

ANALYSIS



**OF THE
JURISPRUDENCE**

**of the European Court on Human Rights
related to hate speech
and hate crime**

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the European Court
on Human Rights related to
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Conceptual framework

The conceptual frameworks of this publication rests on the case-law of the ECtHR in regard to hate speech and hate crimes as well as the minimum standards of respect for human rights which this case-law implements. The Contracting Parties have an obligation to respect these standards, to implement and advance them. The present publication is divided in two parts: Part A focuses on the case-law of the ECtHR in relation to hate speech while Part B is concerned with the case-law related to hate crimes. The case-law of the ECHR being very abundant in particular in relation to hate crimes and hate speech, a necessary selection has been made, focusing on the most significant and impactful decisions of the Court.

Hate speech

The ECtHR case-law starts from the presumption of freedom of expression. Individuals must be free, creative in their expression and also have the right to be informed. Although the right to freedom of expression is not among the absolute rights guaranteed by the ECHR, the Strasbourg Court endorses a liberal perception of freedom of expression and repeatedly insists that the public has a right to hear even ideas which are shocking or not accepted by the majority if these ideas raise questions of public interest and lead towards a public debate. However, not all forms of speech are protected by the right to freedom of expression. As such statements which incite violence, discrimination, or hatred on the basis of race, ethnicity, or nationality, must be prohibited.

The practice of the ECtHR confirmed that the forms of expression which contain hate speech are distinct and take the form of written materials, fliers, verbal insults, illustrations, caricatures, publicities, symbols, graffiti or art works published through different media and in particular through the internet in recent times. The ECtHR accepts that in a democratic and pluralistic society it is necessary to prevent or sanction forms of speech which incite, en-

courage, support, or justify hatred or violence based on intolerance. To this end, the indicated sanctions or limitations must be prescribed by law, must have a legitimate aim and must be proportionate to the legitimate aim which they seek to achieve. Through article 10 paragraph 2, the ECHR affirms that the realization of freedom of expression includes responsibilities and duties and can, only under strict conditions, be limited or sanctioned if the latter are necessary measures of state security, territorial integrity and public safety, protection of order and prevention of disorder and crimes, protection of the health or morals, reputation or rights of others, as well as the limitation of spreading confidential information or preservation of the authority and impartiality of the judiciary. This approach is also based on the necessity to protect freedom of expression by preventing the misuse and abuse of the protection of rights of individuals through the ECHR.

Article 17 of the Convention enunciates that no article of the Convention can be interpreted in a way which would allow a state, group, or individual a right to undertake activities or measures which affect a right or freedom recognized by the Convention, or to limit these rights and freedoms in a greater measure from that intended by the Convention. In the beginning, the principal part of the judgments related to hate speech were analyzed by the ECtHR through the application of Article 10, rejecting applications related to hate speech. In more recent case-law, the ECtHR analyses most frequently through the lens of Article 10, taking as a starting point the presumption that freedom of expression can be limited under certain conditions, and that states have a right to do so when the form of speech is based on intolerance, incites, and urges hatred and violence.

On the other hand, the new techniques and technologies raise the question of protection of freedom of expression on the internet. As such the case *Delfi A.S v. Estonia*¹, opened a chapter in the Court's practice of case-law re-

¹ *Delfi v. Estonia*, Application No. 64569/09, from 10 October 2013 [Section I]

lated to hate speech on the internet.² Through this case, the ECtHR upholds the obligations on states to sanction the encouragement of racist and xenophobic speech, threats, or insults of racist motives, negationism, approval, justification or minimization of genocide or crimes against humanity, even when these are expressed through comment on articles posted on online portals.

Undoubtedly, in whatever form, hate speech pollutes freedom of expression in any democratic society and leaves permanent consequences on the society. Ideas which incite, encourage, or spread hate affect the freedom of others, and in such cases the state must have legal measures to prevent the expansion of such ideas. This is particularly important as before a case arrives in front of the European Court for Human Rights, it usually passes years in procedures in front of national instances and organs, and until then the seed of hate speech will have grown fruits of bitterness, intolerance, and in certain cases, violence. Departing from the importance of the rule of law, the institutions, the courts, the protectors of human rights, and law students must know the practice of the Strasbourg court and be capable of properly applying it. The Contracting States to the Convention have a positive obligation to ensure the application of the ECHR in accordance with the principle of subsidiarity. As such the effective implementation of the standards and principles contained in the Convention must be a principal priority of the states.³

The practice of the principle and the effect of *res interpretata* implies an accessibility to the case-law of the Strasbourg Court in the languages of the member states. It is equally important to include the Strasbourg case-law in the curriculum of law faculties and academies for training and formation of judges and prosecutors, or in the programs of other institutions

which organize the training and formation of certain groups of individuals which must professionally follow the practice of the court (as the bar association).

Precisely because our aim is to bring closer to the judges, prosecutors, lawyers, representatives of civil society, and other subjects, the most important changes and advancement of the standards in regards to the prohibition of abuse of freedom of expression, in this publication we make an attempt to transmit and present the most important and most recent decisions and cases related to hate speech. As such, I believe that human rights practitioners will be encouraged to continue following and analyzing the practice of the ECtHR. After all, the concept of modern democracy rests on the power of being informed and on the constant work of advancing and improving human rights protection.

Hate crime

Hate crimes are criminal acts committed with a bias motive.⁴ A hate crime is therefore (1) always based in a crime that constitutes an offence under criminal law, and (2) motivated by bias or prejudice. The perpetrator of a hate crime selects the victim based on the victim's real or perceived membership or association with a particular group. Hate crimes can target one or more members of, or property associated with, a group that shares a common characteristic, that is immutable or fundamental, such as "race", ethnicity, language, religion, nationality, sexual orientation, gender identity or other characteristic.

Hate crimes are distinguished from discrimination. Although hate crimes can be seen as an extreme example of discrimination, there is a distinction between the two concepts. Acts of discrimination lack the essential element of an act constituting a crime. Discrimination issues are dealt with under civil law, even if the penalty is a criminal sanction. The legal and institutional frameworks governing discrimination

2 In this regard, an *additional protocol of the Convention on Cybercrime, concerning the criminalisation of acts of a racist and xenophobic nature committed through computer systems* is important, this protocol came into force on the 1 March 2006 under the framework of the Council of Europe and the numerous directives of the European Commission.

3 *Scordino v. Italy Application No. 36813/97, Grand chamber from 26.3.2006*

4 OSCE Ministerial Council, Decision No. 9/09, "Combating Hate Crimes", Athens, 1-2 December 2009.

and hate crimes, therefore, are different.⁵

Hate crimes are also distinguished from hate speech. Hate speech is commonly referred to as forms of expression that are motivated by, demonstrate or encourage hostility towards a group or a person because of their membership in that group. As described in details in the Hate Speech section of this publication, while protecting the fundamental right to freedom of expression and opinion, statements which incite violence, discrimination, or hatred on the basis of race, ethnicity, or nationality, must be prohibited. Since hate speech may encourage or accompany hate crimes, the two concepts are interlinked.

The European Convention for Human Rights ('the Convention') does not have a specific article on hate crime, however, it establishes the state duty to investigate and punish violence committed against individuals and to discharge this duty without discrimination. Through its jurisprudence, the European Court on Human Rights ('the Court') further unpacked this duty in relation to hate crimes, in particular, the duty to uncover and effectively investigate bias motivation. In particular, such procedural duty to investigate and unmask discriminatory motives derives from Article 2 (right to life), Article 3 (right to be free from ill-treatment) and Article 8 (right to respect for private and family life) in conjunction with Article 14 (prohibition of discrimination) of the Convention.

The Hate Crime section of this publication aims to raise awareness on hate crime and related state duties under the Convention and to bring the most important advancement of the standards in this regard closer to the law enforcement and criminal justice professionals, as well as other actors, such as lawyers, human rights defenders, activists and students of law. In particular, section B provides an overview of the Convention's framework for hate crime. Relying on concrete judgments, the overview highlights hate crime related duties and operational aspects as derived from the Court's interpretation of the Convention in its jurisprudence. Section B constitutes of thematic sections and

cover particular types of biases, such as racial and ethnic origin, religion, disability, sexual orientation and gender identity, intersectionality and gender-based violence. These sections provide a detailed analysis⁶ of the key judgments, including the most recent ones. Every case selected for an analysis demonstrates a particular aspect of the Court's interpretation of the state's duties in relation to hate crimes and the phenomenon of hate crime in general. Every case includes summary of the facts, the Court's analysis and conclusions along with the commentary. Bearing in mind the practical nature of the publication, these sections also provide references to the relevant resources developed by international organizations, such as OSCE/ODIHR, Council of Europe and EU Fundamental Rights Agency.

5 OSCE/ODIHR, Preventing and responding to hate crimes: A resource guide for NGOs in the OSCE region, 2009, <https://www.osce.org/odihr/39821>

6 Please note that for the purpose of this publication the analysis covers only aspects relevant to hate crime and state's duties in this regards, and does not cover other human rights aspects that were parts of the selected cases.

Part A - Hate speech

The role of the human rights system set up by the Convention is to determine, in the general interest, issues of public policy, raising the standards of protection of human rights and extending human rights jurisprudence throughout the community of the Convention States⁷. Therefore, the Court's judgments and decisions serve to elucidate, safeguard and develop the rules instituted by the Convention, contributing to the observance by the States of the engagements they have undertaken as Contracting Parties⁸. That is why, the Court has emphasized the Convention's role as a "constitutional instrument of European public order" in the field of human rights⁹.

Most of the applications in front of the ECtHR related to hate speech are decided on the basis of Article 10 or Article 17 of the Convention.

In its interpretation of Article 10 of the Convention, the Court has held that "freedom of expression constitutes one of the essential foundations of [a democratic] society, one of the basic conditions for its progress and for the development of every man". The Court has emphasized on several occasions the importance of this article, which is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb; such are the demands of pluralism, tolerance and broadmindedness without which there is no "democratic society"¹⁰.

In view of the above mentioned, no one can

be authorized to rely on the Convention's provisions in order to weaken or destroy the ideals and values of a democratic society¹¹. That is why the general purpose of Article 17 is to prevent totalitarian or extremist groups from exploiting in their own interests the principles enunciated by the Convention¹². Article 17 is linked to the concept of "democracy capable of defending itself"¹³.

Article 10 of the Convention – Freedom of expression "1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises. 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

Article 17 of the Convention – Prohibition of abuse of rights "Nothing in [the] Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention."

7 Konstantin Markin v. Russia [GC], 30078/06, § 89, ECHR 2012

8 Ireland v. the United Kingdom, 18 January 1978, § 154, Series A no. 25, and, more recently, Jeronovičs v. Latvia [GC], no. 44898/10, § 109, 5 July 2016

9 Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland [GC], no. 45036/98, § 156, ECHR 2005-VI

10 Handyside v. the United Kingdom, § 49; Observer and Guardian v. the United Kingdom, § 59

11 Refah Partisi (the Welfare Party) and Others v. Turkey [GC], 2003, § 99

12 W.P. and Others v. Poland (dec.), 2004; Paksas v. Lithuania [GC], 2011, § 87

13 Vogt v. Germany, 1995, §§ 51 and 59; Ždanoka v. Latvia [GC], 2006, § 100; Erdel v. Germany (dec.), 2007; Perinçek v. Switzerland [GC], 2015, § 242



Negationism and revisionism

Negation of the Holocaust and revisionism have been presumed by the Court to incite to hatred or intolerance. The justification for making its denial a criminal offence lies in that the Holocaust is a clearly established historical fact and, in that line, its denial, must be seen as an antidemocratic ideology and anti-Semitism¹⁴. In that direction in a case concerning Holocaust denial, whether the Court applies Article 17 directly, declaring a complaint incompatible *ratione materiae*, or instead finds Article 10 applicable, invoking Article 17 at a later stage when it examines the necessity of the alleged interference, is a decision taken on a case-by-case basis and will depend on all the circumstances of each individual case.

Garaudy v. France (Application No. 65831/01) (decision on the admissibility) from 24 June 2003

Note on the procedure:

The applicant, Mr. Garaudy, lodged a complaint against France for violation of freedom of speech, freedom of thought as well as discrimination and violation of his procedural rights in the process of criminal proceedings. The complaint was lodged on the 23 October 2000.

Summary of the facts

The applicant (Mr. Garaudy) was the author of a book entitled *The Founding Myths of Modern Israel* which was later republished under the title *Samizdat Roger Garaudy*. He was faced with several criminal complaints by associations of former resistance members, deportees, and human rights organizations. This led to five judicial investigations and five separate sets of criminal proceedings under the Freedom of the Press Act of the 29 July 1881. On the 16 December 1998 the Paris Court of Appeal found the

applicant guilty of disputing of the existence of crimes against humanity, racial defamation of a group of people (the Jewish community) in public, and incitement to discrimination and racial hatred. The appeal court imposed suspended sentences of imprisonment and fines. These convictions were upheld by the Court of Cassation in the five judgements on the 12 September 2000.

Applicant's complaint to the Court

The applicant complained of violations under Article 10 (freedom of expression), and violations of Article 6 (right to a fair trial) alone or together with breaches of Article 4 of Protocol 7 (right not to be tried or punished twice). The applicant also alleged that there was a violation of Article 9 (freedom of thought, conscience, and religion) and Article 14 (prohibition of discrimination).

Decision of the Court

Regarding Article 10, the court referred to Article 17 (prohibition of abuse of rights) which prevents individuals from relying on Convention rights to engage in activities or acts which intend to destroy rights or freedoms protected by the Convention. After analyzing the book in question, the Court found that the applicant had, as was found by the domestic courts, adopted revisionist theories, and systematically disputed the existence of the crimes against humanity which were committed against the Jewish community. The court found that the purpose of the work was to accuse the holocaust victims of falsifying history. The applicant's disputing of the existence of crimes against humanity constituted, according to the Court, one of the most severe forms of racial defamation and incitement to hatred and constituted a serious threat to public order. The court found that the book as a whole had clear tendencies to revisionism, as such it

¹⁴ Perinçek v. Switzerland Application No. 27510/08, [GC] judgement from 15 October 2015, §§ 234 and 243

was against the fundamental values protected by the Convention. Hence, the court found that the applicant could not rely on Article 10 and found his complaint incompatible with the Convention.

Regarding the applicant's convictions for racial defamation and incitement to racial hatred, the court found that the domestic courts had provided sufficient and relevant reasons for convicting the applicant and as such the interference he suffered to his freedom of expression was found to be 'necessary in a democratic society'. The court declared this complaint ill-founded.

In regard to Article 6 and Article 4 of Protocol 7, having found that the various criminal proceedings had proceeded concurrently and concerned different offences, as such Article 4 of protocol 7 was inapplicable.

Regarding Article 6, the Court found that with regard to the complexity of the case and the nature of the offences, the requirement to deal with the various criminal proceedings at the same time was justified, and the motives justifying the refusal to join the proceedings had struck a fair balance. The court equally found that nothing suggested that the applicant had not had a fair trial. Hence the court found that the complaint was ill-founded.

The court equally found that the complaints under Articles 9 and 14 were inadmissible as the applicant had failed to exhaust all domestic remedies.

Comment on the decision

This case shows that in determining whether there had been a violation of the applicant's right to freedom of expression, the Court pays particular attention to the historical and factual context of the alleged offence as well as the wording and factual details of the impugned statement (in this case the content of the book).

The applicant incurred criminal liability on account of his book in which he denied the existence of the gas chambers; described the systematic and massive extermination of Jews

as a "sham" and the Holocaust as a "myth"; called their depiction the "Shoah business" or "mystifications for political ends"; and disputed the number of Jewish victims and the cause of their deaths. He trivialized those crimes by comparing them to acts for which he blamed the allies and called into question the legitimacy, and undermined the actions of the Nuremberg Tribunal. For the Court, the main content and general tenor of the applicant's book, and thus its aim, were revisionist and therefore ran counter to the fundamental values of the Convention, namely justice and peace. Denying the reality of crimes against humanity, was aimed at rehabilitating the National-Socialist regime and accusing the victims themselves of falsifying history. This form of denial therefore constituted one of the most serious forms of racial defamation of Jews and of incitement to hatred.

Relaying on Article 17, the applicant's complaint under Article 10 was declared incompatible *ratione materiae* with the provisions of the Convention. In so far as the applicant's conviction also concerned his criticism of the State of Israel and the Jewish community, this part of the complaint was manifestly ill-founded: he had not limited himself to such criticism, but in fact pursued a proven racist aim.

Garaudy demonstrates that the Court is concerned with the motive and intention of the applicant in determining whether the applicant's use of his right to freedom of expression is or is not contrary to the Convention (and therefore entitled to protection under Article 10). In this regard, the Court refuses to allow applicants to use rights derived from the Convention in a manner which is contrary or would destroy other freedoms and rights protected by the Convention. Therefore, Article 17 stands as a guard against the abuse of rights and freedoms derived from the Convention in a manner contrary to the value of the ECHR. *Garaudy* stands precedence that statements negating historical facts, in particular the Holocaust, cannot fall under the protection of Article 10 as they go against the principles of fairness and justice of the Convention and are as such incompatible *ratione materiae* with the ECHR.

M'Bala v. France
(Application no. 25239/13)
(decision on the admissibility)
from 20 October 2015

Note on the procedure:

The applicant (Diedonné M'Bala M'Bala) is a French national, the complaint concerns alleged violations of Article 10 (freedom of expression) and Article 7 (no punishment without law), the complaint was lodged on April 10, 2013, and was heard on the 20 October 2015.

Summary of the facts:

The applicant is a French comedian who is also engaged in political activities. He staged a performance in 2008 entitled *j'ai fait l'con*. At the end of the show, he invited Robert Faurisson on stage who has been convicted several times in France for negationist or revisionist opinions and for denial of the existence of gas chambers in Nazi concentration camps. The applicant called onto an actor wearing striped pyjamas with the Star of David stitched on them to award Mr. Faurisson a 'prize for unrequitability and insolence'. This incident was recorded by the police.

The applicant was summoned on the 27 March 2009 by the public prosecutor to appear before the Paris *Tribunal de Grande Instance* on charge of proffering a public insult directed at a person or group of persons on account of their origin or of belonging, or not belonging, to a given ethnic community, nation, race or religion. The charges pertained to his use of gestures and speech during the performance which amounted to offensive expressions and contemptuous or insulting language. Several associations of former deportees, anti-racism, anti-Semitism and human rights organizations applied to join the proceedings as civil parties.

The Tribunal de Grande Instance, on the 27 October 2009 found the applicant guilty and sentenced him to a fine of 10,000 euro and ordered the publication at the applicant's expense in the daily newspapers *Le Monde* and *Le Parisien-Aujourd'hui en France* of a notice of the court order and the sentence. In a judgement from 17 March 2011, the Paris Court of Ap-

peal upheld the judgement as to the applicant's guilt and the sanctions imposed. The applicant and three civil parties appealed on a point of law, the latter was declared inadmissible by the Court of Cassation which dismissed the appeal by the applicant.

Applicant's complaint to the Court

The applicant complained on violations of Article 7 and 10 of the Convention arguing that the restriction which was made by the French courts on his freedom of expression was neither foreseeable nor necessary.

Decision of the Court

The ECtHR recognized that Article 10 is an essential element of a democratic society and applies equally to satire and other forms of artistic expression and social commentary. The Court's case-law has laid down clear limits to freedom of expression, holding that any remark which goes against the underlying values of the Convention does not fall under the protection of Article 10 by effect of Article 17.

The ECtHR noted that the domestic courts had convicted the applicant for publicly paying tribute to an individual known for his negationist ideas and arranged for an actor dressed as a deportee of Nazi concentration camps to award him an award which formed an object mocking a symbol of Jewish religion. The Court agreed with the assessment of facts which was made by the domestic courts, particularly with the finding that the applicant's show had a strong anti-Semitic content. The ECtHR found that the applicant's statements did not distance him from his guests' sketch but contrary to this, insisted him to go further.

The Court reiterated that in the context of Article 10 offending comments must be examined in light of circumstance and in their whole context. The applicant having previously displayed strong political commitment and having already been convicted for proffering racial insults, the contextual elements and the actual remarks made on stage were not intended to denounce anti-Semitism.

The Court noted that the applicant cannot,

having regard to the entire context, claim to be acting as an artist entitled to express himself through satire, humour or provocation. The ECtHR was of the opinion that the act constitutes a demonstration of 'hatred and anti-Semitism, supportive of Holocaust denial'. The court noted that the act had a marked negationist and anti-Semitic character, the applicant hence attempted to deflect Article 10 from its real purpose and used his right to freedom of expression to ends contrary to the Convention. Pursuant to Article 17 the applicant could not enjoy the protection of Article 10, and his application was rejected as incompatible *ratione materiae* with the Convention.

Comment on the decision:

The present case illustrates the detailed analysis which the ECtHR puts in place in assessing whether the applicant's right to freedom of expression has been interfered. The Court based its decision on an assessment taking into account various relevant factors, including the content of the applicant's statements, his intentions, as well as the historical and factual context which would have led the national authorities to interfere with the applicant's freedom of expression.

M'Bala M'Bala stands as strong precedence that the use of the Convention rights in a manner contrary to the Convention, or in a way which is intended to destroy other ECHR rights and freedoms is not tolerated by the Court. Such activities, by virtue of Article 17, do not fall under the forms of expression which benefit of the protection of Article 10. The blatant display of a hateful and anti-Semitic position disguised as an artistic production could not be assimilated to a form of entertainment, however satirical or provocative, which would be afforded protection by Article 10. It was as dangerous as a fully-fledged and sharp attack and therefore attracted application of Article 17 (§§ 39-40). The application was rejected as incompatible *ratione materiae* with the provisions of the Convention. The present case is a strong precedent that the negationist or revisionist statements in regard to events which occurred during the Holocaust are incompatible *ratione materiae* with the Convention, and as such do not fall under the protection of Article 10.

Williamson v. Germany (Application no. 64496/17) (decision on the admissibility) from 8 January 2019

Note on the procedure:

The application was lodged against Germany on the 28 August 2017 and was heard by the Court on the 8 January 2019. The applicant is a British national.

Summary of the facts

The applicant is a former member of the Saint Pius X Society, an international priestly fraternity founded in opposition to the ecclesiastical reforms of the second Vatican Council. The archbishop, founder of the fraternity, in 1988 consecrated four bishops including the applicant, without the consent of the Pope. As a result of this, the Congregation for Bishops declared that those consecrated in this manner, including the applicant, were automatically excommunicated. In 2009 the Congregation for Bishops decided to lift the excommunication of the applicant and the surviving bishops of the said fraternity. The applicant was then expelled from the Society of Saint Pius X.

On November 2008 the applicant had an interview with a journalist of a Swedish television channel SVT-1 which was recorded at the seminary of the Society of Saint Pius X in Germany, during which the applicant stated that he did not believe in the existence of gas chambers in Nazi concentration camps. This interview was broadcast on 21 January 2009 and was accessible on Swedish pay-television and the internet. The journalist then offered the recording of the interview to a journalist from a German magazine *Der Spiegel*. Prior to the broadcast of the interview on television, *Der Spiegel* had published an article with the applicant's statements concerning the existence of gas chambers, these were then reiterated by other German newspapers. The applicant applied for a preliminary injunction from the German civil courts, for an order for removal of the recording of the interview from the SVT website, an order for the interview to be used for no other purpose than the program it had been broadcast for. This application was rejected by

the Nuremberg-Furth Regional Court, as then dissemination of the interview was considered covered by the applicant's consent.

On 22 January 2009 preliminary proceedings against the applicant were launched, the Regensburg District Court found the applicant guilty of incitement to hatred and sentenced him to 120 days fine of 100 euros each. Following an appeal the district court reduced the sentence, which was later quashed by the Nuremberg Court of Appeal and the proceedings were discontinued.

On 2 October 2012 upon the public prosecutor's request another penal order was issued against the applicant finding him guilty of incitement to hatred and sentencing him to 100 day-fines of 65 euros each. Following an appeal from the applicant this was reduced to a 90 day-fines of 20 euros each. Following a further appeal by the applicant, the Regensburg Regional Court considered that the applicant's statement of denying the existence of gas chambers during the Nazi regime and the killing of Jews in gas chambers constituted a denial of the acts of genocide committed under the Nazi regime.

Applicant's complaint to the Court

The applicant complains of violations of Article 10 (freedom of expression)

Decision of the Court

The ECtHR found the application to be inadmissible. The applicant complained that the German courts had wrongfully applied domestic law to the offence which had been committed. The applicant argued that he exercised his right to freedom of expression in a way which was lawful in one member state (Sweden) but had been restricted in another member state where it was considered unlawful (Germany). This argument was not accepted by the Court which reiterated that the applicant had provided the statement in question in Germany despite habitually residing elsewhere and knowing that the statement was contrary to domestic German law. The ECtHR thus found that the assessment of the German Regional Court was reasonable and well founded, in particular as the offence was committed in Ger-

many which was a key feature of the offence under domestic law, the interview was also carried out publicly and the application of German law was foreseeable.

The Court agreed with the view of the German Regional Court that the interview consisted of an explicit denial of the existence of gas chambers and the killing of Jews in those gas chambers under the Nazi regime, thus amounting to a downplay of the acts of genocide against the Jews and severely disturbing the public peace in Germany. The court thus concluded that the applicant had used his right to freedom of expression to promote ideas which were contrary to the values of the Convention. The Court hence concluded that the interference imposed on the applicant's freedom of expression was proportionate to the legitimate aim pursued and was 'necessary in a democratic society'.

Comment on the decision

Williamson follows the already existing Strasbourg case-law in which the Court reiterates that negationist or revisionist statements are contrary to the Convention and as such will not benefit from protection under Article 10 of the Convention.

Moreover, the Court paid particular attention to the historical and factual context of the case, as well as the fact that the statement had been made in Germany, which was a key feature of the offence. Despite being aware that his statements were subject to criminal liability in Germany and could attract particular interest there, the applicant did not reach any specific agreement with the Swedish television as to any prohibition or restriction on the use of the interview recording and it could indeed be viewed in Germany via satellite television or the Internet. Referring to Article 17, the Court rejected the application as manifestly ill-founded. In its view, the fact that the applicant had sought to use his right to freedom of expression with the aim of promoting ideas contrary to the text and spirit of the Convention weighed heavily in the assessment of the necessity of the interference under Article 10.

Pastörs v. Germany (Application no. 55225/14) (decision on the admissibility) from 3 October 2019

Note on the procedure:

A case was lodged against the Federal Republic of Germany by a German national, Mr. Udo Pastors (the applicant) on the 30 July 2014 and concerns alleged violations of Article 10 of the and Article 6 (1) of the Convention. The hearing was deliberated on the 9 July 2019.

Summary of the facts:

The applicant was a Member of Parliament and chairperson of the National Democratic Party of Germany (NPD) in the Land Parliament of Mecklenburg-Western Pomerania. The applicant along with the members of the NPD parliamentary group did not attend an event organized in the parliament on 27 January 2010, Holocaust Remembrance Day. The following day the applicant held a speech in the Parliament contesting the Holocaust. In February 2012, the applicant's inviolability from prosecution was revoked by the Land Parliament. Criminal convictions were raised against the applicant for the given statement and he was sentenced to 8 months imprisonment.

To the applicant's appeal, the Regional Court concluded that the applicant had denied the mass extinction of Jews carried out in Auschwitz. The court referred to the applicant's use of the terms of 'barrage of propagandistic lies' and 'Auschwitz projection' (*Auschwitzprojection*). The Regional Court was convinced that the applicant had intended to convey a message questioning the truth about Auschwitz and to bring it into Parliament without any parliamentary measures being taken.

