in this case, for lack of consensus, the margin of appreciation should be wide.