The applicant's appeal to the Rostock Court of Appeal was rejected. After learning that one of the three judges at the Rostock Court of Appeal was the husband of the professional district judge who had convicted the applicant at first instance, the applicant lodged a complaint for bias. The bias complaint was dismissed, noting that solely the appellate judgement delivered by the Regional Court had been reviewed, and as such the complaint was ill-suited.

Applicant's complaint to the Court

The applicant complained of an alleged violation of Article 10 (freedom of expression) and violation of Article 6 (right to a fair trial) alleging that the court had lacked impartiality.

Decision of the Court

The ECtHR reiterated that Article 17 of the Convention, with regard to Article 10, should only be applied on exceptional bases and extreme cases and should be resorted to when the statements are clearly contrary to the values of the Convention. The decisive point being whether the statements, whether verbal or non-verbal, are directed against the Convention's underlying values. The Court underlined the importance of political speech within Parliament and the importance which freedom of speech occupies in this regard. However, the Court recognized that some limits are necessary.

Given this, in the present case the Court considered that the applicant's statements showed 'his disdain towards the victims of the Holocaust'. Although the ECtHR recognized the importance of parliamentary speech, it considered that the revoking by the Parliament of Land of the applicant's inviolability from prosecution is particularly relevant.

The Court reiterated that it will only determine whether the interference with the applicant's right to freedom of expression was 'necessary in a democratic society'. The Court agreed with the assessment of facts of the Regional Court, recognized that the latter had evaluated the applicant's speech in full. The Court attached fundamental importance to the fact that the applicant planned his speech in advance, deliberately choosing his words which amounted to qualified Holocaust denial and showed disdain towards the victims of the Holocaust. In this regard, the court considered that the applicant attempted to use his right to freedom of expression as a way to promote ideas contrary to the Convention.

The Court recognized that interferences with the right to freedom of speech deserved particular scrutiny in the context of parliamentary

representatives, however the court asserted that these statements would merit little protection if their content were contrary to the democratic values of the Convention. In light of this, the Court found that the applicant did not suffer a violation of Article 10.

In regard to Article 6 the Court concluded that there were no objectively justified doubts as to the Court of Appeal's impartiality and as such concluded that there had been no violation of Article 6.

The judges Grozev and Mits held a joint partly dissenting opinion. They agreed with the court's conclusions as to Article 10, but could not agree with the majority regarding the lack of objectively justified doubts about the impartiality of the Court of Appeal and found that there was a violation of Article 6.

Comment on the decision

The present case falls in line with the previous case-law of the Court pertaining to negationism, in the particular context of political discussions. The Court reiterates the importance of strict scrutiny of the limits imposed on freedom of expression in the context of political speech and parliamentary discussions, allowing for a wider scope of freedom of expression and a stricter control of the lawful interferences to freedom of expression in this context.

The Court reiterated the necessity to use Article 17 solely in exceptional cases where an action is explicitly or directly contrary to the Convention. In this case, the Court preferred to examine the merits of the applicant's complaint under Article 10, as interferences with the right to freedom of expression called for the closest scrutiny when they concerned statements made by elected representatives in Parliament. The Court attached fundamental importance to the fact that the applicant had planned his speech in advance, deliberately resorting to obfuscation to get his message across. Article 17 had thus an important role to play, as the applicant had sought to use his right to freedom of expression with the aim of promoting ideas contrary to the text and spirit of the Convention and that weighed heavily in the assessment of the necessity of the interference.

The applicant's complaint under Article 10 was eventually rejected as manifestly ill-founded. Considering these contrasting elements, the Court can be seen in this case to be paying particular attention to the content of the applicant's statement, the context in which it was made and the intentions of the applicant. The present case illustrates that even in the context of political speech, where the Court's scrutiny is heightened, acts and statements which misuse Convention rights and are contrary to the values of the Convention will not fall under the protection of the Convention articles.

Ethnic hate



In order to establish whether a particular conduct amounts to an abuse of rights, the Court scrutinizes the aims which an applicant pursues when relying on the Convention and their compatibility with this instrument.

In most of the cases related to racial or ethnic hate, the Court considers that by complaining about conviction for incitement to hatred, the applicants alleged, in essence, a violation of the right to freedom of expression guaranteed under Article 10 of the Convention.

In such a case the Court notes at the outset that it is not for it to determine what evidence was required under national law to demonstrate the existence of the constituent elements of the offence of inciting to hatred. It is in the first place for the national authorities, notably the courts, to interpret and apply domestic law. The Court's task is merely to review under Article 10 the decisions they delivered pursuant to their power of appreciation.

The Court further reiterates that, although its case-law has enshrined the overriding and essential nature of the freedom of expression in a democratic society, it has also laid down the limits to that freedom. The Court has held, in particular, that speech which is incompatible with the values proclaimed and guaranteed by the Convention, would be removed from the protection of Article 10 by virtue of Article 17 of the Convention¹⁵.

In those cases, Article 17 is relevant where an applicant seeks to misuse a Convention provision from its real purpose by taking advantage of the right it guarantees in order to justify, promote or perform acts that: are contrary to the text and spirit of the Convention; are incompatible with democracy and/or other fun-

damental values of the Convention; infringe the rights and freedoms recognized therein. Where an applicant seeks to vindicate his or her Convention rights in a way that violates the rights and values protected by the Convention, such conduct may qualify as an abuse of the right of individual application within the meaning of Article 35 § 3 (a).

When assessing an applicant's conduct and aims in the light of Article 17, the Court takes into account the values proclaimed and guaranteed by the Convention, particularly as expressed in its Preamble such as: Justice and peace; effective political democracy and freedom; peaceful settlement of international conflicts and sanctity of human life; tolerance, social peace and non-discrimination; gender equality; coexistence of members of society free from racial segregation.

Pavel Ivanov v. Russia
(Application no. 35222/04)
(decision on the admissibility)
from 20 February 2007

Note on the procedure:

The applicant, a Russian national, lodged a complaint on the 27 August 2004 against Russia. The court deliberated on the 20 February 2007

Summary of the facts:

The applicant is the founder and sole owner of the *Russkoye Veche* Newspaper which has been published monthly since 2000 at the applicant's expense. In 2003 the applicant was committed for trial on charge of public incitement to ethnic, racial and religious hatred through the use of mass-media. The prosecution's case was that the applicant called for the exclusion of Jews from social life and portrayed the malignancy of the Jewish ethnic group through a series of publications. The Town Court acquitted the

¹⁵ See *Handyside v. the United Kingdom*, from 7 December 1976, Series A no. 24, § 49, and *Lingens v. Austria*, from 8 July 1986, Series A no. 103, § 41

applicant on 8 September 2003, finding that it was not proved that he was the author of the publications. This decision was quashed by the Regional Court which remitted the case. The applicant asked the town Court to commission a history-social report clarifying questions which was refused by the Court. On 24 February 2004 the applicant was found guilty by the Town Court of inciting to racial, national and religious hatred and he was prohibited from engaging in journalism, publishing and disseminating in the mass-media for a period of 3 years. The applicant lodged an appeal, contesting that he could not have incited to national hatred because the Jews did not exist neither as a race nor a nation. The regional court upheld the conviction.

Applicant's complaint to the Court:

The applicant complained in general terms that his conviction for incitement to racial hatred had not been justified. The applicant also complained of violations of Article 13 by the domestic courts and of Article 14 as having been discriminated against because of his religious beliefs.

Decision of the Court:

The Court considered that the applicant's complaint about the conviction for incitement to racial hatred regarding his publications was in essence an alleged violation of the applicant's right to freedom of expression under Article 10. The court reiterated the overriding and essential nature of freedom of expression in a democratic society but re-affirmed that this freedom is limited in particular where the speech used is incompatible with the values guaranteed by the Convention, in which case the latter is removed from the protection of Article 10 by virtue of Article 17 of the Convention.

The ECtHR was of the view that the applicant had authored and published articles which portrayed the Jews as 'the source of evil in Russia', accused the entire ethnic group of plotting a conspiracy against the Russian people, and consistently denied the Jews the right to national dignity and denied their existence as a nation. Therefore, the court agreed with the assessment of the domestic courts, viewing that the applicant's publications incited to hatred towards the Jewish people, which was contrary to the Con-

vention's underlying values and consequently to Article 17 of the Convention, the applicant could not benefit of protection under Article 10.

The court equally did not find any evidence that the applicant's right to a fair trial was infringed. Having found that the applicant's complaint under Article 10 was incompatible *ratione materiae* with the Convention, the applicant had no arguable claim to be a victim of a violation of the Convention and as such Article 13 was inapplicable to the case. Furthermore, Article 14 having no independent existence, the applicant's complaints under the substantive Convention articles having been found inadmissible, there was no room to apply Article 14.

Comment on the decision

In the present case the Court reiterated that statements which shock, offend or disturb, fall under the protection of Article 10. The Court again reiterated the overriding importance of freedom of expression as protected under Article 10, however it balanced these rights with limits to these rights. In the present case the applicant had passed the threshold of statements which are entitled to protection under Article 10. Indeed, the Court found that the applicant's statements had incited hatred towards a particular group, as such the applicant had sought to use his rights under Article 10 to incite hatred on the basis of ethnicity. Going back to the facts, it appears that an owner and editor of a newspaper was convicted of authoring and publishing a series of articles portraying the Jews as the source of evil in Russia, calling for their exclusion from social life. He accused an entire ethnic group of plotting a conspiracy against the Russian people, ascribed fascist ideology to the Jewish leadership and denied the Jews the right to national dignity. The Court had no doubt as to the markedly anti-Semitic tenor of the applicant's views. Such a general, vehement attack on one ethnic group was directed against the Convention's underlying values, notably tolerance, social peace and non-discrimination. In light of this, *Pavel Ivanov v Russia* illustrates that hate speech on the basis of ethnicity does not fall under the protection of Article 10 of the Convention by application of Article 17.

Balsytė-Lideikienė v. Lithuania
(Application no. 72596/01)
from 4 November 2008

Note on the procedure:

The application was lodged against the Republic of Lithuania, by the applicant Mrs. Danute Balsyte-Lideikiene, a Lithuanian national, on 23 May 2001, and was deliberated by the court on the 7 October 2008.

Summary of the facts:

In March 2001 the domestic courts had found that the applicant had breached Article 214 of the code on Administrative Law Offences on account of her publishing and distributing ‘the Lithuanian calendar 2000’ which had promoted ethnic hatred, insulting Polish, Russian and Jewish origin. The applicant received an administrative warning, and the unsold copies were confiscated.

Applicant’s complaint to the Court

The applicant complained of violations of Article 6(1) and 6(3)d (right to fair hearing and fair trial), complaining that the case had been examined by the first instance court without the experts being summoned to the hearing and that the Supreme Administrative Court did not hold a hearing on the appeal. The applicant also complained that the confiscation and the ban of the calendar were in breach of Article 10.

Decision of the Court

The Court observed that the first instance court had appointed experts which were intended to establish whether the ‘Lithuanian calendar 2000’ promoted ethnic hatred, and whether in particular it contained anti-Semitic, anti-polish, anti-Russian expression or assertions of the superiority of Lithuanians compared to other ethnic groups. Although the court had relied heavily on the experts’ conclusions, the applicant had not been given the opportunity to question the experts to determine their credibility or question their conclusions. The refusal of her request to have the experts examined in open court failed to meet the requirements of

Article 6(1). The court concluded by 6 votes to 1 that there was a violation of Article 6.

Regarding Article 10, the court considered that the punishment (administrative penalty and confiscation of the publications) was aimed at protecting the reputation and rights of the ethnic groups living in Lithuania to which the ‘Lithuanian calendar’ referred to. The court had a particular regard to the government’s concern pertaining to the context of the case, which concerned questions of territorial integrity and national minorities. The court also considered Lithuania’s obligations under international law to prohibit any advocacy of national hatred and to protect persons who are subjected to threats as a result of their ethnic identity. The court considered that the domestic authorities had not overstepped their margin of appreciation when considering the serious concern and pressing social need to take measures against the applicant. The court concluded that the interference with the applicant’s right to freedom of expression was reasonably necessary in a democratic society and for the protection of the rights of others, concluding unanimously that there had been no violation of Article 10.

Comment on the decision

The present case is illustrative of the balancing between the applicant’s right to freedom of expression and democratic interests which is done by the Court in determining whether an interference with an individual’s freedom of expression was proportionate. As such, the Court took into account the particular national context, the State’s international obligations as well as the negative reactions which had arisen on an international level in regard to the impugned statements. The applicant, a publisher, was issued with an administrative warning on account of a publication which contained statements promoting territorial claims, expressing aggressive nationalism and referring to the Jews and Poles as the perpetrators of war crimes and genocide against the Lithuanians. The unsold copies of the publication were confiscated. The Court found no breach of Article 10, as the impugned statements inciting hatred against the Poles and the Jews were capable of giving the authorities cause for serious concern, especially given the sensitive na-

ture of the questions of national minorities and territorial integrity after the re-establishment of Lithuanian independence in 1990. The Court did not raise of its own motion the question of application of Article 17.

The Court also took particular note of the nature of the applicant's statements which were considered to be nationalistic and ethnocentric and were a form of incitement to hatred on the basis of ethnicity which validly gave rise to serious concerns. The Court also considered the type and level of sanction imposed on the applicant, as well as the factual context which gave rise to a pressing social need, justifying the interference with the applicant's freedom of expression. In this regard *Balsytė-Lideikienė v. Lithuania* is illustrative of the strict control of the balance struck between different Convention rights which the Court exercises.

***Atamanchuk v. Russia*
(Application no. 4493/11)
from 11 February 2020**

Note on the procedure:

The applicant, a Russian national, lodged an application against the Russian Federation on the 18 January 2011 which the court deliberated in private on the 14 January 2020.

Summary of the facts:

The applicant is an owner of a local newspaper, he was convicted of inciting hatred on account of a newspaper article containing offensive remarks about non-Russian ethnic groups. The applicant had stated that these groups were prone to crimes and would 'slaughter, rape, rob and enslave, in line with their barbaric ideas' and that they 'participate in the destruction of the country'. The article was published twice, in two local newspapers, in a multi-ethnic region. The applicant was fined for each publication with a fine of 5,100 euros and 2-year ban on exercising journalistic or publishing activities. While the sentence concerning the first publication was not enforced, the second one was converted to a 100-hour community work sentence.

Applicant's complaint to the Court

The applicant complained of violations of his right to freedom of expression under Article 10. The applicant also complained of violations of Article 6(1) claiming that his right to a fair trial had been violated.

Decision of the Court

The Court noted that the domestic courts had relied on relevant reasons in convicting the applicant and took in particular note of the context of the sentence, which occurred in the context of domestic legislation aimed at fighting hate speech and protecting the right in particular of non-Russian ethnic groups residing in the applicant's region.

The Court also noted that the applicant's statement was not capable of contributing to the public debate on the relevant issue nor that its principal purpose was to do so. The statement had also lacked factual basis. The Court observed that even if the article didn't contain any explicit call for acts of violence, the national authorities acted within their margin of appreciation. The Court hence concluded that the case revealed exceptional circumstances which justified the sentence imposed on the applicant, particularly having regard to the fact that the prohibition of practicing journalistic activities for 2 years had not prevented the press from upholding its role as watchdog of a democratic society.

Finally, the Court did not find any violation of Article 6(1), holding that the refusal of the applicant's request to summon a philology specialist had not offended the fairness of the criminal proceedings.

Comment on the decision

It is suggested that this case is illustrative of the fragile balance which the ECtHR seeks to strike between the limits of freedom of expression, freedom of the press and the limits of tolerance. The Court dealt with the applicant's statements that non-Russian ethnic groups residing in Russia would "slaughter, rape, rob and enslave, in line with their barbaric ideas" and "participate[d] in the destruction of the coun-

try". The Court found no violation of Article 10 in respect of the applicant's criminal conviction and two-year ban on journalistic and publishing activities imposed on him on this account. Although the Court eventually decided not to rule on the application of Article 17, its decision was significantly based on the case-law on this provision. The case raises the question of the extent to which censorship of freedom of expression, in particular in the press, can be allowed in order to protect others from prejudice. In the present case the Court reiterates the essential role of freedom of expression in a democratic society, but nevertheless recognizes the role of the state and its margin of appreciation in limiting this freedom where there is a potential harm of hate speech.

In determining whether the interference was legitimate, proportionate and necessary the Court took particular account of the fact that the applicant's life was not significantly affected by the ban, taking particular account of the fact that journalism was not his principal activity and had only been exercised sporadically. This is illustrative of the balance which the Court exercises in determining whether the interference with the applicant's freedom of expression was necessary and proportionate.



Religious hate

The Court refers to its settled case-law that freedom of thought, conscience and religion is one of the foundations of a “democratic society” within the meaning of the Convention. Since religious communities traditionally exist in the form of organized structures, the right of believers to freedom of religion, which includes the right to practice one’s religion in community with others, encompasses the expectation that believers will be allowed to associate freely¹⁶. In the context of freedom of religion States enjoy a wide margin of appreciation in the particularly delicate area of their relations with religious communities¹⁷. The State has a duty to remain neutral and impartial in exercising its regulatory power and in its relations with the various religions, denominations and groups within them. It is a positive obligation of the state to preserve pluralism and proper functioning of democracy, one of the principal characteristics of which is the possibility it offers of resolving a country’s problems through dialogue, without recourse to verbal or physical violence. The harmonious interaction of persons and groups with varied identities is essential for achieving social cohesion¹⁸.

The State’s power to protect its institutions and citizens from persons or associations that might jeopardize them must be used sparingly, as the exceptions to the rule of freedom of association are to be construed strictly, and only convincing and compelling reasons can justify restrictions on that freedom.

Norwood v. the United Kingdom
(Application no. 23131/03)
(decision on the admissibility)
16 November 2004

Note on the procedure:

The applicant is a United Kingdom national who lodged his application to the European Court of Human Rights on 16 July 2003, concerning alleged violations by the UK of Articles 10 and 14 of the Convention. The sitting of the court as a Chamber was held on the 16 November 2004.

Summary of the facts:

The applicant was a regional organizer for the BNP (British National Party- extreme right political party), he had displayed through his window a large poster which had been supplied by the BNP between November 2001 and January 2002. The poster depicted a photograph of the Twin Towers in flames with the phrase ‘Islam out of Britain - Protect the British People’ and a crescent and star symbol in a prohibition sign.

Following complaints by the public, the police removed the poster. The applicant was charged with an aggravated offence of displaying, with hostility towards a racial or religious group, any writing, sign or other visible representation which is threatening, abusive or insulting, within the sight of a person and is likely to cause harassment, alarm or distress. To this the applicant pleaded not guilty arguing that the poster was not abusive or insulting as it referred to extreme Islamism and argued that convicting him would amount to infringing his right to freedom of expression under Article 10 of the Convention.

16 Hasan and Chaush v. Bulgaria [GC], no. [30985/96](#), § 62, ECHR 2000-XI

17 Cha’are Shalom Ve Tsedek v. France [GC], no. [27417/95](#), § 84, ECHR 2000-VII

18 İzzettin Doğan and Others v. Turkey [GC], no. [62649/10](#), § 109, ECHR 2016

Applicant's complaint to the Court

The applicant alleged violations of Article 10 (freedom of expression) and Article 14 (prohibition of discrimination).

Decision of the Court

The Court found that the applicant's claims were *ratione materiae* incompatible with the Convention. Indeed, referring to Article 17, the Court reiterated that the article is intended to prevent individuals or groups from exploiting the Convention towards their own aims. The Court reiterated that in its previous case-law the court had found that Article 10 could not be involved in a sense which would be contrary to Article 17.

The court agreed with the assessment by the domestic courts that the word and imagery amounted to a 'public expression of an attack on all Muslims in the United Kingdom'. This amounted to a general vehement attack against a religious group as a whole linking the group to an act of terrorism. The court concluded that such statements were contrary to the fundamental values protected by the Convention, and as such the act of displaying the poster in itself was an act which fell under Article 17, and as such did not enjoy the protection of Article 10 or 14.

Comment on the decision

The applicant was convicted on account of a poster he had displayed in the window of his flat, containing a photograph of the Twin Towers in flame, the words "Islam out of Britain - Protect the British People" and a symbol of a crescent and star in a prohibition sign. Such a general and vehement attack on a religious group, linking the group as a whole with a grave act of terrorism, was incompatible with the values proclaimed and guaranteed by the Convention. By virtue of Article 17, that act did not enjoy the protection of Articles 10 or 14. The Court disregarded the applicant's argument that the poster had been displayed in a rural area not greatly afflicted by racial or religious tension, and there was thus no evidence that a single Muslim had seen the poster. The application was rejected as being incompatible *ratione materiae* with the provisions of the Convention. It is suggested that the present

case is a persuasive and clear precedent illustrating that freedom of expression will not be protected by the Convention where it is used to incite hatred, call for violence or insult individuals or groups on the basis of their religion.

The present case illustrates that the Article 17 stands as a guard ensuring that the Convention is not used for a personal interest which is contrary to the values of the Convention, in the present case the public expression of attacks in calls for violence or hatred towards other religious groups.

I.A. v. Turkey
(Application no. 42571/98)
from 13 September 2005

Note on the procedure:

The case concerns an application against the Republic of Turkey lodged with the European Commission of Human Rights by a Turkish national, Mr. I.A., on the 18 May 1998. The court deliberated in private on the 28 June and 25 August 2005.

Summary of the facts:

The applicant is a proprietor and managing director of a publishing house (Berfin) which published in 1993 a novel by Abdullah Riza Erguven entitled 'Yasak Tumceler' (the forbidden phrases).

The Istanbul public prosecutor in an indictment of 18 April 1994 charged the applicant with blasphemy against 'God, the Religion, the Prophet and the Holy Book' through the publication of the book in question. This indictment was based on expert report drawn at the request of the public prosecutor.

In a letter to the Istanbul court of first instance the applicant contested the expert report arguing that the book was a novel, he also contested the expert's impartiality. A second expert report was produced by a committee of experts, whereby the applicant contested its accuracy and argued it had been a copy of the first report.

The applicant was convicted and sentenced to two years' imprisonment and a fine. The national court commuted the prison sentence to a fine, so that the applicant was ultimately ordered to pay a fine equivalent to 16 US dollars. The applicant appealed to the Court of Cassation, arguing that the book only expressed his views, he also challenged the expert reports. The court of cassation upheld the impugned judgement.

Applicant's complaint to the Court

The applicant complained of violations of Article 10 of the Convention (right to freedom of expression)

Decision of the Court

The Court noted that the applicant's conviction constituted an interference with his right to freedom of expression, this was an interference which was prescribed by law and pursued legitimate aims of preventing disorder and protecting morals and rights of others. The Court noted as such that the assessment related to the question of whether the interference was 'necessary in a democratic society'.

The Court reiterated that freedom of expression is an essential foundation of a democratic society and a basic condition for its progress and for 'each individual's self-fulfilment'. The ECtHR reminded that Article 10 paragraph 2 protected not only information and ideas which are inoffensive, favourably received or indifferent, but also those which offend, shock or disturb.

The Court reminded that the exercise of freedom under paragraph 2 of Article 10 carries with it duties and responsibilities. As such there can be a legitimate duty to avoid expressions which are 'gratuitously' offensive and profane in the context of religious beliefs. In this regard the Court recognized that the State enjoys a certain margin of appreciation which is not unlimited, in determining what is considered 'necessary in a democratic society'. The Court pointed out the absence of a uniform European conception regarding the requirements for protection of the rights of others in relation to attacks on their religious convictions. This,

according to the court, gives the state a wider margin of appreciation. However, the Court warned that it is for it to give a final ruling on whether the restriction imposed by the state is compatible with the Convention, which it does by assessing whether the interference corresponded to a 'pressing social need' and was 'proportionate to the legitimate aim pursued'.

The present case involved a weighing up of conflicting interests between two fundamental freedoms. In this regard the Court considered that the case concerns comments which were an 'abusive attack' on the Prophet of Islam. The quote referred to particular statements which could legitimately be understood as attacks to the believers of that religion. As such the Court held that to the extent that the measures taken were intended as protection against offensive attacks on matters regarded as sacred to the Muslims, the measure could be held as meeting a 'pressing social need'. The court concluded that the domestic authorities had not overstepped their margin of appreciation, therefore there was no violation of Article 10 by votes of 4 to 3.

The Judges Costa, Cabral Barreto and Jungwirth gave a joint dissenting opinion. Although the judges recognized that the statements made were undoubtedly insulting statements, they noted that these should not be taken in isolation as a basis for condemning an entire book. The judges also argued that although the sentence was light, having been commuted from 2 years imprisonment to a modest fine, any type of criminal conviction of the sort can have a 'chilling effect' on the media and press, and discourage publishers from producing books which are not strictly conformist. This, in the judges' view, was a strong risk of self-censorship which was dangerous for freedom. As such the judges found that there had indeed been a breach of Article 10 in the present case.

Comment on the decision

It is suggested that the present case is illustrative of the application of a margin of appreciation to determine what is offensive and what is protected by the Convention in regard to speech pertaining to religion. The present case recognizes that states and national authorities

have to strike a delicate balance between the freedom of expression of one party and the freedom and rights of others, in particular their right to freedom of religion.

The issue in this case therefore involves weighing up the conflicting interests of the exercise of two fundamental freedoms, namely the right of the applicant to impart to the public his views on religious doctrine on the one hand and the right of others to respect for their freedom of thought, conscience and religion on the other hand. The Court reiterates that pluralism, tolerance and broadmindedness are hallmarks of a democratic society. Those who choose to exercise the freedom to manifest their religion, irrespective of whether they do so as members of a religious majority or a minority, cannot reasonably expect to be exempt from all criticism. They must tolerate and accept the denial by others of their religious beliefs and even the propagation by others of doctrines hostile to their faith.

The present case deals not only comments that are shocking, offensive or provocative, but also concerns an abusive attack on the Prophet of Islam. The Court noted the fact that there is a certain tolerance of criticism of religious doctrine within Turkish society, which is deeply attached to the principle of secularity, believers may legitimately feel themselves to be the object of unwarranted and offensive attacks through certain passages in the applicant's publication. The conclusion of the Court was that the measures taken in respect of the statements in issue were intended to provide protection against offensive attacks on matters regarded as sacred by Muslims and in that respect, it finds that the measure may reasonably be held to have met a pressing social need.

Therefore, the authorities cannot be said to have overstepped their margin of appreciation in that respect and that the reasons given by the domestic courts to justify taking such a measure against the applicant were relevant and sufficient. For the proportionality of the impugned measure, the Court was mindful of the fact that the domestic courts did not decide to seize the book, and accordingly considers that the insignificant fine imposed was proportionate to the aims pursued.

It is interesting to note that the majority in the present case paid particular attention to the content of the impugned statement, the context in which it was made as well as the light nature of the sentence. In light of this, the majority found that the domestic courts' interference with the applicant's right to freedom of expression had been in pursuit of a pressing social issue and had been proportionate and necessary. Although the dissenting judgement agreed to some extent with this analysis, it noted the potential chilling effect which such interference to the freedom of expression to publishers could have.

***Erbakan v. Turkey,
(Application no. 59405/00)
from 6 July 2006***

Note on the procedure:

The applicant is a Turkish National (Mr. Necmettin Erbakan) who lodged his application to the Court on 26 July 2000, against the Republic of Turkey.

Summary of the facts:

The applicant is a politician and was Prime Minister of Turkey from June 1996 to June 1997, at the material time he was chairman of the Refah Partisi (the Welfare Party) which was dissolved in 1998 for engaging in activities contrary to the principles of secularism.

On 25 February 1994 the applicant had given a public speech during the local elections campaign, for which criminal proceedings were brought against him 4 years later. The proceedings were for having incited the people to hatred or hostility through the comments in his speech.

The applicant was convicted in 2000 and was sentenced to one year imprisonment and a fine. Having regard to the situation of the city where the speech was held at the material time, where inhabitants had been victims of terrorist acts

by extremist organizations, the State Security Court had found that the applicant, by making particular distinctions between believers and non-believers in his speech, had gone beyond the acceptable limit of freedom of political debate.

Applicant's complaint to the Court

The applicant complained of violations of Article 10 and 6 paragraph 1, arguing that his conviction infringed his right to freedom of expression, and holding that his case had not been heard by an independent and impartial tribunal because of the presence of a military judge in the State Security Court.

Decision of the Court:

In regard to Article 10, the Court noted that, through the use of religious terminology, the applicant had reduced diversity to a simple distinction of believers and non-believers, calling for a political distinction to be formed on the basis of religious affiliation.

The court recognized the importance of combating intolerance in any form or shape, this being an integral part of human rights protection. The Court also noted this fundamental nature of freedom of expression in political debates in a democratic society. The Court observed that the domestic authorities had not sought to establish the content of the speech in question until 5 years after the rally and had only done this on the basis of a video recording whose authenticity was unclear. The Court also noted that it was difficult to establish that, when the speech was given, it had presented a 'present risk' or an 'imminent danger'. The court also observed the very severe sentence, which was imposed on the applicant, who was a very well-known politician. This led the Court to conclude by six votes to one that there is violation of Article 10, as the criminal proceedings instituted against the applicant 4 years and 5 months after the alleged comments had not been reasonably proportionate to the legitimate aims pursued.

Moreover, the Court unanimously voted that there had been a violation of Article 6 paragraph 1, arguing that the applicant had legitimate reasons to fear that the domestic court

had not been independent and impartial since it included a military judge among its members.

Comment on the decision

It is suggested that the present case reiterates the crucial importance of freedom of speech in the context of political debates. The ECtHR relied on the fact that proceedings had not been raised until several years after the speech had been given, there had been no clear evidence of the authenticity of the video on which the courts had relied, nor any evidence that the speech had presented any imminent danger or risk.

Although the Court reiterated in this case, considering the importance of combating intolerance, and hate speech which incites hatred and discrimination, in particular based on religious grounds, the case is precedence for the strict scrutiny which the court applies when freedom of expression is interfered with in a political debate.

Belkacem v. Belgium, (Application no. 34367/14) (decision on the admissibility) from 27 June 2017

Note on the procedure:

The applicant (Mr. Fouad Belkacem), a Belgian national, lodged his complaint against Belgium on the 29 April 2014.

Summary of the facts:

The applicant was the leader and spokesperson of the organization 'sharia4Belgium' which had been dissolved in 2012. The applicant was prosecuted in particular for remarks he had made and published on YouTube concerning the Belgian Defence Minister and the deceased husband of a Belgian female politician. In particular, the applicant had called on the viewers to overpower non-Muslims, to teach them a lesson and fight them.

The applicant was sentenced to a 2-year prison term and fine of 550 euros, which the applicant appealed. The judgement was confirmed but the enforcement of the custodial sentence was suspended for 5 years. The court of Cassation dismissed the applicant's further appeal holding that the applicant had unquestionably incited others to discrimination on the basis of faith and to discrimination, segregation, hatred or violence towards non-Muslims.

Applicant's complaint to the Court

The applicant complained of violations of Article 10 (freedom of expression) arguing that he had never intended to incite others to hatred, violence, or discrimination, but only propagated his ideas and opinions.

Decision of the Court

The ECtHR observed the essential nature of freedom of expression in a democratic society, but also noted that its case-law lays down limits to this right, which results in the exclusion of certain statements from protection of Article 10. The Court noted that the statements made by the applicant in a series of videos he had posted on YouTube, called viewers to overpower non-Muslims, teach them a lesson and fight them. In this regard the Court agreed with the undoubtedly hateful nature of the applicant's comments and agreed with the domestic court's finding that the applicant had sought to stir up hatred, discrimination, and violence towards non-Muslims. The ECtHR held that such a general and vehement attack was incompatible with the fundamental values of the Convention. The Court noted, in particular in regard to the applicant's remarks concerning the Sharia, that it had previously ruled that defending the Sharia while calling for violence could be regarded as a form of 'hate speech'. The Court further noted that the Belgian legislation as applied in the present case was in conformity with the relevant recommendations of the Council of Europe and the European Union which were aimed at combating incitements to hatred, violence, or discrimination.

As such the Court concluded that in accordance with Article 17, the applicant could not claim protection under Article 10 of the Con-

vention as his real purpose was to use his right to freedom of expression for ends which were manifestly contrary to the fundamental values of the Convention.

Comment on the decision

The applicant was sentenced to a fine and a prison term on account of a series of videos on the YouTube platform, in which he called on viewers to overpower non-Muslims, teach them a lesson and fight them. According to the Court's view, such a general, vehement and markedly hateful attack was incompatible with the values of tolerance, social peace and non-discrimination. The case illustrates those statements calling for violence, hatred or discrimination towards a group for their religious beliefs that amounts to a form of hate speech and as such are incompatible with the underlying values of the Convention, in accordance with Article 17. Moreover, the case illustrates that where the applicant relies on his freedom of expression to call for the establishment of the Sharia through the use of violence, this expression is considered by the Court as a use of rights offered under the Convention in a manner which is contrary to its values, and as such, could not fall under its protection.

E.S. v. Austria, (Application no. 38450/12) from 25 October 2018

Note on the procedure:

The applicant (E.S), Austrian national, lodged an application to the Court against Austria for violations of Article 10.

Summary of the facts:

In 2009 the applicant held 2 seminars entitled 'Basic Information on Islam' in which she discussed the marriage between the Prophet Muhammad and Aisha (a 6-year-old girl) who was consummated when she was 9. In these seminars the applicant had stated that Muhammad "liked to do it with children" and "a 56-year-old

and a 6-year-old?... what do we call it, if it is not pedophilia?”.

In 2011 the Vienna Regional Court found that the statements by the applicant implied that Muhammad had paedophilic tendencies. The applicant was convicted for disparaging religious doctrines and was ordered to pay a fine of 480 euros. Following an appeal by the applicant, the Vienna Court of Appeal confirmed the lower court's findings.

Applicant's complaint to the Court

The applicant complained of violations of her right to freedom of expression (Article 10) by the domestic court.

Decision of the Court

The ECtHR observed that when exercising one's freedom to manifest one's religion under Article 9 of the Convention, one cannot expect to be exempt from any criticism, and denial of religious beliefs must be tolerated. The Court reiterated that only where expressions went beyond the limits of criticism denial, and where they incited religious intolerance, can the state legitimately consider them incompatible with respect for freedom of thought, conscience and religion, and may take proportionate measures to restrict them.

The ECtHR observed that in the present case, the subject matter was particularly context sensitive, and the potential effects of the statements depended on the situation in the respective country where they were made. In light of this, the Court considered that the States had a wide margin of appreciation in the present case.

The Court noted that the domestic courts had thoroughly explained why they considered the applicant's statement to be capable of arousing indignation, in particular because it had not been made in an objective manner which would contribute to a debate of public interest. The Court agreed with the domestic courts that the applicant was aware that her statements were partly unfounded and had the potential to arouse indignation. The ECtHR did not find any motive to depart from the domestic

court's qualifications of the statements made by the applicant as being value judgements. In this regard, the Court found that the domestic courts had made a careful balance between the applicant's right to freedom of expression and the rights of others to have their religious feelings protected.

The Court observed that it was incompatible with Article 10 to pack incriminating statements with other acceptable expressions of opinion and claim that this rendered those statements exceeding the permissible limits of freedom of expression as passable.

The Court also noted that the fine imposed on the applicant was moderate and could not as such be considered as a disproportionate sanction. Therefore, the Court concluded that there had been no violations of Article 10.

Comment on the decision

The present case stands precedence for the fact that responsibilities and duties arise along with the rights which applicants can benefit from under Article 10. The applicant having combined in her statement both incriminating statements, which were factually unfounded and capable of arising indignation, along with expressions of opinion, according to the Court, was a form of expression which exceeded the permissible limits of freedom of expression.

The applicant's statements had not been made in an objective manner to contribute to a debate of public interest. The applicant had described herself as an expert in the field of Islamic doctrine, already having held seminars of that kind for a while. Therefore, she had to have been aware that her statements were partly based on untrue facts and presenting objects of religious worship in a provocative way capable of hurting the feelings of the followers of that religion and this could be conceived as a violation of the spirit of tolerance, which was one of the bases of a democratic society.

The applicant had labelled Muhammad with pedophilia as his general sexual preference, while failing to neutrally inform her audience of the historical background, which consequently did not allow for a serious debate on that issue. By

this approach she had made a value judgement without sufficient factual basis and without any evidence to that end. The applicant's argument that a few individual statements had to be tolerated during a lively discussion, was not compatible with Article 10 of the Convention. The Court had held that statements which were based on (manifestly) untrue facts did not enjoy the protection of Article 10. With respect to the proportionality of the sanction, it was noted that the applicant had been ordered to pay a moderate fine of only EUR 480 in total for the three statements made, although the Criminal Code provided for up to six months' imprisonment. The imposed fine was on the lower end of the statutory range of punishment. Given the aforementioned, the criminal sanction had not been disproportionate. The Court noted that the domestic courts had comprehensively assessed the wider context of the applicant's statements, and carefully balanced her right to freedom of expression with the rights of others to have their religious feelings protected in Austrian society. In addition, the impugned statements had not been phrased in a neutral manner aimed at being an objective contribution to a public debate concerning child marriages. Thus, the domestic courts had come to the conclusion that the facts at issue contained elements of incitement to religious intolerance. They had not overstepped their margin of appreciation and the interference with the applicant's rights under Article 10 had corresponded to a pressing social need and had been proportionate to the legitimate aim pursued.

The case stands authority for the fact that the Court recognizes the primary role of domestic authorities in determining the correct balance which should be struck between conflicting rights, in particular where this touches upon religious questions. The case illustrates that the ECtHR will only intervene in the national authority's decision where it has strong motives to do so, or where the domestic authority strikes a balance which clearly amounts to an interference with the applicant's rights which is disproportionate and unnecessary. This approach can be interpreted as a recognition by the ECtHR of a greater margin of appreciation of domestic authorities where the balance to be struck is between freedom of expression and freedom of religion.

Ibragim Ibragimov and Others v. Russia, (Application no. 1413/08 and 28621/11) from 28 August 2018

Note on the procedure:

The case originates from two applications against the Russian Federation lodged by a Russian national and two Russian non-profit organizations on December 3, 2007, and 4 April 2011 respectively. The Court deliberated in private on the 10 July 2018.

Summary of the facts:

The applicants had published or commissioned the publication of books from the Risale-Nur Collection, which was an exegesis on the Qur'an written by Said Nursi, whose texts are considered by Muslim authorities in Russia and abroad, to belong to moderate mainstream Islam, advocating cooperation between religions and opposing the use of violence. These books were declared to be extremist literature by domestic authorities, resulting in a ban on their publication and distribution, as well as seizure of undistributed copies.

Applicant's complaint to the Court

The applicants complained of violation of Article 10 (freedom of expression) in light of Article 9 (freedom of religion).

Decision of the Court

The Court observed that the interference to the applicants' right to freedom of expression, had a valid legal basis in domestic legislation. However, the Court noted that the Venice Commission had expressed its opinion that the definition given by the domestic legislation of 'extremist activity' had been too broad and imprecise, therefore the Court left open the question as to whether the interference had indeed been prescribed by law.

The court observed that in making the judgement that the book in question contained extremist views, the domestic court had not made an independent assessment of the text but had

relied on disputed expert opinion which had itself provided legal findings as to the extremist nature of the book. The Court observed that the domestic court had failed to discuss the necessity of banning the books, the context in which they were published, their nature and wording or their potential harmful consequences.

The Court also noted that both the domestic court and the government had failed to note any circumstances which could have indicated the sensitive nature of the context at the material time against which the statements of the books could have potentially caused serious interreligious friction or lead to harmful consequences. The court also observed that the statements had not been proven to be capable of inciting violence, hatred, or intolerance. As such the Court concluded that the domestic courts had failed to apply the standards which were in conformity with the principles of Article 10 and had failed to provide any relevant or sufficient motives for the interference, finding unanimously that there had been a violation of Article 10.

Comment on the decision

The present case stands as authority that a certain extent of margin of appreciation is available to the Contracting States where freedom of expression touches upon matters which can offend personal convictions in particular in regard to religion. Precisely as a result of the lack of a European consensus on the sufficient level of protection of the right of others concerning religious convictions, what can amount to a grave offence to a person's religious convictions can vary from one Contracting State to another.¹⁹

As a result of the margin of appreciation doctrine, the Court's role is limited to reviewing the domestic measures under Article 10. This implies a review of the case as a whole by the Court, with a focus on proportionality of the measures implemented by national authorities and in particular whether the measures were relevant and sufficient. This analysis amounts to a review by the Court of whether the domestic measures are in conformity with the principles of Article 10.

Ibragim Ibragimov and Others v. Russia expands freedom of expression and illustrates the strict scrutiny which the Court applies in determining whether an interference with the right to freedom of expression was done in pursuit of a legitimate aim and for relevant and sufficient motives. In the present case the fact that the domestic courts had failed to conduct an independent assessment, relying entirely on the findings (including legal findings) of the expert opinion did not amount to a sufficient and proper assessment.

***Tagiyev and Huseynov v. Azerbaijan*
(Application no. 13274/08)
from 5 December 2019**

Note on the procedure:

The applicants (Mr. Tagiyev and Mr. Huseynov), Azerbaijani nationals, lodged a complaint against Azerbaijan to the European Court of human rights on 7 March 2008. In 2011, while the case was pending before the Strasbourg court, the first applicant was stabbed to death, as a consequence his wife was accepted by the court as an applicant to pursue the complaint.

Summary of the facts:

The applicants were a writer and an editor-in-chief of a newspaper, who had been sentenced to 3- and 4-years' imprisonment, respectively, for publishing an article (entitled Europe and us) criticizing Islam on November 1 2006, in the newspaper 'Sanat Gazetti'. The article had received severe criticisms by religious figures and organizations from both Azerbaijan and Iran for including comparisons between Eastern and Western philosophical traditions and speaking negatively of Islam. In November 2006 the public prosecutors initiated criminal proceedings against the applicants for incitement to religious hatred and hostility, committed publicly or by use of mass media. Following their respective sentences, the applicants applied for appeals against their judgements on grounds of violation of Article

¹⁹ *Ibragim Ibragimov and Others v. Russia*, Application No. 1413/08 28621/11, § 95

10 of the ECHR, but the Court of Appeal upheld the convictions without considering possible breaches to the right to freedom of expression.

Applicant's complaint to the Court

The applicants complained of violations of their right to freedom of expression (Article 10).

Decision of the Court

Following the examination of the case, the Strasbourg Court concluded that the criminal convictions imposed on the applicants were an interference to their right to freedom of expression, but this interference was prescribed by law and pursued a legitimate aim of 'protection of the rights of others' and 'prevention of disorder'.

However, the Court found that although the article in question contained remarks pertaining to Islam and its social and philosophical implications, it mainly dealt with a comparison between Western and Eastern values and expressed the author's ideas. In this regard the Court observed that the article should not only be examined in the context of religious beliefs, but also in the context of a debate which was a matter of public interest, as it pertained to the role of religion in society and the role of religion in its development.

The court agreed with the domestic court's analysis that certain remarks made in the article in particular concerning the Prophet Muhammad and Muslims living in Europe, might be seen by certain people as an abusive attack to the Prophet and on Muslims, and as such, might be considered capable of causing religious hatred. However, the court noted that the domestic courts had given no explanation why the specific remarks in question constituted an incitement to religious hatred and hostility.

In particular, the Court found that it is unacceptable that the domestic courts had merely reiterated the conclusions drawn by a forensic report which had gone beyond resolving linguistic and religious issues but had also done legal characterizations of the remarks in question. The Court also observed that the domestic courts had failed to take into account the context of the case, the public interest as well

as the intention of the author which could have justified the use of a degree of provocation or exaggeration. The Court noted that the domestic courts had not even tried to balance the applicants' right to freedom of expression with the protection of the right of religious people not to be insulted on grounds of their beliefs.

The court also observed the capacity of producing a chilling effect resulting from the exercise of freedom of expression of the press in Azerbaijan. As such, the Court found unanimously that there had been a violation of Article 10.

Comment on the decision

The present case is illustrative of the narrowing of the scope of margin of appreciation of domestic authorities where their decision has a negative impact on freedom of the press or where freedom of expression pertains to topics of public interest. In the present case, the impugned articles did not solely pertain to religious questions but raised issues of public interest, in particular discussing the role of religion and society, as well as religion in the development of society. The applicants were given prison terms for inciting religious hatred on account of an article criticizing Islam and containing the following remarks: "Morality in Islam is a juggling act. ... In comparison with Jesus Christ ... the Prophet Muhammad is simply a frightful creature." The Court saw nothing in the impugned statements calling for the application of Article 17 and found that the applicants' conviction was in breach of Article 10.

The domestic courts' decisions had given no explanation as to why the particular remarks contained in the article had constituted incitement to religious hatred and hostility. They had only reiterated the conclusions of a forensic report which "clearly had gone far beyond resolving mere language and religious issues – such as, for instance, defining the meaning of particular words and expressions or their religious importance – and provided, in essence, a legal characterization of the impugned remarks. The Court found that situation unacceptable and stressed that all legal matters had to be resolved exclusively by the courts."²⁰

²⁰ Ibid, § 47

The domestic courts had also failed to consider whether the context of the case, the public interest and the intention of the author of the impugned article had justified the possible use of a degree of provocation or exaggeration. At the same time, the domestic courts in their decisions had not even tried to balance the applicants' right to freedom of expression with the protection of the right of religious people not to be insulted on the grounds of their beliefs.

Moreover, "the circumstances of the present case had not disclosed any justification for the imposition of such severe sanctions, which had been capable of producing a chilling effect on the exercise of freedom of expression in Azerbaijan and dissuading the press from openly discussing matters related to religion, its role in the society or other matters of public interest."²¹ Therefore, the applicants' criminal conviction had been disproportionate to the aims pursued and, accordingly, not "necessary in a democratic society".

The Court has reiterated the general requirement to ensure the peaceful enjoyment of the rights guaranteed under Article 9 to the holders of such beliefs, including a duty to avoid as far as possible an expression that is, in regard to objects of veneration, gratuitously offensive to others and blasphemous. Thus, the Court has pointed out that expressions that seek to incite or justify hatred based on intolerance, including religious intolerance, do not enjoy the protection afforded by Article 10 of the Convention. The case demonstrates that the Court will have particular regard to the specific context of the case, the author's precise intentions, as well as the public interest in the dissemination of the impugned statements (and whether they contribute to a debate of public interest). Such elements are capable of justifying a certain degree of provocation or exaggeration. As such the present case goes towards the view that where a statement is of public interest or where freedom of press is at issue, the Court will only allow freedom of expression to be restricted under strict conditions and only where such interference is fully justified.

21 Ibid, § 49

Political speech **IV.**

The Court has always attached particular importance to the fact that the publication of information, documents or photographs in the press serves the public interest and contributes to a debate of general interest. Such an interest can be established only in the light of the circumstances. In this connection, the Court has consistently held there is little scope for restrictions on political speech or on the debate of questions of public interest. In the Court's view, public interest ordinarily relates to matters which affect the public to such an extent that it may legitimately take an interest in them, which attract its attention or which concern it to a significant degree, especially in that they affect the well-being of citizens or the life of the community. This is also the case with regard to matters which are capable of giving rise to considerable controversy, which concern an important social issue, or which involve a problem that the public would have an interest in being informed about.²² Freedom of expression constitutes one of the essential foundations of any democratic society and one of the basic conditions for its progress and for each individual's self-fulfilment. Subject to paragraph 2 of Article 10, it is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb²³.

However, whoever exercises the rights and freedoms enshrined, also undertakes "duties and responsibilities". Amongst them, in the context of political debate, this may legitimately include an obligation to avoid as far as possible expressions that are gratuitously offensive to others and thus an infringement of their rights, and which therefore do not contribute to any

form of public debate capable of furthering progress in human affairs. Moreover, a certain margin of appreciation is generally available to the Contracting States when regulating freedom of expression in relation to matters liable to offend intimate personal convictions within the sphere of morals. The test of whether the interference complained of was "necessary in a democratic society" requires the Court to determine whether it corresponded to a "pressing social need", whether it was proportionate to the legitimate aim pursued and whether the reasons given by the national authorities to justify it are relevant and sufficient²⁴. In assessing whether such a "need" exists and what measures should be adopted to deal with it, the national authorities are left a certain margin of appreciation. This power of appreciation is not, however, unlimited but goes hand in hand with European supervision by the Court, whose task it is to give a final ruling on whether a restriction is reconcilable with freedom of expression as protected by Article 10²⁵.

Furthermore, there can be no doubt that concrete expressions constituting hate speech, which may be insulting to particular individuals or groups, are not protected by Article 10 of the Convention²⁶.

22 Guide on Article 10 of the European Convention on Human Rights Freedom of expression, last update of 31.12.2020, pg. 30, §130

23 *Handyside v. the United Kingdom*, from 7 December 1976, Series A no. 24, p. 23, § 49

24 *The Sunday Times v. the United Kingdom* (Application no. 1), from 26 April 1979, Series A no. 30, p. 38, § 62

25 *Nilsen and Johnsen v. Norway* [GC], no. [23118/93](#), § 43, ECHR 1999-VIII

26 With regard to hate speech and the glorification of violence, see, *mutatis mutandis*, *Sürek v. Turkey* (Application no. 1) [GC], no. [26682/95](#), § 62, ECHR 1999-IV

Gündüz v. Turkey,
(Application no. 35071/97)
from 4 December 2003

Note on the procedure:

The applicant (Mr. Gündüz) is a Turkish national who lodged an application with the European Commission of Human Rights against the Republic of Turkey on the 21 January 1997, which was deliberated in private on 13th November 2003.

Summary of the facts:

The applicant was a leader of a radical Islamic sect (Tarikar Aczmeni) and had taken part in a television programme (Ceviz Kabugu) which was intended to present the sect and its ideas to the public within a discussion involving other participants. The applicant detailed his views on subjects such as religious costumes, religion, secularism, and democracy in Turkey and Islam. The applicant made critical statements about democracy and openly called for Sharia law.

In 1995 an indictment was issued against the applicant and the public prosecutor instituted criminal proceedings against him on grounds that the applicant's speech on the programme has incited people to hatred and hostility.

The applicant was sentenced by a security court to 2 years imprisonment and was ordered to pay a fine. The Court of Cassation upheld this conviction.

Applicant's complaint to the Court

The applicant complained of violations of his right to freedom of expression under Article 10.

Decision of the Court

The Court observed that there was no dispute as to whether the interference of the applicant's right to freedom of expression was prescribed by law nor whether it was pursued for a legitimate aim (the prevention of disorder, prevention of crime, protection of morals and protection of rights of others). The Court not-

ed that the programme had presented a sect and focused on the role of religion in a democratic society, which the Court noted was an issue of general interest, and as such, restriction to freedom of expression in this respect was to be strictly controlled.

The Court considered that the applicant's statements describing contemporary secular institutions as 'impious' could not be considered a call to violence, or a form of hate speech based on religious intolerance. The Court considered that the programme had been held live which prevent the applicant from re-wording or withdrawing the use of certain terms, the Court also noted the animated nature of the discussion which the domestic courts failed to give weight to.

The Court, in regard to the statements made about Sharia, distinguished this case from previous case-law. The court reiterated that statements intended to propagate, incite, or justify hatred based on intolerance did not fall under the protection of Article 10. However, the Court observed that simply defending Sharia, without calling for violence to bring it about, could be considered a form of hate speech. The Court also paid particular regard to the context in which the remarks were made, in particular the intention of the program to present the sect and its leader's extremist views, which were balanced with the intervention of other participants. The Court thus found that the interference had not been based on sufficient grounds and concluded by a vote of six to one and that there had been a violation of Article 10.

Comment on the decision

The case in front of us is illustrative of the strict control which the ECtHR exercises when the interference of freedom of expression pertains to freedom of the press and freedom of dissemination and spreading of information. "The case is characterized, in particular, by the fact that the applicant was punished for statements classified by the domestic courts as "hate speech". Having regard to the relevant international instruments and to its own case-law, the Court would emphasize, in particular, that tolerance and respect for the equal dignity of all human beings constitute the foundations of a democratic, pluralistic society. That being so, as a

matter of principle it may be considered necessary in certain democratic societies to sanction or even prevent all forms of expression which spread, incite, promote or justify hatred based on intolerance, provided that any “formalities”, “conditions”, “restrictions” or “penalties” imposed are proportionate to the legitimate aim pursued.”²⁷

It is interesting to note that in determining whether the restriction of freedom of expression was justified, majority relied on the particular context of the case, the intention of the program, the forum where the impugned statement had been expressed, as well as the public interest in allowing the dissemination of ideas. As such the Court took particular notice of the fact that there had been no direct or clear incitement of hatred or call to violence by the applicant’s statement, and that the applicant’s extremist views had been balanced out with other participants’ statements and views. In contrast to this, the dissenting opinion of the judge relied strongly on the content of the message by the applicant and the cultural implications, considering that the statements had amounted to hate speech.

It is suggested that the case is authority for the stricter scrutiny which the court applies to interference made with forms of freedom of expression where these can contribute to a debate of public interest, or the spreading of information to the public.

***Faruk Temel v. Turkey,
(Application no. 16853/05)
from 1 February 2011***

Note on the procedure:

The applicant (Mr. Faruk), a Turkish national, lodged an application against the Republic of Turkey on the 16 April 2005, which was deliberated on the 11 January 2011.

Summary of the facts:

The applicant was the president of the provincial youth section of HADEP (People’s Democratic Party), a local political party, and had made statements, during a party conference, regarding the Kurdish problem and the need for a democratic solution. In the applicant’s statements, he protested against the United States’ intervention in Iraq and Abdullah Öcalan’s confinement. The applicant was convicted and sentenced to 10 months’ imprisonment and a fine on the grounds that he had glorified violence and terrorist activities.

Applicant’s complaint to the Court

The applicant complained of violations of his right to freedom of expression (Article 10) as a result of the conviction on account of the statement made. The applicant also complained of violations of Article 6 paragraph 1 (right to a fair trial) on account that he was denied the assistance of a lawyer during the investigation stage.

Decision of the Court

The Court noted that the domestic courts had interpreted parts of the applicant’s statement without considering it as a whole. The Court concluded that the domestic courts had not examined the entire statement and had not paid attention to the terms in the statement as a whole nor the quality or personality of the applicant. The Court also observed that the domestic court had not considered the place and context in which the statement had been made, nor the addressees of the message. As a result, the Court could not agree with the assessment made by the domestic court.

The Court noted that the applicant’s statement did not incite violence nor could be considered as constituting hate speech. The Court in particular noted that the statement read as a whole could not be considered as encouraging the use of violence or armed resistance. The Court hence concluded that the applicant’s conviction was not done in pursuit of a ‘pressing social need’ and as such constituted a violation of Article 10.

The court also found that there had been a violation of Article 6 paragraph 1.

²⁷ *Gündüz v. Turkey* (Application no. 35071/97) judgement from 4 December 2003, § 40

Comment on the decision

The present case is proof of the strict control of interference with the right to freedom of expression in the context of political discussions and debates. As such, the Court applied a strict scrutiny of the assessment made by domestic courts, taking particular account whether the domestic courts had considered all relevant factors. The court also paid particular attention to the fact that in the present case, the applicant's statement did not constitute an incitement to violence or hatred and as such was not hate speech. To this extent, this case expands freedom of expression and stresses the strict scrutiny which the Court uses when the interference pertains to political speech.

Altıntaş v. Turkey,
(Application no. 50495/08)
from 10 March 2020

Note on the procedure:

The applicant is a Turkish national (Mr. Cihan Altıntaş). He lodged a complaint against the Republic of Turkey on 10 October 2008 in front of the ECtHR. The Court deliberated on the 4 February 2020.

Summary of the facts:

The applicant was the editor of a monthly newspaper (Tokat Demokrat). The applicant had published an article in 2007 entitled 'M. and his friends are still living idols of the youth'. The article pertained to events which occurred on March 1972 when members of 2 illegal organizations took hostage 3 British nationals working on a NATO military base in Turkey. The hostages were taken to a house where other members of the organization were located. Following a police siege on this house, the kidnappers refused to surrender and exchanged gunfire with the police before executing the hostages, all except for one of the insurgents were killed in the fighting.

The 2007 article described the insurgences as 'idols' who had been 'slaughtered'. Following the publication of the article, the applicant was charged with the offence of glorifying crimes or criminals, for which he was sentenced and ordered to pay a judicial fine of 430 euros.

Applicant's complaint to the Court

The applicant complained of violations of Article 6 paragraph 1 (right to access to a court) as he had not been able to lodge an appeal against the first-instance judgement. The applicant also complained of violations of Article 10 (freedom of expression).

Decision of the Court

The Court noted that the criminal conviction which had been imposed on the applicant constituted an interference with his right to freedom of expression and that this interference was done in the pursuit of legitimate aims (protection of national security and public safety, preservation of territorial integrity and prevention of crime).

The Court also recognized that the article had been published in a particularly tense social context, in particular considering the sensitivity of the population in regard to the events concerned, especially given the fact that the article was published in the region where the incident had occurred 35 years prior.

The Court also noted the use of approving language in regard to the violent acts committed by the individuals, depicting them as a heroic behaviour through the use of expressions as 'young revolutionaries' and 'idols of the youth', while describing their death during the armed confrontation with the police through the use of terms such as 'slaughtered'. The Court thus observed that the article could be seen as glorifying or at least justifying violence as occurred in the particular events.

The Court thus concluded by majority that, considering the margin of appreciation given to national authorities and the reasonable nature of the fine imposed on the applicant, the Court found that the interference could not be regarded as incompatible with Article 10 and

that it had been proportionate to the legitimate aim purposed.

The court also concluded unanimously that there had been a violation of Article 6 paragraph 1 as a result of the lack of possibility to appeal on point of law against the first-instance decision.

Comment on the decision

The present case recognizes the State's margin of appreciation when dealing with interference in freedom of expression where this is done in pursuit of a legitimate aim, in particular where a particular social context or historical sensitivity as in the present case justified such restriction.

It is suggested that the case stands precedence that applicants will not be able to rely on the protection offered by Article 10 where they are seeking to promote, glorify or justify violence. It is however interesting to note that the dissenting opinion of Judge Bardsen to which Judge Pavli joined, insists on the importance of plurality of ideas in a democratic society, holding that offensive, shocking or worrying ideas are also to be protected by Article 10. However, the dissenting opinion places less importance on the context, impact of the decision and the intention of the author compared to the majority judgement.

Dink v. Turkey, (Application no. 2668/07, 6102/08, 30079/08, 7072/09, 7124/09) from 14 September 2010

Note on the procedure:

The applicants are 6 Turkish nationals who lodged five applications against the Republic of Turkey on the 11 January 2007, which were deliberated by the Court on the 6 July 2010.

Summary of the facts:

The applicants are journalist (first applicant) who is now deceased, and 5 of his close relatives. The first applicant was a publication director and an editor-in-chief of a Turkish-Armenian weekly newspaper, who had written a series of articles in 2003 and 2004. In these articles he had expressed his views on identity of Turkish citizens who were of Armenian origin (as was the first applicant himself), commenting in particular that Armenians were obsessed with their status as victims of genocide which had become their 'raison d'être', a feeling which was treated with indifference by Turkish people, and as such remained a live issue. He referred to the Turkish component of the identity as being both a poison and an antidote, referring also to the blood having been 'poisoned by the Turk'.

Extreme nationalists had reacted virulently to these articles, staging demonstrations, writing threats and lodging a criminal complaint against the applicant, which resulted in the first application against the applicant, who was found guilty in 2005 of denigrating Turkish identity and sentenced to prison. The Court of Cassation upheld the sentence, and in 2007 the criminal court to which the case had been remitted discontinued the proceedings on account of the applicant's death as a result of an assassination.

Investigations were later set to establish whether the local gendarmerie and police departments had known about the assassination plot and had been negligent, but these proceedings were almost all discontinued.

Applicant's complaint to the Court

The applicants complained of violations of Article 2 (right to life) and violations of Article 10.

Decision of the Court

In regard to Article 2, the Court noted that it could reasonably be considered that the security forces had been aware of the strong hostility by extreme nationalist circles toward the applicant, in particular through the strong reactions which been expressed against the

article. Moreover, two police departments and one gendarmerie department having been informed at the time being of the possibility of an assassination attempt as well as the identity of the alleged instigators, the threat of an assassination was real and imminent. The Court considered that the domestic authorities should have acted, in particular, having failed to do so, the Court found that they had failed to take the reasonable available measures to prevent a real and immediate risk to the first applicant's life.

Regarding Article 10, the Court considered that the ruling of the Court of Cassation to uphold the first applicant's sentence of denigrating Turkishness amounted to an interference with the exercise of his right to freedom of expression.

The Court observed that the notion of Turkishness had been interpreted by the Court of Cassation in a way which indirectly penalized the first applicant for criticizing the State institutions' denial of the genocide. The Court also noted that the series of articles taken as a whole did not incite to violence, resistance, or revolt. The Court observed that the first applicant had been conveying his ideas and opinions on an issue of public interest. In this regard the Court noted the particularly important nature of debates surrounding historical events of particularly grave nature. Furthermore, the Court reiterated that Article 10 did not permit restrictions to freedom of expression in the sphere of political debates on issues of public interest and reiterated the wider nature of the limits of permissible criticizing in regard to the government. The Court as such found that the first applicant's conviction had not been in pursuit of a pressing social need.

The Court held that States have a positive obligation regarding the right to freedom of expression, holding that states are required to create a favourable environment for participation in public debate by all persons and enable them to express their opinions and ideas without fear. In the present case the State had failed to comply with its positive obligations regarding the first applicant's right to freedom of expression. The Court hence found unanimously that there had been a violation of Article 10.

Comment on the decision

It is suggested that the present case expands freedom of expression. Indeed, the case is precedent for the fact that Article 10 imposes a positive obligation on States to create a favourable environment where persons are able to participate in public debates and express their opinions and ideas without fear of the possible consequences of doing so. This is particularly important in a democratic society in order to ensure that dissenting opinions can be expressed and public debate is possible.

***Fáber v. Hungary,
(Application no. 40721/08)
from 24 July 2012***

Note on the procedure:

The applicant is a Hungarian national who filed an application against Hungary, lodged on the 12 August 2008, which was deliberated by the Court in private on the 26 June 2012.

Summary of the facts:

The application concerned events which occurred during a demonstration on 2007 held by the Hungarian Socialist Party (MSZP) to protest against racism and hatred, while simultaneously members of a right-wing political party assembled in an adjacent area to express their disagreement. The applicant had been holding a so-called Arpad-striped flag which could be regarded as a historical symbol and a symbol of a former regime. The police supervising the protest called the applicant to either remove the banner or leave. Upon the applicant's refusal, he was taken into custody and fined approximately 200 euro.

Applicant's complaint to the Court

The applicant complained of a violation of his right to freedom of expression under Article 10 in light of Article 11 (freedom of peaceful assembly).

Decision of the Court

The Court observed that the applicant's right to freedom of expression and his claim to freedom of peaceful assembly had to be balanced with the demonstrators' right to protection against disruption of their assembly. As a result, national authorities had a wide discretion both because the domestic authorities were best positioned to determine the necessary measure to achieve this balance, but also because the State had to maintain its obligation of neutrality by affording equal protection to both rights. However, the Court noted that counterdemonstrators had a right to express disagreement with the demonstrators, and as such the State, when taking measures, had to fulfil its right to positive obligations to protect the right of assembly to both demonstrating groups.

In the present case the Court observed that the interference with the applicant's right pursued legitimate aims of maintaining public order and protecting the rights of others. The Court noted that the presence of the Arpad-striped banner had not represented a symbol which was a clear threat nor presented a danger of violence, or caused any disruption to the demonstrations. The Court also observed that neither the applicant's conduct nor that of others had been threatening or abusive. In light of this, the Court found that the motives given by the domestic authorities to justify the interference were not relevant nor sufficient.

The Court reiterated that the freedom to take part in a peaceful assembly was of fundamental importance and could not be restricted as long as the person expressing it did not commit reprehensible acts. The ECtHR emphasized that even if a statement or symbol can be considered offensive, shocking or provocative, its mere display would not justify an interference with the right to freedom of expression, where it is not intimidating or capable of inciting violence. As such, the applicant's display of the flag was regarded by the Court as a form of expression of the applicant's political views.

Comment on the decision

The present case expands freedom of expression and stands as precedent for the fact that

the right to freedom of expression under Article 10 also covers acts and statements which are offensive, shocking, or worrying. The Court exercises a strict scrutiny in determining whether the domestic courts had sufficient and relevant motives for interfering with the applicant's freedom of expression, finding that the applicant's expression had not presented a clear threat or danger of violence. The fact that the applicant's expression caused a sentiment of unease among victims was not sufficient on its own to limit freedom of expression. The case is precedent for the fact that statements or actions which cause outrage or ill-feeling, which do not incite violence, hatred or intimidation, are protected under Article 10.

The judgment illustrates the extent to which the use of symbols and emblems associated to a political movement or political entity fall under the protection of Article 10 of the Convention. The political nature of the context in which these symbols are used requires that a particularly rigorous control is performed on any restriction of such use of freedom of expression. In parallel, Article 11 (right to freedom of assembly) protects also those forms of demonstration which may offend, shock or provoke individuals who oppose the ideas promoted or claimed by the demonstrators. As such, this right of freedom of assembly cannot be limited unless its exercise interferes with another right or incites violence or rejects fundamental principles of a democratic society.

Nix v. Germany (Application no. 35285/16) from 13 March 2018 (decision on admissibility)

Note on the procedure:

The applicant (Hans Bukhard Nix), a German national, lodged an application to the ECtHR on 14 June 2016 against Germany. The Court sat on the 13th March 2018.

Summary of the facts:

The applicant is a blogger based in Germany, posting blogs on matters pertaining to economics, politics, and society. The applicant had produced 6 posts in which he complained of alleged Employment Agency's racist and discriminatory interaction with his daughter (of German-Nepalese origin) regarding her professional development. In his third post the applicant had included a statement accompanied by a picture of former SS chief Heinrich Himmler in an SS uniform and with a badge of the Nazi party and swastika armband. Next to this picture the applicant had included a quote by Himmler concerning the schooling of children in Eastern Europe.

In January 2015, criminal proceedings were instituted against the applicant with the domestic court convicting him of the offences of libel and using symbols of unconstitutional organizations. The applicant's appeal was dismissed.

Applicant's complaint to the Court

The applicant complained of an alleged violation of the right to freedom of expression (Article 10) as a result of his conviction.

Decision of the Court

The Court noted that the applicant's conviction was an interference with his right to freedom of expression which was prescribed by law and done in the pursuit of the legitimate aim of preventing disorder.

The Court considered the historical context in establishing whether the inference was necessary in a democratic society. The Court took particular note of the absence of criminal liability where Nazi symbols were used for civil education, to combat unconstitutional movements, promote art or science, research and teaching or to report on historical and current events or similar purposes. The Court also noted the exemption of criminal liability where opposition to the ideology embodied by the symbols was made clear.

The Court accepted that the applicant had not intended to spread totalitarian propaganda, incite violence, or utter hate speech and that his statement had not resulted in intimidation. How-

ever, the Court noted the absence of clear links between the impugned post and the previous posts, nor was there any reference to racism and discrimination in that particular post. In light of this, the Court held that the domestic courts were not at fault for considering only the impugned statement and post when assessing the applicant's criminal liability. The domestic legislation intended to prevent the gratuitous use of symbols of unconstitutional organizations. In this regard the Court concluded that the domestic courts had remained within their margin of appreciation, and the interference with the applicant's right under Article 10 had been proportionate to the legitimate aim purposed and necessary in a democratic society.

Comment on the decision

The case confirms the particular importance which can be accorded to a particular historical context or pressing social need which can justify an interference with the right to freedom of expression. The applicant was convicted on account of displaying, in a blog post, a picture of Heinrich Himmler in SS uniform with the badge of the Nazi party and wearing a swastika armband. The impugned post concerned allegedly discriminatory and racist treatment of his daughter by the employment office. While the applicant had not intended to spread totalitarian propaganda, to incite to violence or to utter hate speech, he had failed to explain how the interaction of the employment office with his daughter could be compared to what had happened during the Nazi regime. Moreover, he had not rejected Nazi ideology in a clear and obvious manner, which would have exempted him from criminal liability. Considering the ban on the use of the Nazi symbols in the light of the historical experience of Germany, which was a weighty factor, the Court rejected the applicant's complaint under Article 10 as manifestly ill-founded.

In the present case the Court recognized the need for states which experience Nazi horrors to have special moral responsibility to distance themselves from the atrocities, and more restrictive legislation to be accepted. The allowed use of the impugned symbols where there had been clear and obvious rejection of the ideology, was a sufficient safeguard to freedom of expression.

Condoning terrorism

V.

Leroy v. France
(Application no. 36109/03)
from 2 October 2008

Note on the procedure:

The applicant (Mr. Denis Leroy), a French national, lodged an application against the Republic of France on 12 November 2003, which was deliberated by the Court on the 9 September 2008.

Summary of the facts:

The applicant was a cartoonist working for several local publications including the weekly newspaper *Ekaitza*. The applicant submitted to the newspaper a drawing representing the 9/11 attacks with a caption parodying a famous advertising slogan 'We have all dreamt of it... Hamas did it', and the drawing was published on 13th September 2001. Following this publication, the public prosecutor brought proceedings against the applicant and the newspaper's publishing director for complicity in condoning terrorism and condoning terrorism. In 2002 the applicants were convicted and sentenced each to a fine of 1 500 euro. The Pau Court of Appeal upheld the judgement and the Court of Cassation dismissed the main part of the appeal on points of law lodged by the applicant.

Applicant's complaint to the Court

The applicant complained of alleged violations of his right to freedom of expression under Article 10 and violations of Article 6 paragraph 1 (right to a fair trial).

Decision of the Court

The Court noted that the applicant's conviction was an interference to his right to freedom of

expression, which had been prescribed by law and pursued legitimate aims (public safety and prevention of disorder and crime).

The Court considered that the applicant's drawing had supported and glorified the violent destruction of American imperialism which the applicant criticized. The Court found that through the use of positive language, the applicant had approved the violence perpetrated during the attacks and as such had diminished the dignity of the victims. The Court also noted that the domestic courts had examined whether public interest had justified the use of provocation or exaggeration by the applicant. The Court took particular account of the context of the illustration which had been done on the day of the attacks and published 2 days later, as well as the fact that it had been published in a particularly politically sensitive region (Basque Country). The Court also noted that the article had caused public reactions which were capable of causing violence and having a significant impact on the public order.

The Court also noted the modest nature of the fine imposed given the context and gravity of the impugned illustration. In light of this the Court found that there had been no violation of Article 10.

The Court found that there had been a violation of Article 6(1) on ground of the failure to communicate to the applicant the report by the reporting judge.

Comment on the decision

Leroy v France stands as a substantial precedent for the fact that the use of the right to freedom of expression to glorify, justify or support acts of terrorism does not fall under the protection of Article 10 of the Convention. Although the Court recognizes the importance of protecting freedom of expression in a democratic society,

the intentional use of positive language and illustration to glorify and support terrorist acts which had occurred was not a form of expression which fell to be protected by Article 10.

The decision has particular importance as it frames freedom of expression in the context of freedom of the press. Although in its previous case-law the Court has insisted on the importance of freedom of press in a democratic society, and the potential risk of a chilling effect of any restriction on the freedom of press, the present case illustrates that this freedom is not without boundaries. As such, the state is entitled to restrict freedom of press where this is done in the pursuit of a legitimate aim. As such, the condoning of acts of terrorism does not fall, according to the Court, to statements which benefit the protection of freedom of the press. While reaching this conclusion, the Court took particular note of the context in which the statement had been made (having been published only 2 days after the 9/11 attacks) as well as the political contextual sensitivity of the particular region in which the illustration had been published.

Roj TV A/S v. Denmark (Application no. 24683/14) from 17 April 2018 (decision on admissibility)

Note on the procedure:

The applicant is a Danish company and television channel which lodged a complaint against Denmark on the 24 March 2014 pertaining to alleged violations of Article 10, and which was heard by the Court on the 17 April 2018.

Summary of the facts

The applicant was granted a license to broadcast in 2003 by the Danish Radio and Television Board, broadcasting programs mainly in Kurdish in Europe and the Middle East in 2004. In 2010 the applicant and its parent company were charged with breaching anti-terrorism provisions of the Danish Penal Code by promoting

through their broadcasting programs the PKK from June 2006 to September 2010. The applicant was fined 2.6 million Danish crowns by the Copenhagen City Court, a decision which was upheld by the High Court of Eastern Denmark, which extended the period concerned and increased the fine to 5 million crowns. The High Court also deprived the applicant from its license to broadcast. The Supreme Court upheld the prohibition to broadcast.

Applicant's complaint to the Court

The applicant complained of violations of its right to freedom of expression (Article 10).

Decision of the Court

The Court reiterated that its task under Article 10, in regard to domestic law, was only to satisfy itself that the domestic courts based their decision on acceptable assessment of the relevant facts. In this regard the Strasbourg Court was satisfied that the domestic courts had based their findings on adequate assessment of facts. The Court relied on previous case-law (*Zana v Turkey*²⁸) noting that there was no breach of the right to freedom of expression where someone is convicted for expressing support for the PKK.

In regard to the applicability of Article 17 in this case, the Court reiterated that the latter provision could only be applicable in exceptional cases where any statement, verbal or non-verbal, went directly against the underlying values of the Convention. Considering that the programs of the applicant had been funded to a significant extent by the PKK between 2006 and 2010, and that the programs included sections inciting to violence and in support of terrorist activities, the activities by the applicant were judged by the Court as falling within the scope of Article 17 and as such could not be protected by Article 10 of the Convention.

28 Case of *Zana v. Turkey* (Application no. 69/1996/688/880), judgement from 25 November 1997

Comment on the decision

The present case stands as precedent for the fact that applicants cannot rely on their right to freedom of expression to promote terrorist organizations through the use of television programs. Such activities fall out of the scope of Article 10 by virtue of Article 17. For the Court, the applicant company's complaint did not, by virtue of Article 17, attract the protection afforded by Article 10, given the impact and the nature of the impugned programmes, which had been disseminated to a wide audience and included incitement to violence and support for terrorist activity and thus related directly to the prevention of terrorism, an issue which was paramount in the modern European society. In particular, "the one-sided coverage with repetitive incitement to participate in fights and actions and to join the guerrilla group, as well as the portrayal of deceased guerrilla members as heroes, amounted to propaganda for the PKK, a terrorist organization, and could not be considered only a declaration of sympathy."²⁹ In addition, at the material time, the applicant company had been financed to a significant extent by the PKK. Although Article 17 is only to be applied in exceptional cases where the statement is directly against the fundamental values of the Convention, the article was applicable in the present case. Indeed, the incitement of violence and the support for terrorist activities through the dissemination of the television program amounted to an activity which was contrary to the underlying values of the Convention, and as such could not benefit from the protection of Article 10. It is suggested that the case is illustrative of the refusal of the ECtHR to permit the reliance on the right of freedom of expression to promote hatred, discrimination or support calls for violence in particular on the basis of ethnicity.

29 *Roj TV A/S v. Denmark* (Application no. 24683/14) decision on admissibility from 17 April 2018, § 46

Stomakhin v. Russia, ***(Application no. 52273/07),*** ***from 9 May 2018***

Note on the procedure:

The applicant (Mr. Stomakhin), a Russian national, lodged his application against the Russian Federation on 7 November 2007. The Court deliberated in private on the 3 April 2018.

Summary of the facts:

The applicant was the editor, publisher and distributor of a monthly newspaper between 2000 and 2004 and was dealing principally with the then ongoing war in Chechnya. In December 2003, the authorities began an investigation against the applicant on suspicion of expressing views amounting to an appeal to extremist activities and incitement to racial, national and social hatred. The domestic courts found that the applicant had justified and glorified the acts of terrorism by Chechens and called for violence against the Russian people. The applicant argued that he had only expressed his political opinion, had not distributed the newspaper, and denied supporting extremism. The applicant was convicted in 2006 and sentenced to 5 years in prison and a 3-year ban on journalism.

Applicant's complaint to the Court

The applicant complained that his conviction was contrary to Article 10 (freedom of expression) and Article 11 (freedom of assembly). The applicant also complained of violations under Article 6 (right to a fair trial).

Decision of the Court

The Court found that the applicant's conviction pursued legitimate aims in particular that of protecting the rights of others and protecting national security, territorial integrity, public safety and preventing disorder and crime.

The Court reiterated the necessity of considering the context in which the statements had been published, their nature and wording, their potential to lead to harmful consequences as well as the motives relied on by the domestic

courts. The Court distinguished the applicant's statements into three groups, the first had justified terrorism, vilified Russian servicemen and praised Chechen leaders approving violence. In regard to these statements the Court considered that the domestic court's treatment of the statements had been proportionate. The second pertained to criticisms by the applicant of Orthodox believers and ethnic Russians which had incited hatred. In their regard, the Court found the domestic courts' considerations to be relevant and sufficient. Finally, certain statements by the applicant had not gone beyond the limits of criticism, in particular concerning the state of the war. In their regard the Court noted that the domestic authorities had failed to demonstrate the 'pressing social need' for the interference with the applicant's freedom of expression. The statements being part of a matter of public concern, the restriction imposed on them had to be strictly construed.

The Court recognized the harsh nature of the sentence imposed on the applicant but was unable to conclude whether it was necessary in the particular case. The Court took into account the fact that the applicant has never previously been convicted of any similar offence as well as the fact that the potential of the impact of the statement had been reduced as the newspaper had been distributed in a very small number of copies and only to individuals interested. The Court as such found that the applicant's punishment had not been proportionate to the legitimate aims purposed. The Court unanimously found a violation of Article 10.

Comment on the decision

The present case stands authority for an expanded freedom of expression as to criticism pertaining to the government. The Court recognized the importance of limiting the use of freedom of expression where this is used to incite hatred, violence and discrimination towards specific individuals and groups, or to glorify or justify acts of terrorism. However, the Court held that a wider freedom of criticism existed where the criticism made pertained to the government. To this extent, the Court exercises a stricter control over the limits imposed on freedom of speech and criticism to the government.

Further, the Court emphasized that even where criminalization of such criticism could be justified, namely where this amounted to hate speech, States were at no freedom to impose prison sentences, as these had to be proportionate to the test of necessity under Article 10. It is suggested that such a rigorous control of restrictions imposed on freedom of speech pertaining to criticism of the government is particularly important in a democratic society. Indeed, this form of control is necessary to ensure that dissenting opinions, or opinions of opposition can freely be expressed, without fear of reprehension or sanction by the government. Hence, this implies ensuring that freedom of expression equally applies to statements in tune with the general opinion, or the views supported by the state just as much as statements which may shock, offend or worry the general opinion or ones which criticize or go against the state.

The Court left open the question whether a ban on the exercise of journalistic activities, as such, was compatible with Article 10 of the Convention. A deprivation of liberty coupled with a ban on practicing journalism was an extremely harsh measure, particularly when imposed for such a long period. In that respect, the Court was unable to conclude that the applicant's sentence was rendered necessary by any particular circumstances of his case. The applicant had never been convicted of any similar offence (otherwise, the choice of a harsh sentence would have been more acceptable). Moreover, the potential impact of the impugned statements was reduced. They had been printed in a self-published newsletter with a very low number of copies and an insignificant circulation. The copies had been distributed by the applicant in person or through his acquaintances at public events in Moscow only to those individuals who had expressed their interest. The applicant's punishment had therefore not been proportionate to the legitimate aims pursued.

Homophobic hate speech

VI.

The Court has consistently held that freedom of expression is applicable not only to “information” or “ideas” that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb. Such are the demands of pluralism, tolerance and broadmindedness without which there is no “democratic society”. Freedom of expression is subject to exceptions which must be construed strictly, and the need for any restrictions must be established convincingly³⁰. The Court must examine the interference complained of in the light of the case as a whole and determine whether it was ‘proportionate to the legitimate aim pursued’ and whether the reasons adduced by the national authorities to justify it are ‘relevant and sufficient’. In doing so, the Court has to satisfy itself that the national authorities applied standards which were in conformity with the principles embodied in Article 10 and that they relied on an acceptable assessment of the relevant facts. Furthermore, an important factor to be taken into account when assessing the proportionality of an interference with freedom of expression is the nature and severity of the penalties³¹. Whether an interference with a right protected by Article 10 was necessary in a democratic society and proportionate to the legitimate aim pursued, the Contracting States enjoy a certain margin of appreciation. The state’s margin of appreciation goes hand in hand with European supervision. The Court has generally understood the margin of appreciation to mean that, where the independent and impartial domestic courts have carefully examined the facts, applying the relevant human rights standards consistently with the Convention and its case-law, and adequately balanced the applicant’s personal interests against the more general public interest in the case, it is not for it to

substitute its own assessment of the merits for that of the competent national authorities.

“Hate speech”, as this concept has been construed in the Court’s case-law, falls into two categories. The first category of the Court’s case-law on ‘hate speech’ is comprised of the gravest forms of ‘hate speech’, which the Court has considered to fall under Article 17 and thus excluded entirely from the protection of Article 10. The second category is comprised of ‘less grave’ forms of ‘hate speech’ which the Court has not considered to fall entirely outside the protection of Article 10, but which it has considered permissible for the Contracting States to restrict. In the case of *Beizaras and Levickas v. Lithuania* the Court found a violation of Article 14 taken in conjunction with Article 8, and of Article 13, on account of the authorities’ refusal to prosecute authors of serious homophobic comments on Facebook, including undisguised calls for violence. Therefore, the Court has not only put speech which explicitly calls for violence or other criminal acts, but has held that attacks on persons committed by insulting, holding up to ridicule or slandering specific groups of the population can be sufficient for allowing the authorities to favour combating prejudicial speech within the context of permitted restrictions on freedom of expression. In cases concerning speech which do not call for violence or other criminal acts, but which the Court has nevertheless considered to constitute ‘hate speech’, that conclusion has been based on an assessment of the content of the expression and the manner of its delivery.

30 *Bédat v. Switzerland* [GC], Application no. 56925/08, judgement from 29 March 2016, §48

31 *Vejdeland and Others v. Sweden*, Application no. 1813/07, judgement from 9 February 2012, §58,

Vejdeland and Others v. Sweden
(Application no. 1813/07)
from 9 February 2012

Note on the procedure:

The applicants are 4 Swedish nationals who lodged an application against the Kingdom of Sweden on the 4 January 2007, which the Court deliberated upon on the 10 January 2012.

Summary of the facts:

The applicants had been convicted in 2006 by the Supreme Court of agitation against a national or ethnic group after leaving homophobic leaflets in student lockers in a school. The first 3 applicants were given suspended sentences with fines ranging from 200 euros to 2000 euros while the 4 applicant was sentenced to probation.

Applicant's complaint to the Court

The applicants' complained that their convictions constituted a violation of their right to freedom of expression under Article 10.

Decision of the Court

In its decision, the Strasbourg Court agreed with the Swedish Supreme Court which had found that even if the applicant's statements had contributed to public debate (as to the objectivity of education in Swedish schools), regard had to be given to the language used in the leaflets. The latter had used derogative and pejorative terms in regard to homosexuality as well as claims which were unfounded. The Court noted that although the applicants' statements did not make direct calls to violence, they contained serious and prejudicial allegations. The Strasbourg Court took particular note of the fact that the leaflets had been left in pupils' lockers, when these were at a particularly sensitive and impressionable age, and that the distribution took place in a school to which none of the applicants had direct access nor attended.

The Court also observed that the applicants' sentences had not been excessive in the cir-

cumstances of the case. The Court accordingly held that the sentences and convictions were not disproportionate to the legitimate aim pursued and the domestic Court had given relevant and sufficient reasons for its decision. The interference was therefore regarded as necessary in a democratic society for the protection of the reputation and rights of others.

Comment on the decision

The present case limits freedom of expression to the extent that it recognizes that freedom of expression can be legitimately interfered with where necessary in a democratic society in order to protect the rights of others. As such the case stands authority in holding that applicants cannot rely on the protection of their right to freedom of expression, where their statements are targeting a specific group (here based on their sexual orientation) and which contain statements which are unfounded or prejudicial.

Namely, the Court noted that the applicants distributed the leaflets with the aim of starting a debate about the lack of objectivity of education in Swedish schools. The Court agreed with the Supreme Court that even if this is an acceptable purpose, regard must be paid to the wording of the leaflets. The Court observes that, according to the leaflets, homosexuality was "a deviant sexual proclivity" that had "a morally destructive effect on the substance of society". The leaflets also alleged that homosexuality was one of the main reasons why HIV and AIDS had gained a foothold and that the "homosexual lobby" tried to play down pedophilia. In the Court's opinion, although these statements did not directly recommend individuals to commit hateful acts, they are serious and prejudicial allegations. The Court reiterated that inciting to hatred does not necessarily entail a call for an act of violence, or other criminal acts. Attacks on persons committed by insulting, holding up to ridicule or slandering specific groups of the population can be sufficient for the authorities to favour combating racist speech in the face of freedom of expression exercised in an irresponsible manner. In this regard, the Court stressed that discrimination based on sexual orientation is as serious as discrimination based on "race, origin or colour". The leaflets were left in the lockers of

young people who were at an impressionable and sensitive age and who had no possibility to decline to accept them. Moreover, the distribution of the leaflets took place at a school which none of the applicants attended and to which they did not have free access.³² Also, an important factor to be taken into account when assessing the proportionality of an interference with freedom of expression is the nature and severity of the penalties imposed. The Court noted that the applicants were not sentenced to imprisonment, although the crime of which they were convicted carries a penalty of up to two years' imprisonment. Instead, three of them were given suspended sentences combined with fines ranging from approximately EUR 200 to EUR 2000, and the fourth applicant was sentenced to probation. Therefore, the penalties were not excessive in the circumstances.³³

Although the Court recognized the possible interest of raising a public debate, the fact that the applicants distributed leaflets in schools which they did not attend, went beyond the simple expression of their opinions, since the distribution of the leaflets could be seen as an imposition of their views on a category of the population which was particularly impressionable and was done at a place which was not appropriate (a school).

Beizaras and Levickas v. Lithuania
(Application no. 41288/15)
from 14 January 2020

Note on the procedure:

The applicants (Mr. Pjius Beizeras - first applicant, and Mr. Mangirdas Levickas - the second applicant), two Lithuanian nationals, lodged an application against the Republic of Lithuania on 13 August 2015. The Court deliberated on this case in private on the 22 October 2019 and 26 November 2019.

Summary of the facts:

In 2014 one of the applicants posted a photograph of the couple (the first and second applicants) kissing on his Facebook page in public, with intent to announce their relationship and trigger a debate on LGBT rights in Lithuania. The post received many strong homophobic comments (containing words calling to 'castrate', 'kill' or 'burn' the applicants'). Upon request by the applicants and an organization upholding the rights of LGBT people, the applicants lodged a complaint with the prosecutor's office against 31 of these online comments, asking for an investigation for incitement to homophobic hatred and violence. This request was refused by the prosecutor's office and appeals were refused by the courts.

Applicant's complaint to the Court

The applicants complained of violations of their rights under Article 14 (prohibition of discrimination) and Article 13 (effective remedy).

Decision of the Court

The Court noted that the hateful comments against the applicants and the LGBT community were instigated by a bigoted attitude towards that community and this discriminatory state of mind was also at the core of the authority's failure to fulfil their positive obligation to investigate in an effective manner. As a result of this the Court found that there had been a discrimination on grounds of the applicants' sexual orientation without good cause. The Court hence concluded that it seemed prima

32 *Vejdeland and Others v. Sweden*, no. 1813/07, February 2012, § 54-56

33 *Vejdeland and Others v. Sweden*, no. 1813/07, February 2012, § 58

facie that the applicants' homosexual orientation had played a role in the way they were treated by the authorities.

In regard to the criminal nature of the impugned comments, the Court observed that in order for a comment to incite hatred it did not necessarily need to call for an act of violence or other criminal acts. Insults, ridicule, or slander could be sufficient where they were expressed in an irresponsible manner. The Court also noted that the hateful nature of the comments, along with the calls to 'kill' the applicants was sufficiently serious even if the author had only posted on such remark (and not done so systematically).

The Court recognized that criminal sanctions could only be invoked as an 'ultima ratio measure', it held that this equally applied to hate speech against sexual orientation in life and sexual life of others. However, the Court held that the present case being concerned by a direct call for attack on the applicant's physical and mental integrity, protection by criminal law was required. The Court thus held that failure of the authorities to discharge their positive obligation to investigate in an effective manner whether the statements constituted incitement to hatred and violence was in violation of Article 14.

The Court also unanimously found that there had been a violation of Article 13 as the discriminatory attitudes of the authorities had impacted the effectiveness of the remedies.

Comment on the decision

This an important case which stands authority against discrimination by individuals as well as the state on grounds of sexual orientation. The case is precedence that any form of discrimination, including hate speech on grounds of sexual orientation bares the same gravity as discrimination on the basis of other grounds as race, ethnicity or religion.

The ECtHR clearly establishes in this case the necessity for states to ensure that individuals are neither discriminated by state organs on the basis of their sexual orientation, but also an obligation to ensure that their rights are not affected by the other individuals. As such, the

present case illustrates a positive obligation imposed on States to ensure that any form of hate speech on the basis of sexual orientation or sexual life should be sanctioned.

Lilliendahl v. Iceland (Application no. 2929718) from 12 May 2020 (decision on the admissibility)

Note on the procedure:

The applicant (Mr. Lilliendahl), an Icelandic national, lodged an application against Iceland on the 12 June 2018. The Court sat on the 12 May 2020.

Summary of the facts:

In 2015 the local authorities of a town in Iceland approved a proposal, in cooperation with the national LGBT association (Samtokin'78), to strengthen elementary and secondary school education on LGBT matters. This decision led to an important public discussion on different news outlets and social media in which the applicant got involved. The applicant commented in response to an online article, expressing his disgust and using derogatory terms as "kynvilla" (sexual deviation) and "kyunvillingar" (sexual deviants).

Samtokin'78 reported the applicant's comments to the police and following an investigation the applicant was indicted for publicly mocking, defaming, denigrating, or threatening a person or group of persons for certain characteristics, including their sexual orientation or gender identity. The Supreme Court overturned the first instance acquittal of the applicant and convicted him fining him with approximately 800 euros.

Applicant's complaint to the Court

The applicant complained of violations of Article 10 (freedom of expression) and Article 14 (prohibition of discrimination).

Decision of the Court

The Court noted that the comments did not amount to the gravest form of ‘hate speech’ and were excluded from protection of Article 10 through application of Article 17 as the comments were not immediately clear as being aimed at inciting violence and hatred or destroying the rights or freedoms protected by the Convention. The Court found that the comments nonetheless promoted intolerance and hatred of homosexuals and were therefore a ‘less grave form’ of hate speech.

The Court also agreed with the Supreme Court that the interference with his freedom of expression had been prescribed by law and done in pursuit of a legitimate aim (of protecting the rights of others). The Court also concluded that the assessment of the Supreme Court had been reasonable, taking particular account of the Supreme Court’s effort to weigh the applicant’s freedom of expression and the rights of others, and the fine imposed had not been excessive. In light of this, the Court found the applicant’s complaint ill-founded and rejected it as inadmissible.

Comment on the decision

The present case plays an important role in the Court’s case-law, as it enforces that hate speech on the ground of sexual orientation is contrary to the Convention. This applies both to ‘severe’ forms of hate speech (direct calls to violence, threats...) as well as ‘less severe’ forms of hate speech as in the present case. To this extent, this case emphasizes that hate speech in any form on the basis of sexual orientation does not fall to be protected under Article 10. The case concerned the applicant’s conviction and fine for highly prejudicial homophobic comments he had made online in the context of the debate sparked by the local authorities’ decision to strengthen education on LGBT matters in schools. In particular, he had described homosexual persons as “sexual deviants” and expressed disgust. Even though the impugned statements amounted to “hate speech”, in the Court’s view, they did not reach the high threshold for the applicability of Article 17. However, the Court endorsed the balancing exercise performed by the domestic courts

and dismissed the applicant’s complaint under Article 10 as manifestly ill-founded.

The applicant’s use of statements which expressed a clear and severe intolerance towards a group of individuals on the basis of their sexual orientation and gender identity, could not be considered to contribute to public debate. As such the interference to the applicant’s freedom of expression by the State had been justified as it allowed the state to strike a necessary and correct balance between the opposing rights.

VII.

Incitement to racial discrimination or hatred

The Court has a chance to build clear standing in a number of cases concerning statements, verbal or non-verbal, alleged to stir up or justify violence, hatred or intolerance. In assessing whether the interference with the exercise of the right to freedom of expression of the authors, or sometimes publishers, of such statements was “necessary in a democratic society” in the light of the general principles formulated in its case-law, the Court has had regard to several factors. For example, it is important whether the statements were made against a tense political or social background (the tense climate surrounding the armed clashes between the PKK³⁴; problems related to the integration of non-European and especially Muslim immigrants in France³⁵; and the relations with national minorities in Lithuania shortly after the re-establishment of its independence in 1990³⁶). An important factor has been whether the statements, fairly construed and seen in their immediate or wider context, could be seen as a direct or indirect call for violence or as a justification of violence, hatred or intolerance³⁷. In assessing that point, the Court has been particularly sensitive towards sweeping statements attacking or casting in a negative light entire ethnic, religious or other group³⁸. The Court has also paid attention to the manner in which the statements were made, and their capacity to lead to harmful consequences.

In the Court’s case-law, it was the interplay between the various factors rather than any one

of them taken in isolation that determined the outcome of the case. The Court’s approach to that type of case can thus be described as highly context-specific.

In *Aksu v. Turkey*, the Court held, *inter alia*, that the negative stereotyping of an ethnic group was capable, when reaching a certain level, of having an impact on the group’s sense of identity and on its members’ feelings of self-worth and self-confidence. It could thus affect their “private life” within the meaning of Article 8 § 1 of the Convention. On this basis, the Court found that proceedings in which a person of Roma origin who felt offended by passages in a book and dictionary entries about Roma in Turkey, sought redress and engaged that article.

***Jersild v. Denmark*
(Application no. 15890/89)
from 23 September 1994**

Note on the procedure:

The applicant (Mr. Jens Olaf Jersild) is a Danish national, who lodged an application against Denmark with the European Commission for Human Rights on 25 July 1989.

Summary of the facts:

In 1985, a news magazine published a story about the growth of a xenophobic and racist group (The Greenjackets) and later the same outlet aired an interview with 3 members of the group conducted by the applicant. The interview which had lasted 5 hours had been shortened to a few minutes in which the members made derogatory statements about racial

34 *Süreç v. Turkey* (Application no. 3) [GC], Application no. 24735/94 from 8 July 1999, §40

35 *Le Pen v. France* (dec.), Application no. 18788/09 from 20 April 2010

36 *Balsytė-Lideikienė v. Lithuania*, Application no. 72596/01 from 4 November 2008, §78

37 *Fáber v. Hungary*, Application no. 40721/08 from 24 July 2012, §52 and 56-58

38 *Norwood v. the United Kingdom* (dec.), Application no. 23131/03, 2004-X

minorities and immigrants. A complaint was lodged to the Minister of Justice who pressed charges against the members. Charges were also brought against the applicant and against the head of Danmarks Radio news section. The latter and the applicant were found guilty and sentenced to fines of 2,000 and 1,000 Danish kroner, respectively or 5 days imprisonment. Subsequent appeals were dismissed.

Applicant's complaint to the Court

The applicant complained of a violation of his right to freedom of expression under Article 10.

Decision of the Court

The Court noted that freedom of expression is particularly relevant to media which play a key role in the society as 'public watchdogs'.

The Court found that the interference was done in compliance with the state's obligation under core international human rights treaties, but the Court found that the sentence imposed on the applicant was not proportional in particular taking into account that the applicant was a member of the media. The Court took particular account of the fact that although certain remarks of the Greenjackets read out of context, were highly offensive, the way in which they were presented outweighed their effect on the reputation or rights of others. In this regard the Court concluded that the government had not shown that the interference to the applicant's freedom of expression was warranted by a legitimate aim and therefore, had not been proven to be necessary in a democratic society.

Comment on the decision

The present case plays an important role in the Court's case-law as it emphasizes the importance of freedom of expression, in particular freedom of the press. The case stands authority for the fact that the press plays an important role in the society as a watchdog of democracy, transmitting not only information and ideas which are favourable to the majority but also ones that might shock, disturb or offend the general public, where this is one in the interest of public debate.

It is suggested that the distinction which the Court makes between the author of a statement, and the role of the media and press as sharing and disseminating these statements and other relevant information, is particularly interesting. This distinction allows for a stronger protection of the press and allows to ensure their crucial role as disseminators of different opinions, including controversial ones. This is particularly important as any significant interference or sanctioning of the media for disseminating certain information would potentially have a chilling effect on the press.

***Soulas and Others v. France
(Application no. 15948/03)
from 10 July 2008***

Note on the procedure:

The applicants (Mr. Gilles Soulas and Mr. Guillaume Faye - French nationals and the company Société Européenne de diffusion et d'édition - registered in Paris) lodged an application against France on 6 May 2003. The Court deliberated on the 27 May and 17 June 2008.

Summary of the facts:

The applicants were involved in the publication of a book 'The Colonisation of Europe' with the subtitle 'Truthful remarks about immigration and Islam'. The first two applicants were convicted in their respective capacities of author (first applicant) and publisher (second applicant) for inciting hatred and violence against Muslim communities from Northern and Central Africa, being ordered to pay a fine of 7,500 euros each, and symbolic amounts in damages to the International League against Racism and Antisemitism and the Movement against Racism and for Friendship between Peoples. The third applicant was convicted for civil liability.

Applicant's complaint to the Court

The applicants complained of violations of their right to freedom of expression (Article 10)

Decision of the Court

The Court took particular note that the domestic courts had paid attention to the terms used by the book which were intended to give rise to a feeling of rejection to the readers, this was exacerbated by the use of military language, and the designation of the communities in question as the enemy leading the readers to a solution of war of ethnic re-conquest. In this regard, the Court found that the grounds for conviction relied upon by the domestic courts were sufficient and relevant, and the interference with the applicants' right to freedom of expression was necessary in a democratic society. The Court thus considered that there was no violation of Article 10.

Comment on the decision

Soulas and Others v France illustrates the necessary limits which states are entitled to impose of freedom of expression where the latter is used to discriminate or incite hatred on the basis of racial grounds. The case recognizes in particular the need of a wide margin of appreciation of the state while ensuring the protection of social peace and public order in particular in matters pertaining to integration and immigration policies.

The case illustrates that the use of freedom of expression to convey a feeling of rejection against a specific group, in particular through the use of strong language and the portrayal of a group as the enemy, is not compatible with the values of the Convention. It is suggested that the decision plays an important role in reiterating that the use of freedom of expression with ends of discrimination, incitement of hatred or xenophobia cannot warrant protection under Article 10.

Féret v. Belgium, Application (Application no. 15615/07), from 16 July 2009

Note on the procedure:

The applicant (Mr. Daniel Feret), Belgian national, lodged an application against the Kingdom of Belgium on the 29 March 2007, on which the Court deliberated on the 16 June 2009.

Summary of the facts:

The applicant was the chairman of the 'Front National-Nationaal Front' party and a member of the Belgian House of Representatives. During an election campaign his party distributed leaflets and posters which represented non-European immigrant communities as criminally minded and keen to exploit benefits from living in Belgium and making fun of them. These leaflets led to complaints of incitation to hatred, discrimination, and violence. The applicant's parliamentary immunity was lifted, and criminal proceedings were brought against him as the author and editor-in-chief of the leaflets. The applicant was sentenced to 250 hours of community service related to integration of immigrants and 10 months suspended prison sentence and was declared ineligible for 10 years.

Applicant's complaint to the Court

The applicant complained of violations of his right to freedom of expression.

Decision of the Court

The Court noted that the interference with the applicant's right to freedom of expression was prescribed by law and was done in pursuit of a legitimate aim of preventing disorder and protecting the rights of others. The Court reiterated that incitation to hatred did not require a call for violence, therefore, insults, ridicule and defamation or incitation to discrimination targeted at a specific group were sufficient. The Court took particular account of the applicant's position as a parliamentary member and the fact that the leaflets had been distributed as part of the election campaign (as such being intended for the whole population).

The Court recognized that political freedom of expression required a high level of protection in particular through mechanisms such as parliamentary immunity, even where the ideas portrayed by political parties shocked, offended or disturbed the population. However, the electoral context could help kindle hatred and intolerance where freedom of expression is used in a harmful way. The Court observed that the wording of the impugned texts was a clear incitation to racial hatred and discrimination, as such the interference on the applicant's right was done in pursuit of a pressing social need and the motives for the interference were sufficient and pertinent. The Court also concluded that the interference had been necessary in a democratic society, finding by 4 votes to 3 that there had been no violation of Article 10.

Comment on the decision

The case holds authority for the importance of taking into account the identity of the statement maker, his influence, the impact of the statement and the scope of the potential audience in determining whether an interference with the use of freedom of expression had been justified. Although the case reiterates the importance of freedom of expression in the context of political speech, it also recognizes the gravity and wider scope of impact that a speech made in political context may have. In particular in the context of elections, which can aggravate the hatred and intolerance which a speech may cause. To this extent, the present case illustrates the balancing which Courts must realize in assuring freedom of political speech while ensuring that this freedom is not used in a way which would incite hatred or violence.

Le Pen v. France, Application (Application no. 18788/09), 20 April 2010 (decision on the admissibility)

Note on the procedure:

The applicant (Mr. Jean-Marie Le Pen), a French national, lodged an application against France on the 3 April 2009, which the Court deliberated upon on the 20 April 2010.

Summary of the facts:

The applicant was the president of the French political party 'Front National' and had been fined 10,000 euros in 2005 for incitement of discrimination, hatred and violence towards a group of people for their origin, membership or non-membership of a specific ethnic group, nation, race or religion. This conviction was concerned with particular statements made in an interview with a French newspaper (le Monde). In 2008 the applicant was fined for the same amount again for another statement pertaining to the initial fine in a weekly newspaper (Rivarol). The Court of Cassation dismissed the appeal lodged by the applicant.

Applicant's complaint to the Court

The applicant complained of violations of his rights under Article 10 (right to freedom of expression) and Article 6 paragraph 1 (right to a fair trial).

Decision of the Court

The Court did not question that the interference to the applicant's right to freedom of expression, which took the form of a criminal conviction, had been prescribed by the law and was done in the pursuit of a legitimate aim of protecting the rights of others.

The Court reiterated the importance of freedom of speech in a democratic society particularly in the context of political debates, as such where the person concerned is an elected representative, the Court must exercise the strictest supervision of the interference suffered.

The Court took particular account of the context in which the statements had been made as well as the necessary latitude given to the State to assess what is the necessary interference in such contexts. The Court noted that the applicant's statement as a whole gave rise to a feeling of rejection and hostility and had presented a religious community as a whole as being a threat to the dignity and security to the French population. In light of this, the Court found that the interference had been imposed for relevant and sufficient motives and as such was not in violation of Article 10.

Comment on the decision

It is suggested that the present case falls within the established Strasbourg case-law which refuses to accept any form of hate speech in the context of political debates and refuses to recognize such political speech as falling under the protection of Article 10.

The present case reiterates the importance of exercising a strict scrutiny of any form of interference with freedom of expression in the context of political debates. However, the case insists on the particular role of politicians and the potential wide impact of their use of their right to freedom of expression. It is suggested that the case stands authority for the obligations that politicians rest on in ensuring that their use of their political speech freedom does not intentionally foster hatred and intolerance towards a specific group.

***Perinçek v. Switzerland,
(Application no. 27510/08),
from 15 October 2015 (Grand
Chamber)***

Note on the procedure:

The applicant (Mr. Dogu Perincek), Turkish national, lodged an application on the 10 June 2008 against Switzerland. The Grand Chamber deliberation on this case took place in private on the 28 January and 9 July 2015.

In a previous Chamber judgement from 17 December 2013, the Court held by 5 votes to 2 that there had been a violation of Article 10 of the Convention.

Summary of the facts:

The applicant was the chairman of the Turkish Workers' Party. In 2005 he took part in several conferences organized in Switzerland in which he publicly denied the existence of the Armenian genocide by the Ottoman Empire in 1915 and following years, holding that the idea of an Armenian genocide was an 'international lie'. The Switzerland-Armenia Association lodged a criminal complaint against the applicant as a result of which he was ordered to pay ninety days-fine of 100 Swiss francs, he was suspended for 2 years, he was also sentenced with a fine of 3,000 Swiss francs which could be replaced by 30 days imprisonment, and a compensation of 1,000 Swiss francs to the association.

Applicant's complaint to the Court:

The applicant complained that his criminal conviction and sentence in Switzerland had been in breach of his right to freedom of expression (Article 10) and his right not to be punished without law (Article 6).

Decision of the Court:

In regard to the applicability of Article 17 to this case, the Court noted that the relevant question was whether the applicant's statement had been intended to stir up hatred or violence and had by doing so attempted to rely on the Convention to engage in activities which were aimed at the destruction of the rights and freedoms promoted by the Convention. The Court noted that this question could only be determined when joined to the merits of the applicant's complaint under Article 10.

The Court found that the interference with the applicant's right to freedom of expression had been prescribed by law and had been done in the pursuit of a legitimate aim of protecting the right of others.

Concerning the necessity of the interference in a democratic society, the Court noted that it

needed to determine whether the interference suffered by the applicant had been necessary to protect the rights of others, in this case the rights of Armenians to respect for their and their ancestors' dignity, including the right to respect their identity (construed around the understanding as a community which had suffered genocide). In light of this, the Court observed that the balance that needed to be struck was between the applicant's right under Article 10 and the rights of Armenians to private life under Article 8.

The Court noted that the applicant's statements had been made in the context of a heated debate and had not perceived them as a form of incitement to hatred or intolerance. The Court did not consider that the same presumption could be applied here as in relation to statements made concerning the Holocaust, as it concerned statements made in Switzerland concerning events on the territory of the Ottoman Empire. The Court noted that the controversy of the statement was external to Switzerland's political life, nor was there evidence of a particularly sensitive context pertaining to this matter at the relevant time. The Court noted that the concept of proportionality inherent in the phrase 'necessary in a democratic society' required a reasonable connection between the measures taken and the aim pursued. The Court observed that the applicant's statements read as a whole and taken in their immediate and wider context, could not be seen as a call for hatred, violence, or intolerance towards the Armenians.

The Court observed that the applicant had been criminally convicted which amounted to the most serious form of interference with the right to freedom of expression. Taking these different elements into account, the Court noted that the applicant's statement had related to a matter of public interest and had not amounted to a call for hatred, intolerance of violence. There was no evidence of a context of special historical overtones or heightened tension in Switzerland requiring a criminal response by Switzerland. As such the Court held that the interference had not been necessary in a democratic society, concluding by 10 votes to 7 that there was a violation of Article 10.

Comment on the decision

The present case can be seen as expanding freedom of expression in particular as it imposes a strict scrutiny on what amounts to an interference which is necessary in a democratic society. In paying particular attention to the geographical and historical factors as well as the time frame in which the impugned statements had been made, the present case was distinguished from previous case-law of the Court, particularly pertaining to negationism in regard to the Holocaust. By finding that Switzerland did not demonstrate the necessary geographical nor historical context which would justify interfering with the applicant's freedom of expression, the Court in the present case emphasized the strict conditions which must be fulfilled for an interference to freedom of expression to be justified.

Šimunić v. Croatia, Application (Application no. 20373/17), 22 January 2019 (decision on the admissibility)

Note on the procedure:

The applicant, a Croatian national, lodged his application against Croatia on the 9 March 2017, the Court sat on the 22 January 2019

Summary of the facts:

The applicant was a football player and had been convicted for addressing messages to spectators during a football match which were considered to be expressing or inciting hatred on the basis of race, nationality, and faith. The applicant received a fine of approximately 3,300 euros.

Applicant's complaint to the Court

The applicant complained of violations of his right to freedom of expression under Article 10.

Decision of the Court

The Court noted that the conviction against the applicant was an interference which was prescribed by law and pursued a legitimate aim of preventing disorder and combating racism and discrimination in sporting events.

The Court noted that the national authority had based its decision on relevant and sufficient grounds in convicting the applicant. It had in particular found that the expression used by the applicant had been used as an official greeting of the Ustashe movement and totalitarian regime of the Independent State of Croatia, which the Court found was based on fascism and inter alia racism, symbolizing hatred towards persons of a different religion or ethnic identity. The Strasbourg Court observed the applicant's role as a famous football player which increased the potential negative impact of provocative conduct.

The Court also noted that the fine that was imposed had not been disproportionate. To this extent, the Court found that the domestic court had as such struck a fair balance between the applicant's right to freedom of expression and society's interest in promoting tolerance and mutual respect as well as combating discrimination. The Court found no violation of Article 10.

Comment on the decision

The present case can be seen as restricting freedom of expression to the extent that it considered the impugned statement to amount to hate speech and as such it did not fall under the protection of Article 10. Although this decision might be contrasted with previous case-law of the Court and its stance that statements which offend, shock, and worry also fall under the protection of Article 10, it is suggested that this decision remains coherent. Indeed, in the present case the Court pays attention to the particular historical and geopolitical context in which the statement was made, having special regard to the inter-ethnic tensions which were prominent at the time that the impugned statement was made.

Hate speech and the Internet

VIII.

Delfi AS v. Estonia, Application (Application no. 64569/09), from 16 June 2015 (Grand Chamber)

Note on the procedure:

The applicant (Delfi AS), a public limited liability company registered in Estonia, lodged a complaint against the Republic of Estonia on 4 December 2009. The Court deliberated on the 9 July 2014 and 18 March 2015.

In a Chamber decision of 10 October 2013, the Court found unanimously that there had been violation of Article 10.

Summary of the facts:

The applicant company was the owner of one of the largest internet news portals in Estonia. Following the publication in 2006 of an article on the portal concerning a ferry company, comments which contained personal threats and offensive language targeting the owner of the ferry-company were posted under the article. As a result of this, defamation proceedings were brought against the applicant company, and they were ordered to pay a fine of 320 euros.

Applicant's complaint to the Court

The applicant company complained of violations of its rights to freedom of expression (Article 10)

Decision of the Court

The Court observed that the comments in question had constituted hate speech and direct incitement to violence which had generated a significant amount of public concern. The scope of the Court's decision here was limited to determining the duties and responsibilities of the internet news portal.

The Court was satisfied that the interference with the applicant company's right was prescribed by law and was deemed necessary in particular because the applicant company's involvement in making the comments public on the portal made its role beyond that of a passive technical service provider. The Court also observed that a sanction of 320 euros could not be considered disproportionate to the breach.

The Court thus considered that the interference imposed on the applicant company had been based on relevant and sufficient grounds and had not constituted a disproportionate restriction on its right to freedom of expression. Hence, by 15 votes to 2 the Court found that there was no violation of Article 10.

Comment on the decision

The case is a leading decision in regard to internet news portals and their responsibility about third party comments. The effect of the decision is to impose a responsibility on online news portals that exercise some control over comments. This requires online portals to have an effective mechanism to ensure the control and protection of rights of others, and imposes the risk of liability for any comment which might constitute a form of hate speech.

The decision seeks to strike a balance between the freedom of expression of the internal portal as well as the internet portal users (commentators and such) with the rights and reputation of others. However, it is arguable that to a certain extent the decision may be considered as having a detrimental effect on freedom of the press. The risk of potential liability may have a detrimental effect of pushing online portals to prohibit any comments on their posts and articles in order to avoid responsibility for the latter, the effect of this would be to limit the possibility of diffusing different views and opinions, including those which are well within the limits of Article 10.

Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt v. Hungary (Application no. 22947/13) from 2 February 2016

Note on the procedure:

The case originates in an application against Hungary lodged by the applicants (two legal entities registered under Hungarian law) on the 28 March 2013 and deliberated upon by the Court in private on the 5 January 2016.

Summary of the facts:

The first applicant was a self-regulatory body of internet content providers, and the second applicant was the owner of an internet news portal. The applicants' portals allowed for the publication of comments by users which were not edited nor moderated by the applicants before publication, both portals contained disclaimers as to the comments and had a notice-and-take down system allowing for users to request a comment to be deleted.

In 2010 the first applicant published an opinion concerning real estate management websites, the text of which was also published on the second applicant's portal. The article attracted comments from users which used derogatory terms resulting in a civil action against the applicants by the company operating the websites to which the articles referred. The applicants removed the offending comments but were nonetheless found liable by the domestic courts and ordered to pay procedural fees.

Applicant's complaint to the Court

The applicants complained of violations of their rights under Article 10 (freedom of expression).

Decision of the Court

The Court had been asked to assess whether an appropriate balance had been struck between the applicants' rights to freedom of expression under Article 10 and the plaintiff's right to reputation under Article 8.

The Court took account of the context in which the comments were posted, noting that the article had concerned a matter of public interest. The Court also observed that although the impugned comments contained vulgar language, they were of a register style which was commonly used on internet portals, therefore the impact attributed to them could be reduced. The Court also noted that the domestic courts had not embarked on a proportionality analysis to determine the respective liability of the authors of the comments and the applicants.

The Court observed that the applicants had immediately taken down the comments once they had been notified of the civil proceedings and had a general mechanism to prevent or remove defamatory comments. In light of this, the Court considered the domestic court's decision to be requiring excessive and impracticable forethought which undermined the impact of the freedom of information on the internet. The Court took particular account of the potential chilling effect on freedom of expression on the internet which could arise as a form of objective liability for third-party comments.

Given the absence of hate speech or direct threats, the Court found that the comments were accompanied by effective procedures allowing for a rapid response, the existence of the notice-and-take-down mechanism would have in itself provided a viable protection for the plaintiff's reputation. As such the interference with the applicant's right to freedom of expression had been in violation of Article 10.

Comment on the decision

The present case can be seen as protecting freedom of expression and freedom of the press to the extent that it found that an expansion of the responsibility of internet news portals through the imposition of strict liability for third party comments would amount to a violation of Article 10 of the Convention.

It is suggested that the Court seeks to strike a fair balance between the protection of freedom of expression and the protection of rights of others. In the present case, the existence of effective mechanisms that allowed the taking down of comments, which could be realized

rapidly satisfied the obligations and responsibility of the web portals according to the Court. Moreover, in the present case the impugned comments were not clearly constitutive of unlawful speech. As such the existence of mechanisms to remove the impugned comments were sufficient to fulfil the responsibility of the portals.

Pihl v. Sweden, application (Application no. 74742/14), 7 February 2017 (decision on the admissibility)

Note on the procedure:

The applicant, a Swedish national, lodged an application against Sweden on the 22 November 2014 which was deliberated by the ECtHR on the 7 February 2017.

Summary of the facts:

The applicant was accused on a blog post of being involved in a Nazi party, following which a comment to the post accused him of being a 'hash-junkie'. After a request from the applicant both the blog post and the comment were removed and the association running the blog published a post apologizing. The applicant brought civil proceedings against the association; this action was dismissed as was the applicant's application to the Chancellor of Justice for damages for the State's failure to fulfil its Positive obligation to protect the applicant's private life.

Applicant's complaint to the Court

The applicant complained of violations under Article 8 of the Convention arguing that his right to respect for his private life had been violated.

Decision of the Court

The Court held that the right balance had been struck between the applicant's right to respect

to his private life and the association's right to freedom of expression. The Court took particular account that the association could not have foreseen the comment in particular as it was not directly related to the content of the post. Moreover, the comment did not amount to hate speech or incitement to violence. The ECtHR also noted that the association had removed the post and the comment only a day after it had been notified by the applicant and had published an apology. The Court reiterated the potential chilling effect on freedom of expression which could be caused by internet liability for third-party comments.

In light of this the Court found that there had been no violation of the applicant's rights under Article 8 of the Convention.

Comment on the decision

The effect of the present case is to draw a distinction between clearly unlawful speech as in *Delfi*, in which case the web portal may have responsibility regardless of notice, and other forms of speech, which although vulgar or possibly offending, are not clearly unlawful, as in the present case, where the obligation to remove the comment arises only once the portal had notice or could have foreseen the defamatory nature of the comment. It is suggested that this distinction seeks to ensure a correct balance between the protection of freedom of expression and the protection of rights and reputations of others.

It is suggested that this balance is one which is difficult to realize as any form of severe liability or responsibility imposed on intermediaries, such as web news portals, might have a possible chilling effect on freedom of press.

Smajić v. Bosnia and Herzegovina,
(Application no. 48657/16)
from 18 January 2018
(decision on the admissibility)

Note on the procedure:

The applicant is a citizen of Bosnia and Herzegovina who lodged an application against Bosnia and Herzegovina on the 29 July 2016, which the ECtHR deliberated on the 16 January 2018.

Summary of the facts:

Following posts which the applicant had made on the internet, he was found guilty of inciting national, racial and religious hatred, discord or intolerance and was sentenced to 1 year suspended prison sentence and his personal computer and laptop were seized.

Applicant's complaint to the Court

The applicant complained of violations of his rights under Article 10 (freedom of expression) and Article 6 paragraph 1 and 3 (right to a fair trial and right to legal assistance of one's own choosing).

Decision of the Court

The ECtHR noted that the domestic courts had analyzed the applicant's case and that their decision had been done in conformity to the principles under Article 10 and as such had provided relevant and sufficient motives for his convictions. The Court took particular account to the fact that the content of the applicant's post had dealt with very sensitive matters concerning ethnic relations in post-conflict Bosnian society. The Court also took account of the fact that the penalties imposed on the applicant had not been excessive. As such the ECtHR noted that the interference had been prescribed by law and pursued a legitimate aim of protecting the reputation and rights of others. As such the complaint was manifestly ill-founded.

In regard to the applicant's complaints under Article 6, the Court did not find that the finding of the domestic courts had been arbitrary or unreasonable. The Court found that there had been no violations of Article 6.

Comment on the decision

This case plays an important role in establishing liability for hate speech on the internet. As opposed to the previously analyzed cases which were concerned with the responsibility of web portals for comments of third parties, *Smajić v. Bosnia and Herzegovina* pertains to the interference with the applicant's freedom of expression where the applicant is the author of impugned posts. As such the case stands authority that comments and posts online which constitute hate speech do not benefit for protection under Article 10.

The Court, in reaching its decision, paid particular attention to the socio-political context at the time (given the sensitive ethnic relations in post-war Bosnia) as well as the level of the sentence, in determining whether the domestic courts had acted within their margin of appreciation and in a manner proportionate to the pursued legitimate aim.

Savva Terentyev v. Russia,
(Application no. 10692/09)
from 28 August 2018

Note on the procedure:

The applicant, Russian national, lodged an application against the Russian Federation on the 5 January 2009. The ECtHR sat as a Chamber and deliberated in private on the 3 July 2018.

Summary of the facts:

The applicant was a blogger who posted an online comment in which he labelled all police officers as 'lowbrows' and 'the dumbest and least educated representatives of the animal world'. He called for the 'burning of infidel cops in Auschwitz like ovens' to 'clean[se] society of this cop-hoodlum filth'. As a result of these comments, he was convicted for incitement of hatred against police officers as a group and was sentenced to 1 year suspended prison term.

Applicant's complaint to the Court

The applicant complained of violations of his right to freedom of expression under Article 10.

Decision of the Court

The Court presumed that the interference was prescribed by law and in pursuit of a legitimate aim of protecting the reputation and rights of others.

The ECtHR noted the very vulgar and derogatory nature of the comments but also took account of the fact that they had been posted in the context of a discussion pertaining to matters of general interest, namely the involvement of police officers in silencing opposition during electoral campaigns.

The Court also noted that the applicant's comments had not attacked personally any identifiable officer but were a critique of the police as a public institution which the Court did not consider to be a group which needed heightened protection. The Court observed that as bodies of the state, the police had to have a higher degree of tolerance to offensive speech. The Court also found that there had been no particular public context which demonstrated a particular sensitivity on the matter, nor did the applicant have significant public influence as he was not a well-known blogger. In this regard the Court considered that the domestic courts had failed to take into account relevant facts and factors, as such failing to give relevant and sufficient justifications for the interference with the applicant's right to freedom of expression. As such the interference had been disproportionate to the pursued legitimate aim.

Comment on the decision

The present case emphasizes freedom of expression, through the use of online comments. In particular, the Court refused to allow the misuse of law, and Convention rights, to limit or control freedom of expression. In particular, the Court did not accept that the freedom of expression could be legitimately limited in order to limit offensive speeches targeted at the police force.

The Court thus refused to view the police as a historical group which could be associated to an unprotected minority or group which was entitled to protection from offensive speech. In fact, it highlighted that as a state organ, the police had to have a higher degree of tolerance towards offensive comments. The impugned statements having not constituted a personal attack to identifiable officers, but rather a criticism to a state organ as a whole, the margin of criticism was wider.

IX. Insult of state officials

Stern Taulats and Roura Capellera v. Spain, (Application no. 51168/15 and 51186/15) from 13 March 2018

Note on the procedure:

The case originates from two applications against the Kingdom of Spain by two Spanish nationals who lodged their applications to the ECtHR on the 2 October 2015. The ECtHR deliberated on the 13th February 2018.

Summary of the facts:

The applicants had set fire, during a public demonstration, to a large photograph of the royal couple. They were sentenced to 15 months imprisonment for insult to the Crown, which was subsequently replaced by a penalty of 2,700 euros each and in the event of failure to pay, the applicants would have to serve the prison term.

Applicant's complaint to the Court

The applicants complained of violations of their right to freedom of expression under Article 10 as the conviction had amounted to an unjustified interference with their right to freedom of expression. The applicants also complained of violations of their right of freedom of thought, conscience, and religion under Article 9.

Decision of the Court

The Court observed that the interference imposed on the applicants had been prescribed by law and was done in the pursuit of a legitimate aim of protecting the reputation and rights of others.

The ECtHR observed that the act by the applicants had been done as part of a political

demonstration of general interest (pertaining to the independence of Catalonia), it had not been a personal attack to the Kingdom of Spain but rather a denunciation of the King as Head and Symbol of the State. As such this fell within the sphere of political criticism and corresponded to an expression of rejection of the monarchy as an institution.

The Court noted that the applicants' intention had not been to incite anyone to commit acts of violence against the King. Although their actions had involved the burning of a picture, this was seen by the Court as a means of expressing an opinion in a debate pertaining to an issue of public interest. In this Context the Court reiterated that freedom of expression extended to ideas and opinions which offended, shocked or disturbed.

The Court noted that the act by the applicants could not be construed as an incitement to hatred or violence, and as such did not constitute hate speech which would have fallen under Article 17 of the Convention.

Finally, the Court found that the prison sentence constituted an interference which was not proportionate to the legitimate aim pursued, nor necessary in a democratic society. As such, the Court found that there had been a violation of Article 10.

Comment on the decision

The present case stands for authority determining the level of freedom of expression protected by the Convention, when the impugned act could be seen as an insult to a state official. In the present case the impugned act was considered to have been realized in the context of a political demonstration which was of general interest. The act having not been a personal attack to the King but rather an act against the monarchy as an institution, in line

with previous case-law, the Court considered that a higher level of criticism was acceptable as the act was directed against the State and government.

The decision highlights the importance of freedom of expression in political debates in a democratic society. The impugned action having been done in the context of a demonstration, was not constitutive of an act of violence against the King but as an act of political demonstration, and as such fell under the protection of Article 10. To this extent the case reiterates the broad nature of protection of freedom of political speech, which encompasses statements and acts which are capable of offending, shocking or worrying.

Part B – Hate crime

The ECHR framework for hate crimes and an overview of the state's duties specific to hate crimes

By interpreting substantive and procedural aspects of the Convention, the Court highlighted a number of the hate crime-specific duties and operational points, which need to be followed by the national authorities, police and criminal justice professionals, in order to fulfil the obligations under the Convention.

First of all, this refers to the duty to conduct prompt and effective investigation into bias-motivated crimes, including a duty to investigate and uncover a possible bias motivation. This duty arises in relation to Article 2 (right to life), Article 3 (right to be free from ill-treatment) and Article 8 (right to respect for private and family life) taken in conjunction with Article 14 (prohibition of discrimination). The development of the Court's jurisprudence demonstrated that the scope of this procedural duty applies to crimes with various types of discriminatory biases, such as racial and ethnic origin, political, religious, sexual orientation, gender identity, disability and potentially other protected grounds. Further, the Court has specifically highlighted that this duty applies to both the offences committed by State actors and the offences committed by private individuals.

As the jurisprudence of the Court developed, the Court has specified that the duty to unmask a possible bias motivation includes the authorities' duty to take into consideration hate crime bias indicators that suggest an offense might have had discriminatory motives. Additionally, procedural duty to investigate and uncover a possible bias motivation extends to hate crime by association and hate crimes with multiple motives. Importantly, the Court has also specifically addressed the need for a state's criminal justice system to be able to adequately investigate, prosecute and punish hate crimes, as well as the importance of neutrality and impartiality in the work of investigating and prosecuting authorities when dealing with hate crimes.

All abovementioned aspects are analysed in the section below based on the concrete Court's judgements.

a. A state has a duty to conduct prompt and effective investigation into bias-motivated crimes, including a duty to investigate and uncover a possible bias motivation

In 2005, the Court, sitting as the Great Chamber, considered **Nachova v. Bulgaria** case,³⁹ in which the Bulgarian military police, during an arrest attempt, shot dead two Bulgarian nationals of Roma origin, conscripts who had recently absconded from a military construction force and were known to be unarmed. The Court found that Bulgaria had failed to comply with its obligations under Article 2 in that the relevant national legal framework on the use of force was fundamentally flawed and grossly excessive force had been used by the military police. Further, the Court noted that Article 2 also implies **positive duty of authorities to conduct an effective official investigation into crimes which interfere with the right to life**. This requires authorities to act of their own motion once the matter has come to their attention, to ensure the persons responsible for and carrying out the investigation are independent and impartial, and to base the investigation's conclusions on thorough, objective and impartial analysis of all relevant elements. The investigation must also be effective in the sense that it is capable of leading to a determination of whether the force used was or was not justified in the circumstances and to the identification and punishment of those responsible. Failure to conduct an effective investigation amounts to the violation of the Article 2, which was found in this case due to the numerous flaws in the investigation.

Furthermore, the Court considered Article 14 in conjunction with Article 2. It considered that it could not be established that racist attitudes

³⁹ *Nachova v. Bulgaria*, Applications nos. 43577/98 and 43579/98.

had played a role in the death of two men, thus, found no violation of Article 14 taken together with Article 2 in its substantive aspect. However, in this case, the Court has taken the new approach linking a possible violation of Article 14 to the substantive and procedural aspects of Article 2 separately. Hence, from a procedural aspect the Court stated that Article 14 also implies **a procedural duty to adequately investigate possible racist motives**. In particular, “the state authorities have the additional duty **to take all reasonable steps to unmask any racist motive** and to establish whether or not ethnic hatred or prejudice may have played a role in the events. Failing to do so and treating racially induced violence and brutality on an equal footing with cases that have no racist overtones would be to turn a blind eye to the specific nature of acts that are particularly destructive of fundamental rights.”⁴⁰ The Court specified that whenever there are facts of the case pointing to a possible role of racial overtones in the events, it must be verified and – if confirmed – a thorough examination of all the facts should be undertaken in order to uncover any possible racist motives.⁴¹

In this case, the authorities disposed of plausible information sufficient to alert them to the need to carry out an initial verification into possible racist overtones in the events leading to the death of the two men, i.e. statement of a neighbour of the victims who said that, immediately after the shooting, the police officer had shouted “you damn Gypsy”, while pointing a gun at him. That statement, observed against the background of the numerous published accounts of the existence of prejudice and hostility against Roma in Bulgaria, called for verification. However, the Bulgarian authorities had done nothing to verify the neighbour’s statement or the reasons it had been considered necessary to use such a degree of force. This was sufficient for the Court to conclude that the authorities failed in their procedural duty under Article 14 taken in conjunction with Article 2.

In its jurisprudence following the *Nachova v. Bulgaria* case, the Court has detailed the

scope of the duty to investigate and uncover a possible racist motivation and applied it to other biases. In the *Milanović v. Serbia* case (2012),⁴² the Court considered **religiously motivated attacks** on a leader of the Vaishnava Hindu religious community, also known as Hare Krishna. The applicant has suffered a series of physical attacks between 2001 and 2007 by far-right groups, all occurring around a time of major Serbian Orthodox religious holidays. Along with finding the violation of Article 3 for failing to prevent the applicant’s repeated ill-treatment and to conduct an adequate investigation, the Court examined a possible violation of Article 14 in conjunction with Article 3. Following the reasoning of *Nachova v. Bulgaria*, the Court stated that “just like in respect of racially motivated attacks, when investigating violent incidents State authorities have the additional duty to take all reasonable steps **to unmask any religious motive** and to establish whether or not religious hatred or prejudice may have played a role in the events. [...] Treating religiously motivated violence and brutality on an equal footing with cases that have no such overtones would be turning a blind eye to the specific nature of acts that are particularly destructive of fundamental rights.”⁴³ As Serbian authorities failed to take adequate actions being aware that the attacks in question had most probably been motivated by religious hatred, the Court considered that there has been a violation of Article 14 taken in conjunction with Article 3.

In the *Virabyan v. Armenia* case (2012),⁴⁴ the Court extended the same principles to hate crimes motivated by a **political bias**. In this case the applicant, a member of one of the main opposition parties in Armenia, alleged that he had been tortured while in police custody because of his political opinion and no effective investigation had been carried out into his allegations of torture. The Court found violation of the substantial aspect of Article 3 because the treatment to which the applicant was subjected, constituted torture. Regarding the procedural aspects of Article 3, the Court specified that for an **investigation** into serious allegations

40 *Id.*, § 160.

41 *Id.*, § 164.

42 *Milanović v. Serbia*, Application no. 44614/07.

43 *Id.*, §§ 96-97.

44 *Virabyan v. Armenia*, Application no. 40094/05.

of ill-treatment to be **effective**, it must be **thorough** (“authorities must always make a serious attempt to find out what happened and should not rely on hasty or ill-founded conclusions to close their investigation or as the basis of their decisions”), **expedient** (“authorities should react “promptly to the complaints at the relevant time”), and **independent** (“the independence of the investigation implies not only the absence of a hierarchical or institutional connection, but also independence in practical terms”).⁴⁵ The Court concluded that the investigation in this case was “ineffective, inadequate and fundamentally flawed” and thus constituted a procedural violation of Article 3.

Analysing the allegations that the Article 3 violations were committed due to discrimination against the applicant because of his political opinions, the Court considered substantive and procedural aspects of Article 14 separately. As the Court did not have sufficient evidence to conclude that the torture was committed because of the applicant’s political opinions, it found no violation of the substantive limb of Article 14 taken in conjunction with Article 3. However, regarding the procedural aspect the Court noted that “when investigating violent incidents, State authorities have the additional duty to take all reasonable steps **to unmask any political motive** and to establish whether or not intolerance towards a dissenting political opinion may have played a role in the events. Failing to do so and treating politically induced violence and brutality on an equal footing with cases that have no political overtones would be to turn a blind eye to the specific nature of acts that are particularly destructive of fundamental rights.”⁴⁶ In this case, the Court acknowledged that proving political motives would be difficult, however stated that the authorities disposed of plausible information which was sufficient to alert them to the need to carry out an initial verification but they did almost nothing with it. The investigating authorities only asked two of the involved police officers about the applicant’s political affiliation and had not probed the point further. Accordingly, the Court found a breach of Article 14 taken together with the procedural aspect of Article 3.

45 *Id.*, §§ 162 – 164.

46 *Id.*, § 218.

In the *Identoba and Others v. Georgia* case (2015),⁴⁷ the Court extended the duty to unmask bias motives to **homophobic hate crimes**. This case concerned violence during the peaceful demonstration in Tbilisi on the occasion of the International Day against Homophobia. The demonstration was violently disrupted, the participants were insulted, threatened and ultimately assaulted by counter-demonstrators, who outnumbered the participants. The physical attacks left several of the applicants with serious injuries. The applicants complained that the authorities had failed to protect them from the attacks and to investigate effectively the incident, including by establishing the bias motive of the attackers.

The Court found that the violence, which consisted mostly of hate speech and serious threats, but also some sporadic physical abuse in illustration of the reality of the threats, rendered the fear, anxiety and insecurity experienced by all applicants, was severe enough to reach the threshold under Article 3 read in conjunction with Article 14. Further, the Court noted that in the context of negative attitudes towards sexual minorities in some parts of the society, as well as the fact that the organiser of the march specifically warned the police about the likelihood of abuse, the law-enforcement authorities were under “a compelling positive obligation to protect the demonstrators,” which they failed to do. Lastly, the authorities fell short of their procedural obligation to investigate the case by failing to conduct a proper investigation with particular emphasis on unmasking the bias motive. The Court found a breach of the state’s positive obligations under Article 3 taken in conjunction with Article 14.⁴⁸

In 2012, the Court considered the case *Dorđević v. Croatia*,⁴⁹ which concerned physical and verbal harassment of a mother and her mentally and physically disabled son for over four years by children living in their neighbourhood motivated by **bias against people with disability**.

47 *Identoba and Others v. Georgia*, Application no. 73235/12.

48 *Id.*, §§ 97-100.

49 *Dorđević v Croatia*, Application no. 41526/10. This case is analysed in more detail in the section *Hate crimes motivated by bias against people with disability*.

Most of the alleged perpetrators in this case were children below 14 years of age, against whom, under the national system, it was not possible to apply any criminal law sanctions, thus, the Court stated that the case was not about the state's procedural obligations to conduct an effective and independent investigation, but rather about the state's positive obligations outside the sphere of criminal law to adequately respond to acts of violence and harassment that had already occurred and to prevent any such further acts. The Court found that no relevant action had been undertaken by the relevant authorities, despite their knowledge that the applicants had been systematically targeted and that future abuse had been quite likely. It therefore concluded that Article 3⁵⁰ and Article 8⁵¹ had been violated. As to the alleged discrimination, due to the lack of an adequate response by the competent authorities, the Court could not consider this complaint and rejected it because internal remedies had not been exhausted. Although this case could not be examined from the perspective of procedural obligations to investigate a case of alleged ill-treatment and procedural obligations to unmask bias motive behind such ill-treatment, the case reaffirmed the state's obligation to adequately respond to violence directed against a person with physical and mental disabilities.

In its jurisprudence, the Court has also referred to the duty **“to unmask possible discriminatory motives”** in the cases of assaults against migrants⁵² and gender-based violence.⁵³ The Court considers this duty to be well-established principles of the case-law on Articles 2, 3 and 14 concerning the state's procedural obligation when confronted with cases of violent incidents triggered by suspected discriminatory attitudes. In its latest jurisprudence, the Court stated that “where there is a suspicion that discriminatory attitudes induced a violent act, it is particularly important that the official investigation is pur-

sued with vigour and impartiality, having regard to the need to continuously reassert the society's condemnation of such acts and to maintain the confidence of minority groups in the ability of the authorities to protect them from the discriminatory motivated violence.”⁵⁴ The case-law suggests that the duty extends to the violent incidents induced by suspected discriminatory attitudes relating to the victim's protected characteristics, including those that have not been considered by the Court before.

In procedural terms this duty implies that the authorities must do “whatever is reasonable in the circumstances to collect and secure the evidence, explore all practical means of discovering the truth and deliver fully reasoned, impartial and objective decisions, without omitting suspicious facts that may be indicative of violence induced by, for instance, racial or religious intolerance, violence motivated by gender-based discrimination or sexual orientation.”⁵⁵ The duty requires the authorities to look at all the facts of the case pointing to a possible role of discriminatory overtones in the events.⁵⁶

b. Procedural duty to investigate and unmask discriminatory motives covers the offences committed by state actors and the offences committed by private individuals

In the case *Nachova v. Bulgaria*, the Court for the first time specified the state's procedural duty to adequately investigate possible discriminatory motives that might have played a role in the events. As the case related the offences committed by the state actors, the Court stipulated this duty in relation of violent incidents, in particular, **committed by the state agents.**

In the case *Secic v. Croatia* (2007),⁵⁷ the Court considered a case of a Roma man who was severely beaten by two persons belonging to a skinhead group with wooden bats while shout-

50 *Id.*, §§ 147-150.

51 *Id.*, § 153.

52 See *Sakir v. Greece* that is analysed in the section Procedural duty to unmask possible discriminatory motivations and to take into consideration hate crime bias indicators.

53 See *B.S. v. Spain* that is analysed in the section Intersectionality.

54 *Sabalic v. Croatia*, § 95

55 *Id.*, § 94.

56 This is further explored in the section Procedural duty to unmask possible discriminatory motivations and to take into consideration hate crime bias indicators.

57 *Secic v. Croatia*, Application no. 40116/02.

ing racial abuse. Despite several leads, the authorities failed to conduct effective investigation to find the perpetrators and to take reasonable steps to investigate the racist motivation in the case. The Court reiterated that when investigating violent incidents, authorities have the additional duty to take all reasonable steps to unmask any racist motive and that this also applies “in cases where the treatment contrary to Article 3 is **inflicted by private individuals**.”⁵⁸ In this case, the Court found violation of Article 3 due to the authorities’ failure to obtain any tangible evidence with a view to identifying and arresting the attackers over a prolonged period of time. Further, the Court found violation of Article 14 taken in conjunction with the procedural aspect of Article 3 as it found it “unacceptable that, being aware that the event at issue was most probably induced by ethnic hatred, the police allowed the investigation to last for more than seven years without taking any serious action in view to identifying or prosecuting the perpetrators.”⁵⁹

c. Procedural duty to investigate and unmask discriminatory motives applies to Article 2 (right to life), Article 3 (right to be free from ill-treatment) and Article 8 (right to respect for private and family life)

In its jurisprudence, the Court raised the duty to investigate and unmask discriminatory motives in relation to the violation of Article 2 (the right to life), Article 3 (the right to be free from ill-treatment), and Article 8 (right to respect for private and family life), in conjunction with Article 14 (prohibition of discrimination).

In the above considered case *Nachova v. Bulgaria* (2005), the Court noted that Article 2 implies state duty to conduct an effective investigation into crimes which interfere with the right to life, and if there is a suspicion that racist attitudes induced a violent act, Article 2 taken in conjunction with Article 14 also implies a procedural duty to adequately investigate possible racist motives. The Court applied the same principle in relation to Article 3, e.g. in

58 *Id.*, §§ 66-67.

59 *Id.*, § 69.

the case above, it considered the cases *Secić v. Croatia* (2007) and *Identoba and Others v. Georgia* (2015), reiterating this duty in relation to crimes which interfere with the right to be free from ill-treatment and torture.⁶⁰

The Court has also examined the duty to investigate and unmask discriminatory motives in relation to Article 8, i.e. interference with the right to respect for private and family life.⁶¹ In the most recent case, **Association ACCEPT and others v. Romania** (2021),⁶² the Court considered a state’s alleged failure to protect the applicants from homophobic verbal abuse and threats during the LGBT History Month movie screening, and a failure to conduct a subsequent effective investigation into the applicants’ complaint. First the Court considered the applicability of Article 3 and found that the minimum level of severity required for Article 3, has not been attained. In particular, the Court noted that while discriminatory treatment as such can in principle amount to degrading treatment, the applicants have not pointed to any facts that could enable the Court to find that the level of mental suffering that they experienced came close to the level that the Court has found in other similar cases. The Court distinguished the present case from the *Identoba and Others v. Georgia* (2015) case, where verbal abuse and serious threats were followed by actual physical assaults. Further, the Court mentioned that although the counter-demonstrators outnumbered, they were continuously monitored by the police, no acts of physical aggression took place, and the verbal abuse, although openly discriminatory, was not so severe as to cause the kind of fear, anguish or feelings of inferiority that are necessary for Article 3 to come into play.

In addition, the Court considered the applicability of Article 8 taken in conjunction with Article 14 and found that the treatment complained of affected the individual applicants’ psychological well-being and dignity, thus falling within

60 Also in cases *Milanović v. Serbia* (2012), *Virabyan v. Armenia* (2012).

61 Also in the case *R.B. v. Hungary* (2016).

62 *Association ACCEPT and others v. Romania*, Application no. 19237/16. The case is analysed in more detail in the section *Hate crime motivated by sexual orientation and gender identity bias*.

the sphere of their private life. Additionally, the violent verbal attacks on the applicants, which, moreover, had occurred in the context of evidence of patterns of violence and intolerance against a sexual minority, had attained the level of seriousness required for Article 8 to come into play. Analysing the merits, the Court first stipulated the state’s “duty to prevent the infliction of hatred-motivated violence (whether physical attacks or verbal abuse) by private individuals and to investigate the existence of any possible discriminatory motive behind such violence.”⁶³ Regarding the obligation to protect, the Court found that the authorities failed to correctly assess the risk incurred by the individual applicants at the hands of the intruders and to respond adequately in order to protect the individual applicants’ dignity against homophobic attacks by a third party.⁶⁴ Regarding the obligation to investigate, the Court concluded that “the authorities did not take reasonable steps to investigate whether the verbal abuse had been motivated by homophobia. The necessity of conducting a meaningful inquiry into the possibility that discriminatory motives had lain behind the abuse was absolute, given the hostility against the LGBT community in the respondent State and in the light of the evidence that homophobic slurs had been uttered by the intruders during the incident.”⁶⁵ The above led to a breach of Article 14, taken in conjunction with Article 8.

d. The criminal justice system must be able to adequately investigate, prosecute and punish hate crimes

In 2007, the Court considered the [Angelova and Iliev v. Bulgaria](#)⁶⁶ case which concerned an alleged failure of the state to conduct an effective and prompt investigation into the ill-treatment and death of a Roma man. Another aspect considered was that the lack of domestic legislation for racially-motivated crimes led to a failure to provide adequate legal protection against such crimes. At the time of the

crime, the Bulgarian national legal system did not separately criminalise racially motivated murder or serious bodily injury, nor did it contain explicit penalty-enhancing provisions related to such offences if they were motivated by racism. In regard to this, the Court stated that a **lack of direct hate crime laws should not undermine the ability of the authorities to pursue the racist motivation during the criminal process** and that the general criminal law framework should allow for appropriate and enhanced punishment for these types of crimes. In particular, the Court stated that **“other means may also be employed to attain the desired result of punishing perpetrators who have racist motives.”**⁶⁷ In this case, there was a possibility in domestic legislation to impose a more severe sentence depending on, inter alia, the motive of the offender; and the authorities charged the assailants with aggravated offences. This, though failing to make a direct reference of the racist motives of the perpetrators, provided for more severe sentences than those envisaged in domestic legislation for racial hatred offences.

Thus, the Court observed that the lack of penalty-enhancing provisions for racist murder or serious bodily injury should not have constrained the authorities from conducting an effective investigation and applying effectively the existing domestic legislation.⁶⁸ It concluded that the authorities had failed on their obligation under Article 2 to effectively investigate the death promptly, expeditiously and with the required vigour, capable of leading to the trial and conviction of the individuals responsible, considering the racial motives of the attack.⁶⁹

The need for the criminal justice system to be able to adequately investigate and sanction hate crimes was also recently highlighted in the case [Sabalić v. Croatia](#) (2021),⁷⁰ in which a woman was violently attacked after disclosing she was a lesbian. The Croatian authorities failed to investigate the motive behind the attack and instituted only minor offence proceedings for breach of public peace and order;

63 *Id.*, § 96.

64 *Id.*, § 113.

65 *Id.*, § 123.

66 *Angelova and Iliev v Bulgaria*, Application no. 55523/00.

67 *Id.*, § 104.

68 *Ibid.*

69 *Id.*, § 105.

70 *Sabalić v. Croatia*, Application no. 50231/13.

further the authorities dismissed the victim's complaint that there has been a hate crime on the basis that a criminal prosecution was barred by the minor offences conviction. The Court reiterated that in relation to hate crimes "compliance with the State's positive obligations requires that the domestic legal system must demonstrate its capacity to enforce criminal law against the perpetrators of such violent acts."⁷¹ In particular, it implies "an **effective application of domestic criminal-law mechanisms capable of elucidating the possible hate motive** with homophobic overtones behind the violent incident and of identifying and, if appropriate, **adequately punishing, those responsible.**"⁷² And, importantly, in cases when the official investigation has led to the institution of proceedings in the national courts, the Court highlighted the role of national courts to prevent grave attacks on physical and mental integrity to go unpunished, or for serious offences to be punished by excessively light punishments. In this regard, **the role of the national courts is "to ensure that a state's obligation to protect the rights of those under its jurisdiction is adequately discharged,** which means that it must retain its supervisory function and intervene in cases of manifest disproportion between the gravity of the act and the punishment imposed."⁷³

The Court further observed that the response of the Croatian authorities through the proceedings for minor offences was not capable of demonstrating their commitment to ensuring that homophobic offenses do not remain ignored by the relevant authorities and to providing effective protection against such acts.⁷⁴ It concluded that by instituting the ineffective proceedings for minor offences and as a result of erroneously discontinuing the criminal proceedings on formal grounds, the domestic authorities failed to discharge adequately and effectively their procedural obligation under Article 3 taken in conjunction with Article 14, and that such conduct of the authorities is contrary to their duty to combat impunity for hate crimes.⁷⁵

71 *Id.*, § 95.

72 *Id.*, § 105.

73 *Id.*, § 109.

74 *Id.*, § 111.

75 *Id.*, §§ 115- 116.

e. Procedural duty to unmask possible discriminatory motivations implies taking into consideration hate crime bias indicators

State's duty to unmask possible discriminatory motivations requires the authorities to look at all the facts of the case pointing to a possible role of discriminatory overtones in the events. In other words, the authorities are required to consider bias indicators. **Hate crime bias indicators** are objective facts, circumstances, or patterns connected to a criminal act or acts which, standing alone or in conjunction with other facts or circumstances, suggest that a crime committed may have been motivated in whole or in part by any form of bias.⁷⁶

In the case **Balazs v. Hungary** (2015),⁷⁷ the Court has specifically referred to the use of the hate crime indicators. The case concerned a racist attack of a man of Roma origin by a penitentiary officer and authorities' alleged failure to conduct an effective investigation into the attack and in particular lack of sufficient action to establish a possible racist motive. Although the investigating authorities (the prosecutor's office), had started an investigation into the offence and pursued the examination of a possible racial motive behind the offence, they discontinued the case on the grounds that although there was a likelihood of racist motives, this could not be established beyond doubt so as to warrant the offender's indictment. To that end, the Court observed the facts of the case established by the investigating authorities, in particular, the offender used offensive and racist language (e.g. "you cannot handle a dirty little gypsy?") before the fight with the victim; the day after the incident, he posted on a **social media** and commented that he "had been kicking in the head a gypsy lying on the ground"; he also posted a film scene with explicitly racist message, and commented that "some other types of rubbish live among us". The Court noted that that the prosecuting authorities failed to explain why the content of the posts and the applicant's subsequent testimony could not be unequivocally linked to the impugned events and could not be regarded as

76 A resource guide: Preventing and responding to hate crimes, OSCE/ODIHR, 2009, <https://www.osce.org/odihr/36426>.

77 *Balazs v. Hungary*, Application no. 15529/12.

an evidence of racially biased motives.⁷⁸ Therefore, the Court concluded that the prosecuting authorities' failure "to identify the racist motive in the face of **powerful hate crime indicators** [such as social media posts] ... impaired the adequacy of the investigation to an extent that is irreconcilable with the State's obligation in this field to conduct vigorous investigations."⁷⁹ The Court found violation of Article 14 read in conjunction with Article 3.

In this case, the Court has cited and referred to the OSCE/ODIHR *A resource guide Preventing and Responding to Hate Crimes*, 2009,⁸⁰ which aims to help the authorities to identify hate crimes, and among other things, characterizes hate crimes bias indicators. The guide lists the most **common types of bias indicators**, such as victim/witness perception; conduct of the offender (comments, written statements, or gestures); differences between perpetrator and victim on ethnic, religious or cultural grounds; drawings, markings, symbols, and graffiti left at the scene; involvement of organized hate groups or their members; location and timing; patterns/frequency of previous crimes or incidents, as well as nature of violence.

In its jurisprudence, the Court has referred to various types of factual information and context surrounding the cases it considered which, according to the Court, mandated the authorities to examine a possibility that the offenses might have had discriminatory motives. In particular, in the *Identoba and Others v. Georgia* case, the Court specifically highlighted the "clearly **homophobic hate speech** uttered by the assailants during the incident" as a fact that required the authorities to conduct a meaningful inquiry into the discrimination behind the attack. This was reaffirmed even in stronger terms in the *Sabalić v. Croatia* case with the Court stating that "**discriminatory remarks and racist insults must in any event be considered as an aggravating factor** when considering a given instance of ill-treatment in the light of Article 3."⁸¹

78 *Id.*, §§ 71-73.

79 *Id.*, § 75.

80 A resource guide: Preventing and responding to hate crimes, OSCE/ODIHR, 2009, <https://www.osce.org/odihr/36426>

81 *Sabalić v. Croatia*, § 65.

In the *Secić v. Croatia* case, the Court noted the facts that "the attackers belonged to a **skin-head group** which is by its nature governed by extremist and racist ideology"⁸² and that the authorities were aware of this, were indicative that the attack was most probably induced by ethnic hatred and thus required an appropriate investigation from the authorities. Similarly, in the case *Abdu v. Bulgaria* (2014),⁸³ the Court mentioned that the alleged perpetrators were known to the police as skinheads, well-known for their **extremist and racist ideology**, and this was a clear indicator of a possible bias motive behind the perpetrator's actions and thus required authorities' examination into that.

In a number of cases, the Court also mentioned a general level of intolerance or widespread prejudices against a certain minority group in the society or in a particular area as a possible factor for the authorities to consider and which, taken together with other hate crime indicators, might suggest discriminatory motives behind an offense. In the *Identoba and Others v. Georgia* case, the Court took note of "the history of public hostility towards the LGBT community in Georgia" and in its conclusion mentioned that "the necessity of conducting a meaningful inquiry into the discrimination behind the attack on the march [...] **was indispensable given**, on the one hand, **the hostility against the LGBT community** and, on the other, in the light of the clearly homophobic hate speech uttered by the assailants during the incident."⁸⁴ Similarly, in *Nachova v. Bulgaria*, the Court stated that a racist statement of the offender, "seen against the background of the many published accounts of the **existence in Bulgaria of prejudice and hostility against Roma**, called for verification."⁸⁵ Similar arguments were used by the Court in the **M.C. and A.C. v. Romania** (2016) case.⁸⁶

82 *Secić v. Croatia*, §§ 68-69.

83 *Abdu v. Bulgaria*, Application no. 26827/08. This case is reviewed in more detail in the section *Hate crimes motivated by racial and ethnic origin*.

84 *Identoba and Others v. Georgia*, § 77.

85 *Nachova v. Bulgaria*, § 163.

86 This case is reviewed in more details in the *Hate crimes motivate by sexual orientation and gender identity bias*.

The case **Sakir v. Greece** (2016)⁸⁷ was concerned with an assault on an Afghan man in the centre of Athens, which led to his hospitalisation, and the state's failure to conduct an effective investigation, including to assess possible racist motives behind the assault. In this case, the Court found a violation of Article 3, in its procedural aspect. In its reasoning, the Court pointed out the **general context of the case** and the reports by international NGOs and national authorities that highlighted the **phenomenon of racist violence in central Athens**, in particular, the increase in violent incidents of racist nature (especially in the Aghios Panteleimon district, where the assault on the applicant took place), the existence of a recurring pattern of assaults on foreigners, perpetuated by extremist groups, and serious omissions on the part of the police to investigate these attacks. The Court concluded that although the incident in the present case took place in Aghios Panteleimon and the nature of the attack had the characteristics of a racist attack, the police completely failed to bring this case into the context described by the reports and treated it as an isolated case. This, along with other procedural flaws in the investigation, made the Court conclude that the authorities did not treat the case with the level of diligence and efficiency required by Article 3.

In cases of offenses committed by state agents, the Court, in a few instances, mentioned the context of "**institutionalised racism**", "**excessive use of force by the law-enforcement authorities**" or "**continuing incidents of police abuse**" towards a particular minority group in a given state as signals that should prompt the authorities to take all possible steps to investigate whether or not discriminatory motives may have played a role in the events. In the case **Cobzaru v. Romania** (2007),⁸⁸ which concerned an alleged ill-treatment of a Roma man by the police in the police station, the Court noted "the **numerous anti-Roma incidents** which often involved State agents following the fall of the communist regime in 1990, and other documented evidence of **repeated failure by the authorities to remedy instances of such violence**" that were known to the public

at large as they were regularly covered by the media. As these instances were brought to the attention of the authorities, and the Romanian government adopted policy measures to address this, this context was known to the investigating authorities in the present case, "or should have been known, and therefore special care should have been taken in investigating possible racist motives behind the violence."⁸⁹

In the case **Boacă and Others v. Romania** (2016),⁹⁰ the Court considered an ill-treatment of a Romanian man of Roma origin by the police, and the subsequent lack of effective investigation into the offense and lack of investigation of possible racial motives. The Court could not establish the state's liability for the police violence on the basis of the victim's ethnic origin due to the absence of concrete evidence (the applicants made allegations that abusive and racist language was used against them by law enforcement officers, but these allegations were not substantiated). However, in relation to the state's duty to investigate possible racist motives, the Court took into account the facts that the authorities' investigation into the ill-treatment was procedurally flawed (which led to a violation of Article 3) and that they dismissed the applicants' complaint about the discrimination (without providing objective and reasonable justification for that). The Court then stated that these facts, "seen against the background of the many published accounts of the **existence in Romania of general prejudice and hostility towards Roma people and of continuing incidents of police abuse against members of this community**" called for verification and investigation of a possible causal link between the alleged racist attitudes exhibited by the police officers and the abuse suffered by the applicant in their hands.⁹¹ Thus, the Court concluded that lack of any apparent investigation into the complaint of discrimination amounts to a violation of Article 14 taken together with Article 3 in its procedural aspect.

87 *Sakir v. Greece*, Application no. 48475/09 (French version).

88 *Cobzaru v. Romania*, Application no. 48254/99.

89 *Id.*, § 97.

90 *Boacă and Others v. Romania*, Application no. 40355/11.

91 *Id.*, §§ 107-109.

f. An investigation cannot exclude bias motivation because other motives are present

In the case *Balazs v. Hungary* (2015), considered above, along with other aspects, the authorities refused to indict a perpetrator of a racist attack on a man of Roma origin based on the argument that his racist motives could not be established “unequivocally and beyond doubt”. In particular, they argued that the reason for the attack might have had other motives than racial hatred. In this regard, the Court noted that “not only acts based solely on a victim’s characteristic can be classified as hate crimes. For the Court, **perpetrators may have mixed motives**, being influenced by situational factors equally or stronger than by their biased attitude towards the group the victim belongs to.”⁹² Therefore, the Court rejected the authorities’ argument on proving that the insult was “precisely” due to the applicant being a Roma.

g. Investigating and prosecuting authorities must be neutral and impartial in their assessment of the evidence before them

In the case *Stoica v. Romania* (2008),⁹³ in which the alleged ill-treatment by the police of a Roma boy left him with permanent disabilities, the Court examined the way the investigation was conducted and found that the **lack of impartiality**, combined with other deficiencies, of the investigation amount to a failure to conduct a proper investigation, thus, a violation of Article 3 in its procedural aspect. In particular, the Court noted that the investigating authorities took testimonies of only three out of twenty to thirty villagers who were present during the incidents and provided no explanation as to why the other villagers did not testify during the investigation. Further, the villagers’ statements were discarded as “biased and less credible” by the military prosecutor without explaining why they would be less credible than those of the police officers, as all participants could be considered equally biased due to their opposing positions in the proceedings (alleged

victims against alleged perpetrators).⁹⁴ Additionally, the military prosecutors had ignored statements by police officials that the villagers’ behaviour was “purely Gypsy”, a statement that in the eyes of the Court demonstrated the stereotypical views of the police and proved that the police officers were not racially neutral, neither during the incidents nor throughout the investigation.⁹⁵

In the case *Cobzaru v. Romania*, the Court, analysing the state duty to investigate possible racial motives, considered that the tendentious remarks made by the prosecutors in relation to the applicant’s Roma origin throughout the investigation disclose **a general discriminatory attitude of the authorities** and question the neutrality and the effectiveness of the investigation. The Court noted the failure on the part of the prosecutors to verify whether the police officers involved in the violence had been involved in previous similar incidents or whether they had been accused previously of displaying anti-Roma sentiments.⁹⁶ In the eyes of the Court this together with the state’s failure to provide any justification for these omissions was an important factor to which the Court had regard in finding a violation of Article 14 taken in conjunction with Articles 3 in its procedural limb.

h. Procedural duty to investigate and uncover a possible bias motivation extends to hate crime by association

In the case *Škorjanec v. Croatia* (2017),⁹⁷ the applicant, a victim of a racial attack by association with her partner, a man of Roma origin who was also attacked, complained about the failure of the authorities to protect her as a victim of hate crimes by association,⁹⁸ and a

94 *Id.*, §§ 70 – 73.

95 *Id.*, § 128.

96 *Cobzaru v. Romania*, para 98.

97 *Škorjanec v. Croatia*, Application no. 25536/14.

98 Hate crimes do not only target individuals from specific groups. People merely associated with /or perceived to be a member of a group that shares a protected characteristic can also be victims of hate crime. OSCE/ODIHR Preventing and responding to hate crimes: A resource guide for NGOs in the OSCE region (2009), cited above.

92 *Balazs v. Hungary*, § 70.

93 *Stoica v. Romania*, Application no. 42722/02.

failure of the authorities to pay due attention to the racial overtones of the attack along with a failure to prosecute the attackers merely because she had not been of Roma origin herself. Elaborating on the scope of the duty to investigate possible bias behind an assault, the Court stated that the obligation on the authorities to seek a possible link between racist attitudes and a given act of violence, under Article 3 taken in conjunction with Article 14, “concerns not only acts of violence based on a victim’s actual or perceived personal status or characteristics but also acts of violence based on a **victim’s actual or presumed association or affiliation with another person who actually or presumably possesses a particular status or protected characteristic.**”⁹⁹

The Court further explained 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 in a particular group 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.”¹⁰⁰ In this case, the authorities confined their investigation only to the hate crime element of the attack on the applicant’s partner, while treated the applicant merely as a witness despite the fact that she had also sustained injuries in the course of the same attack while in his company. Thus, the Court stated that they “failed to carry out a thorough assessment of the relevant situational factors and the link between” the applicant’s relationship with her partner and the racist motive for the attack on them. This, in the eyes of the Court, together with the fact that the 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, resulted in a deficient assessment of the circumstances of the case. Thus, the Court concluded that the authorities failed to comply with their obligations and found violation

of the Article 3 under its procedural aspect in conjunction with Article 14.¹⁰¹

99 *Id.*, § 56.

100 *Id.*, § 66.

101 *Id.*, paras 67 - 72.

Hate crimes motivated by racial and ethnic origin



Abdu v. Bulgaria
(Application no. 26827/08)
rom 11 March 2014

Note on the procedure

The applicant, a Sudanese national, alleged that the authorities had failed in their obligation to conduct an effective investigation into the racist attack against him. He relied on Article 3 and Article 14 of the Convention.

Summary of the facts¹⁰²

In May 2003, Mr. Abdu and a friend were involved in a fight with two Bulgarian youths who were later described by the police as skinheads. One of the youths reportedly pushed Mr. Abdu to the ground and kicked him while calling him a “dirty nigger”. The second attacker then pulled out a knife, whereupon the victims fled. Mr. Abdu and his friend subsequently met some police officers, who arrested their attackers. The forensic doctor who examined Mr. Abdu noted that he had several injuries that could have been caused in a fight.

On conclusion of the investigation, the police forwarded the evidence to the public prosecutor for a decision as to whether to commence criminal proceedings for “racially motivated violence”, an offence under the Bulgarian Criminal Code. In June 2007, the public prosecutor issued a decision that there was no case to answer; he found that, in the absence of evidence proving that the attack had been racially motivated, the offence was not made out. The appeals lodged by Mr. Abdu against that decision were dismissed and in August 2008 the public prosecutor refused to provide the applicant’s lawyer with copies of the criminal case file. Mr.

Abdu alleged that the authorities failed in their obligation to carry out an effective investigation into the racist nature of the attack on him. Under the same provisions he also claimed that the lack of an investigation was due to prejudice on the part of the authorities.

Court’s analysis and conclusions

Assessing the severity of the treatment inflicted on the applicant, the Court considered that the injuries sustained by the applicant, him being threatened with a knife, and **particularly the infringement of human dignity constituted by the presumed racial motive for the violence**, qualify the treatment to fall within the scope of Article 3.

As to the compliance with the state’s positive obligations, the Court noted that a preliminary investigation was promptly initiated, all evidence collected and transmitted to the public prosecutor for a decision on whether the two Bulgarian youths should be prosecuted for racist violence. However, the prosecution decided that the offence had not been made out and, in particular, that the racist motivation for the violence had not been established. The prosecuting authorities concentrated their investigations on establishing who started the fight, merely noting the lack of evidence that the violence had been motivated by racist considerations. The Court considered that in light of the specific substantiated allegations about racist insults made by the applicant (racial slurs, the two alleged perpetrators were skinheads who were well known to the police), the competent authorities had plausible evidence at their disposal suggesting possible racist motivation for the violence and failed in their obligation to take all reasonable measures to investigate this. The prosecuting authorities neither asked the witness about the remarks he may have heard during the incident, nor questioned the accused about a possible racist motive for their actions.

¹⁰² Press-release of 11.03.2014.

As the government contended that other legal remedies had been open to the applicant, such as a private prosecution for minor injuries or claiming damages in tort vis-à-vis the two persons responsible, the Court observed that a private prosecution would not cover the alleged racist motivation for the violence, which is a fundamental part of the applicant's complaint. As to the possibility of bringing an action for damages, the Court observed that such an action, which could lead to payment of compensation but not to the prosecution of those responsible, would not fulfil the state's procedural obligations under Article 3 in a case of assault. The alternative legal remedies mentioned by the government therefore could not be considered, under the circumstances of this case, capable of fulfilling the state's procedural obligations.

The Court concluded that there has been a violation of Article 3 under its procedural aspect, taken separately and in conjunction with Article 14.

Comments

With this case, the Court confirmed the state's duty to investigate a possible racial motive behind an act of violence, including to take into consideration the facts of the case suggestive of such a motive. In this case, in particular, the clear indications of bias motive were the racial slurs uttered by the attackers during the fight. Also, the alleged perpetrators were known to the police as skinheads, well-known for their extremist, racist ideology. Further, the Court referred to the findings of various national and international authorities concerning the failure by the Bulgarian authorities effectively to implement provisions punishing cases of racist violence as an important contextual information that should have been taken into consideration.

In this case, the Court also highlighted that racist motivation is an important factor in assessing the severity of ill-treatment in the light of Article 3, and thus its applicability. In its case-law, the Court noted that even where the victim did not suffer serious or lasting physical injuries, the treatment can be described as "degrading" in so far as it constituted an assault on "precisely that which it is one of the main purposes of Article 3 to protect, namely a person's dignity and physical integrity." For example, in

the case *Dorđević v. Croatia* (2012),¹⁰³ a case concerning harassment of a person suffering from physical and mental disabilities, the Court ruled that the feelings of fear and helplessness caused by the ill-treatment were sufficiently serious to attain the level of severity required to fall within the scope of Article 3, even though the applicant had suffered physical injuries on only one occasion. Discriminatory remarks and racist insults must in any event be considered an aggravating factor when assessing a given instance of ill-treatment in the light of Article 3, applicable to both the acts attributed to state agents (see the case *B.S. v. Spain* (2012)¹⁰⁴ and to private individuals, like in this case. In the context of religious intolerance, the Court held that the guarantees under Article 3 could not be limited to acts of physical ill-treatment, but could also cover the infliction of psychological suffering by third parties (see the case *Begheleri and Others v. Georgia* (2014)).¹⁰⁵

***Burlya and Others v. Ukraine* (Application no. 3289/10)¹⁰⁶ from 6 November 2018**

Note on the procedure

The applicants are Ukrainian nationals of Roma ethnicity, they alleged that the attack on their homes in the course of an anti-Roma "pogrom", which the authorities had allegedly been complicit in or had at least failed to prevent or to investigate effectively, as well as their inadequate living conditions following their displacement as a result of that attack, had breached Articles 3, 8, 13,¹⁰⁷ 14 of the Convention and Article 1 of Protocol No. 1.¹⁰⁸

¹⁰³ This case is analysed in more detail in the section *Hate crimes motivated by the bias against people with disabilities*.

¹⁰⁴ This case is analysed in more detail in the section *Intersectionality*.

¹⁰⁵ This case is analysed in more detail in the section *Hate crimes motivated by the religious bias*.

¹⁰⁶ *Burlya and others v. Ukraine*.

¹⁰⁷ Article 13 - Right to an effective remedy.

¹⁰⁸ Article 1 of Protocol No 1 - Protection of property.

Summary of the facts¹⁰⁹

On 7 September 2002, a 17-year-old ethnic Ukrainian was murdered in the village of Petrivka, in the Odessa Region of Ukraine, allegedly by a Romany man. In response, a crowd of residents demanded the expulsion of all Roma from the village. At a meeting the following day, the local council agreed with this approach. Following an intervention by the District Administration and District Police Department, the council decided to ask law enforcement authorities to expel “socially dangerous individuals, regardless of ethnic origin”.

That evening, the village mayor advised Roma residents to leave ahead of an impending “pogrom”. That same night, a mob estimated at several hundred people ransacked the applicants’ homes and destroyed belongings. Police officers were present during the attack but did not try to prevent the looting and apparently concentrated solely on preventing human casualties. Most of the applicants were in the village during the build up to the attack, between 7 and 9 September, although a small group had left beforehand and did not discover what had happened until their return afterwards.

Criminal proceedings were initiated immediately, on 10 September, for suspicion of disorderly conduct committed in a group. The investigation, led by a regional police investigator but also involving local police, was suspended and reopened on a number of occasions before its definitive suspension in March 2009.

Court’s analysis and conclusions

First, the Court distinguished between two groups of applicants: 1) the applicants who were present in the village in the run-up to the attack of the night of 9-10 September 2002 and had to flee their homes in the village under the threat of that attack, and 2) the applicants who, by their own admission, were away from their homes at the time of the events in question, and so had no knowledge of the imminent attack, having only learned about the damage done to them afterwards.

A violation of Article 3 taken in conjunction with Article 14 in respect of the Group I

In relation to the **substantive aspect of Article 3**, the Court established that the attack on the applicants’ homes was motivated by anti-Roma sentiment. It further established that the police failed to take any measures to protect the applicants’ homes from the attack and no objective reason was given for their inaction. In particular, both the police in the village and the police at the district level knew about the pogrom being prepared sufficiently ahead of time. Furthermore, the resolution of the village council and in particular the police presence and passivity at the scene of the attack, created an appearance of official endorsement for the attack. Lastly, the attack constituted degrading treatment, in particular on account of the attitude of the authorities. In particular the Court considered that this group of applicants must have felt fear, anguish, helplessness and inferiority at having to flee their homes, which would in turn have been exacerbated by the knowledge that these would likely be ransacked. This had grossly diminished their dignity and had amounted to degrading treatment, in violation of Article 3. All of the above led the Court to conclude that there has been a violation of the substantive aspect of Article 3, taken together with Article 14.

In relation to the **procedural aspect of Article 3**, the Court noted that the domestic investigation into the attack was characterized by a number of serious omissions. Furthermore, members of the local police played an active role in the investigation despite being accused of involvement in the attack. Circumscribing the investigation in such a fashion and the failure to explore such a clearly required line of inquiry, in the eyes of the Court, indicated not only inadequacy and lack of thoroughness in the investigation, but also a lack of independence. In addition, despite clear evidence that the attack targeted members of a specific ethnic group, it was investigated as an ordinary disturbance and no attention was given to anti-Roma prejudice as a possible aggravating circumstance. This led the Court to conclude that the investigation into the incident cannot be considered as having been effective, thus, there has been a violation of the procedural aspect of Article 3, taken in conjunction with Article 14.

¹⁰⁹ Press-release of 06.11.2018.

A violation of Article 3 taken in conjunction with Article 14 in respect of the Group II

In light of the analysis and conclusions concerning the Group I applicants, the Court found that the situation of the Group II applicants does not fall within the ambit of Article 3 and can be sufficiently addressed under Article 8. Therefrom, the Court noted that the same conclusions are also valid for the Group II applicants because the only difference between them and the former group was that they were absent from the village at the time of the events from 7-10 September 2002 and only returned to the village later to find their homes damaged. The Court reiterated its findings from the above, and held that those considerations are sufficient for the Court to find that there has been a violation of Article 8, taken in conjunction with Article 14, on account of the role the authorities played prior to and in the course of the attack on the applicants' homes and their failure to conduct an effective investigation into the attack.

Comments

The Court highlighted the role of the local authorities in preventing and protecting against the attacks, in this case the attack on the community and their houses, motivated by anti-Roma sentiments. The destruction of their houses had amounted to inhuman and degrading treatment, for which the authorities were responsible on the grounds that they had been complicit in the attack and had failed to protect them from it, i.e. they did not take any steps to prevent it and stood by as it unfolded.

In this case, when assessing the scope of application of and responsibility under Article 3, the Court pointed out two aspects that contributed to diminishing the applicants' dignity. First is the **nature of the attack**, namely, its bias motive and the impact it can have on people sharing the same protected characteristic that is attacked. In particular, the applicants were attacked not for something they did but for who they were, i.e. **because of their ethnicity**. In addition to a physical harm, this can have a serious psychological impact and instigate the

feeling of fear of future attacks.¹¹⁰ This is particularly so where a community has historically been marginalized and subjected to discrimination or even persecution, which is the case of Roma communities in many countries in Europe. The second element that, in this case, only reinforced the feeling of anguish and helplessness among the applicants who had been warned about the attack was exactly that the authorities chose not to protect the applicants but advised them to leave before the "pogrom." So, the applicants were put in a situation where they had to conclude that **because of their family relations and their ethnicity, they could not count on the protection of the law** in the place where they had lived in regular accommodation for a substantial period of time. The decision to leave their homes before the attack was not a result of the exercise of their free will, but their way of protecting their physical integrity. Their feelings of fear and inferiority were further exacerbated by understanding that their homes would likely be plundered, and that they were unable to protect them without putting their lives at risk. All in all, it grossly diminished their dignity. The Court concluded that the role of the police and the fact that those events were driven by sentiments aimed at them as Roma was sufficient to constitute an affront to the applicants' dignity sufficiently serious as to be categorised as "degrading" treatment.¹¹¹

Lingurar v. Romania, (Application no. 48474/14) from 16 April 2019

Note on the procedure

The applicants are a family of four Romanian nationals of Roma origin who complained that they had been ill-treated by the police, that the investigation into their allegations had been ineffective and that the authorities' justification for the raid had been racist. They relied on Article 3 and Article 14.

¹¹⁰ Understanding the Needs of Hate Crime Victims, OSCE/ODIHR, 2020, <https://www.osce.org/odihr/463011>.

¹¹¹ *Burlyta and others v. Ukraine*, § 134.

Summary of the facts¹¹²

According to the applicant's family, several police officers and gendarmes wearing special intervention clothing, including balaclavas, broke down their front door during the raid in the early hours of 15 December 2011, dragged them out of bed and beat them. The two male family members were further abused in the yard, then taken to the local police station for questioning. They were released the same day with a fine for illegally cutting timber. The family went to the local hospital after the raid for treatment of abdominal and chest pain, and bruising. Medical reports for three of the applicants concluded that their injuries could have been caused by them being hit with hard objects.

In 2012, the family lodged a criminal complaint accusing the law enforcement authorities of violence. After an initial investigation, it was concluded that there was not enough evidence to prosecute, the courts ordered the prosecuting authorities to carry out further enquiries, and in particular to justify the applicants' injuries. The new investigation concluded that the male applicants must have been injured when the police had to use force to immobilise them, while the women applicants' injuries could be explained by "behaviour specific to Roma", namely pulling their own hair and slapping themselves on their faces. The prosecutor also noted that most of the inhabitants of Vâlcele where applicants lived, were known for breaking the law and being aggressive towards the police. The courts finally dismissed the applicants' complaints about the prosecutors' decisions in 2014. They considered the prosecutors' explanations for the applicants' injuries to be plausible and found that the police officers had not used excessive force. Both the prosecuting authorities and the courts dismissed the applicants' allegations that it was a systematic practice in the area for the police to attack the Roma community.

Court's analysis and conclusions

Alleged ill-treatment

The Court noted that the applicants had been left with injuries requiring medical care after the raid, which had attained the minimum level of severity under Article 3. Nothing suggested that four gendarmes responsible for the raid, part of a group of highly trained officers, had been overwhelmed by the unarmed applicants; therefore, the Court rejected the argument that the use of force had been necessary because of the applicants' aggressive behaviour. Moreover, no proceedings had ever been initiated against the applicants for any violent crime. As to the authorities' hypothesis that the injuries suffered by the women applicants had been self-inflicted, there was no evidence to corroborate it. The Court therefore stated that the force used by law-enforcement officers during the raid had not been proportionate and held that there had been a violation of Article 3 in its substantive limb.¹¹³

Alleged racial motives for the organisation of the police raid

The Court noted that in the police intervention plan, drafted prior to the police raid of 15 December 2011, the authorities identified the ethnic composition of the targeted community and referred to the alleged anti-social behaviour of ethnic Roma and the alleged high criminality among Roma. The same assertions were made by the investigators, who explained the applicants' alleged aggressiveness by their ethnic traits or by habits "specific to Roma." The Court considered that the manner in which the authorities justified and executed the police raid showed that the police had exercised their powers in a discriminatory manner, expecting the applicants to be criminals because of their ethnic origin. The Court found that that had amounted to **ethnic profiling of the applicants** and that it had been discriminatory, in violation of Article 14 taken in conjunction with Article 3.¹¹⁴

112 Press-release of 16.04.19

113 §§ 69 - 73.

114 §§ 74 -78.

Alleged lack of an effective investigation

The Court noted the evidence produced by the parties and the available material which show that in Romania the **Roma communities are often confronted with institutionalised racism and are prone to excessive use of force by the law-enforcement authorities**. In this context, in the eyes of the Court, the mere fact that in the present case stereotypes about “Roma behaviour” feature in the authorities’ assessment of the situation, may give rise to suspicions of discrimination based on ethnic grounds. The Court concluded that such suspicions, coupled with the modalities of the intervention of 15 December 2011, should have prompted the authorities to take all possible steps to investigate whether or not discrimination may have played a role in the events. However, the applicants’ allegations of discrimination against and criminalization of the Roma community have been dismissed by the domestic authorities and courts without any in-depth analysis of all the relevant circumstances of the case. Thus, there had also been a violation of Article 14 taken in conjunction with Article 3 concerning the investigation. Having found a violation of Articles 3 and 14 together, the Court held that no separate issues arose under Article 3 alone concerning the applicants’ complaint about the ineffectiveness of the criminal investigation.

Comment on the decision

This case has highlighted a problem of **institutional racism** and **ethnic profiling**.¹¹⁵ In this case, the Court for the first time has explicitly used the term “ethnic profiling” with regard to police action, and found it discriminatory. The Court observed that the applicants’ own behaviour was extrapolated from a stereotypical perception that the authorities had of the Roma community as a whole, and thus the applicants were targeted because they were Roma and

because the authorities perceived the Roma community as anti-social and criminal. This conclusion goes beyond a simple expression of concern about ethnic discrimination in Romania. It shows specifically that the decisions to organise the police raid and to use force against the applicants were made on considerations based on the applicants’ ethnic origin. The authorities automatically connected ethnicity to criminal behaviour, thus their ethnic profiling of the applicants was discriminatory.

Further, the Court noted that the same attitude towards the Roma community in Romania is shared by the prosecuting authorities and national courts. The prosecutor also considered that the police raid had been rendered necessary by the problems experienced with the Roma community and their criminal behaviour. This shows that the authorities extended to the whole community the criminal behaviour of a few of their members on the sole ground of their common ethnic origin. Lastly, the domestic courts accepted an assessment made by the police, as justification for the use of force in which negative inference seemed to have been drawn from the ethnic composition of the community. The domestic courts did not censure what seemed to be a discriminatory use of ethnic profiling by the authorities.¹¹⁶ To this end, importantly, the Court reiterated that in situations where there is evidence of patterns of violence and intolerance against an ethnic minority, **“the positive obligations incumbent on national authorities require a higher standard of response to alleged bias-motivated incidents.”**¹¹⁷

115 Preventing unlawful profiling today and in the future: a guide, FRA, 2018, <https://fra.europa.eu/en/publication/2018/preventing-unlawful-profiling-today-and-future-guide>. This guide explains what profiling is, the legal frameworks that regulate it, and why conducting profiling lawfully is both necessary to comply with fundamental rights and crucial for effective policing and border management. The guide also provides practical guidance on how to avoid unlawful profiling in police and border management operations.

116 *Lingurar v. Romania*, §§ 75-76, 79.

117 *Lingurar v. Romania*, § 80.

Hate crimes motivated by religious bias



Begheluri And Others v. Georgia (Application no. 28490/02) from 7 October 2014

Note on the procedure

The applicants are 99 Georgian nationals, all of whom, with one exception, are Jehovah's Witnesses. They alleged that their rights under Articles 3, 6, 9, 10, 11, 13 and 14¹¹⁸ of the Convention had been breached on account of the large-scale religiously motivated violence to which they had been subjected in Georgia and the relevant authorities' failure to prevent, stop or investigate the alleged violations.¹¹⁹

Summary of the facts¹²⁰

The alleged harassment included 30 instances of physical violence and verbal abuse of Jehovah's Witnesses. In particular, in September 2000, a meeting of some 700 Jehovah's Witnesses, which took place in a village in Western Georgia on the property of two of the applicants, was disrupted by the police. According to the applicants, police officers opened fire, devastated the house and beat several of the applicants. Other applicants submit that they were assaulted by groups of people while celebrating a religious festivity in a private house, visiting a congregation, or distributing religious literature in the street. Others, who were on their way to a religious meeting in September 2000, were stopped by the police at check-

points on the road and were prevented from getting to the meeting. At the same time, believers in the Georgian Orthodox Church were allowed to enter the meeting place, where they destroyed religious objects and beat attendees. On another occasion, a large group of Orthodox believers entered a courtroom in Tbilisi, where a hearing was held in a criminal case against two Jehovah's Witnesses. The former attacked several of the applicants, as well as journalists and observers, using large wooden crosses, among other things.

The applicants lodged approximately 160 complaints with the investigating authorities, alleging that some of the attacks were either carried out with the direct participation of the police and other representatives of the authorities or with their connivance. Those complaints failed to bring about any concrete results. In only a few of the cases did the applicants receive a written response. In a majority of the cases the applicants complained about the investigating authorities' inactivity to the General Prosecutor, without any adequate follow-up. In three cases the applicants were able to take their complaints to the Supreme Court, which dismissed them.

Several international bodies and non-governmental organisations, including the UN High Commissioner for Human Rights and Amnesty International, repeatedly reported that in 2000-2001, the Jehovah's Witnesses in Georgia had been the target of violence by private individuals and Orthodox believers, and that the relevant State authorities had failed to prevent or stop this.

118 Article 6 – Right to a fair trial, Article 9 – Right to a freedom of thought, conscience and religion, Article 10 – Right to a freedom of expression, Article 11 – Right to a freedom of assembly and association.

119 For the purpose of this publication, only considerations in relation to Articles 3 and 14 are presented, with a resume of main findings of the Court without detailing individual complaints.

120 Press-release of 07.10.2014.

The Court's analysis and conclusions [selected aspects]

As to the treatment inflicted and the authorities' duty to prevent and protect

The incidents of which the applicants complained had varied significantly as regards the scale of violence and the extent of the alleged involvement of state actors.¹²¹ The Court observed however that the common feature of all incidents was the feeling of fear, anguish and humiliation they had all allegedly caused the applicants. The Court found a violation of Article 3 with regard to 32 of the applicants, on account of the ill-treatment which they had suffered.¹²² In those cases, the Court concluded that it was established beyond reasonable doubt that they had been subjected to physical violence and/or to abuse and humiliation in the context of a violent attack. In all those cases, the police had done nothing to prevent the attacks; in several cases, State officials had even been directly involved. For example, as regards the assault on several applicants during a court hearing in Tbilisi, the Court noted that the court proceedings in question had concerned a widely known criminal case against two Jehovah's Witnesses. Although the authorities were aware of the sensitivity of the case and the possibility of a violent confrontation, they had not taken appropriate security measures. During the incident itself, the judge and the security personnel had not intervened to stop the confrontation.

As to the authorities' reaction and the follow-up given to the complaints

The Court noted – and the government did not contest – that the alleged acts of violence had

been brought to the attention of the relevant authorities. The latter had therefore had a duty to promptly verify the information and take the necessary steps to prosecute any offences committed. However, in some cases no investigation had been conducted. In the remaining cases, the investigations had been plagued by a number of deficiencies. This included significant delays in opening criminal proceedings; key investigative steps taken only after substantial delays; no medical examinations of those applicants alleging physical abuse; and no questioning of the alleged perpetrators; insufficient involvement of the applicants in the criminal proceedings.

Furthermore, the authorities failed to look into the possible discriminatory motive behind the violence against the applicants, which, in the eyes of the Court, in itself raises an issue as to the inadequacy and ineffectiveness of the investigation. The Court considered that, in view of the available material at hand, the discriminatory motive of the assailants, whether private individuals or state officials, in attacking the applicants – all of whom were Jehovah's Witnesses – was evident from the widespread prejudices and the scale of the violence in Georgia at the time.¹²³ All the applicants explicitly alleged in their criminal complaints that they had been subjected to violence because of their religion. Nevertheless, in any of the investigations there hadn't been any efforts taken to discover the discriminatory intent behind the violent incidents. Those deficiencies were sufficient for the Court to conclude **that there had been a systematic practice on the part of the Georgian authorities of refusing to adequately and effectively investigate** acts of violence against Jehovah's Witnesses. There had accordingly been a violation of Article 3 under its procedural limb on that account.

Furthermore, the Court found a violation of Article 14 in conjunction with Article 3. Having regard to all the available materials, the Court established that the various forms of violence directed against the applicants either by State officials or private individuals had been motivated by a bigoted attitude towards the community of Jehovah's Witnesses. The Georgian

121 A number of complaints were considered inadmissible due to the lack of evidence with regard to the treatment to which they had allegedly been subjected; or they had failed the "six months" rule.

122 In a number of cases, the Court did not find a violation of Article 3. In some, the Court observed that, although the incidents must have been disturbing, particularly in view of the apparent religious motive, those applicants had not shown that they had been exposed to violence affecting their physical and emotional integrity to an extent required by Article 3. In others, the applicants had not submitted any concrete evidence to show that the relevant authorities had known or ought to have known of attacks on them.

123 *Begheluri and others v. Georgia*, § 141-142.

authorities took no steps whatsoever to investigate the alleged religious motive; while various police officers made tendentious remarks in relation to the applicants' religion throughout the proceedings. To that end, the Court reiterated that remarks disclose a general discriminatory attitude of the authorities. The same discriminatory state of mind had also been at the core of the relevant public authorities' failure to investigate the incidents of religiously motivated violence in an effective manner.

Comments

This case has reiterated the state's obligation to protect from violent acts motivated by religious bias and to investigate acts of such violence taking into account the bias motive. Moreover, the Court has highlighted that contexts of hostile attitudes or behaviour towards certain groups, documented by international and domestic actors, may be playing an increasing role in the assessment of alleged bias-motivated offenses. Specifically, in this case, the Court took into consideration a **national climate of religious intolerance towards the community of Jehovah's Witnesses in Georgia** at the time of the events as an essential aspect to a) determine whether the treatment to which the applicants were subjected met the threshold of the severity to fall within the ambit of Article 3, and b) signal the need for the investigation into discriminatory motives behind the attacks.

Furthermore, this case has highlighted another important aspect of bias-motivated violence, i.e. that if left unaddressed it **tends to escalate** and as such can pose a security threat not only to the individuals and communities targeted because of a particular personal characteristic but also to the society as a whole. In this particular case, the relevant authorities were ineffective in preventing and stopping religiously motivated violence. Through the conduct of their agents, who either participated directly in the attacks on Jehovah's Witnesses or by their acquiescence and connivance into unlawful activities of private individuals, the authorities created a climate of impunity, which ultimately encouraged other attacks against Jehovah's Witnesses throughout the country. Furthermore, by an obvious unwillingness to ensure

the prompt and fair prosecution and punishment of those responsible, the authorities neglected the preventive and deterrent effect in relation to future violations against Jehovah's Witnesses.



Hate crimes motivated by bias against people with disabilities

Dorđević v. Croatia
(Application no. 41526/10)
from 24 July 2012

Note on the procedure

The applicants are two Croatian nationals, a mother and her mentally and physically disabled son Dalibor. They complained that they had been harassed, both physically and verbally, for over four years by children living in their neighbourhood, and that the authorities had failed to protect them. They relied on Articles 2, 3, 8, 13 and 14.

Summary of facts¹²⁴

Dalibor has no legal capacity because he is mentally and physically disabled, the result of an illness he suffered in his early childhood. His mother takes care of him, including feeding, dressing and washing him. She also helps him move about as his feet are severely deformed.

Both Dalibor and his mother complained that they had been continuously harassed between July 2008 and February 2011 by pupils from the nearby primary school and that the authorities had not adequately protected them. A series of incidents were recorded throughout that period, with children ringing the family doorbell at odd times, spitting on Dalibor, hitting and pushing him around, burning his hands with cigarettes, vandalising their balcony and shouting obscenities at them. Those attacks had left Dalibor deeply disturbed, afraid and anxious. According to Dalibor and his mother, the harassment was triggered by Dalibor's disability and their Serbian origin.

Dalibor and his mother complained on numer-

ous occasions to various authorities, including the social services and the ombudsman. They also rang the police many times reporting the incidents and seeking help. Following each call, the police arrived at the scene, sometimes too late, and sometimes only to tell the children to disperse or stop making noise. They also interviewed several pupils and concluded that, although they had admitted their violent behaviour towards Dalibor, they were too young to be held criminally responsible. In a number of medical reports on Dalibor's condition, doctors recorded his deep distress as a result of the children's attacks on him, and recommended psychotherapy as well as a secure and calm environment.

The Court's assessment and conclusions

Ill-treatment (Article 3) in respect of the first applicant (Dalibor)

The Court observed that Dalibor had been continuously harassed and, as a result, was felt helpless and afraid for prolonged periods of time. He had also been physically hurt on one occasion. That ill-treatment had been sufficiently serious to attract the protection of Article 3 in his regard.

The Court further noted that violent acts which fell under Article 3 required criminal-law measures against the perpetrators. However, given the young age of Dalibor's harassers (children below 14 years of age), it had been impossible to criminally sanction them. Therefore, the Court distinguished this case from cases concerning the state's procedural obligations under criminal law in respect of acts of ill-treatment contrary to Article 3 (a duty to conduct a thorough, effective and independent investigation). This case concerned the state's positive obligations in a different type of situation, outside the sphere of criminal law, where the competent authorities are aware of a situation

¹²⁴ Press-release of 24.07.2012.

of serious harassment against a person with physical and mental disabilities. It concerns the alleged lack of an adequate response to such a situation in order to properly address acts of violence and harassment that had already occurred and to prevent any such further acts.

As early as July 2008, Dalibor's mother had informed the police about the ongoing harassment of her son. Afterwards, she had repeatedly contacted them with additional complaints, which she had also brought to the attention of the ombudsman and the social services. Therefore, the authorities had been well aware of the situation. Nevertheless, while the police had interviewed some children about the incidents, they had made no serious attempts to the extent of the problem and to prevent further abuse taking place. The police had reported that the children had been pestering Dalibor but this had not been followed by any specific action. No policy decisions had been adopted and no monitoring mechanisms had been put in place in order to recognise and prevent further harassment. The Court was struck by the lack of any true involvement of the social services and the absence of counselling given to Dalibor. It concluded that, apart from responses to specific incidents, no relevant action of general nature had been undertaken by the relevant authorities, despite their knowledge that Dalibor had been systematically targeted and that future abuse had been quite likely. There had, accordingly, been a violation of Article 3 concerning Dalibor.¹²⁵

Protection of private and family life (Article 8) in respect of the second applicant

The Court reiterated that, under Article 8, states were not only obliged not to harm individuals, but they also had a duty to act in order to protect people's moral integrity from acts of others. Given that Dalibor and his mother had been subjected to repeated harassment, the mother's private and family life had been negatively affected too. In the same way as the authorities had not put in place any relevant measures to prevent further harassment of her son, they had failed to protect her. There had, therefore, been a violation of Article 8 concerned the second applicant.

¹²⁵ *Dorđević v Croatia*, §§ 141 – 150.

Comments

While this case has not been considered by the Court from the perspective of a duty to investigate a bias motive in offenses against people with disability, it is an important case that highlighted the state's responsibility to protect from a continued abuse and to effectively counter disability hate crimes. People with disabilities are regularly targeted by hate crimes, while these crimes remain widely invisible and misunderstood. Disability hate crimes are often different from other types of hate crime. For example, many are committed repeatedly over years and involve people who are close to the victims. Perpetrators may target people with disabilities, or people who are perceived to have a disability, because they believe that these people are vulnerable due to the symptoms of their impairment or health condition, thus considered "easy targets" who will not report an offense. The perception of all people with disabilities as vulnerable ultimately minimizes or disregards the social factors associated with their participation and inclusion within the society, and is prejudicial.¹²⁶

When analysing the response of the authorities to the situation, i.e. addressing acts of violence and harassment and preventing any such acts in the future, the Court emphasized the role of not only the police but also of the social services (social welfare centre) and other competent authorities (Ombudswoman for Persons with Disabilities, Ombudswoman for Children, school authorities). The Court specifically noted a failure of the authorities "to assess the true nature of the situation complained of, and to **address the lack of a systematic approach** which resulted in the absence of adequate and comprehensive measures."¹²⁷ Adopting systemic and coherent approach to prevent further abuse in the case of disability hate crimes is particularly important as these crimes are often repeated over an extended time period and are not visible.

¹²⁶ Disability Hate Crime, factsheet, OSCE/ODIHR, 2016. The factsheet provides information on how to recognize and report hate crimes against people with disabilities.

¹²⁷ *Dorđević v Croatia*, § 148.

IV.

Hate crimes motivated by sexual orientation, gender identity and gender expression

***M.C. and A.C. v. Romania,
(Application no. 12060/12)
from 12 April 2016***

Note on the procedure

The applicants are two Romanian nationals, M.C. and A.C. who alleged, in particular, that the investigations into their allegations of ill-treatment motivated by discrimination based on the sexual orientation had not been effective; thus, complained of the violation of Articles 3, 8, and 14 of the Convention and of Article 1 of the Protocol 12 to the Convention.¹²⁸

Summary of the facts¹²⁹

On 3 June 2006, the applicants participated in the annual gay march in Bucharest. On their way home, in the metro, they were attacked by a group of six young men and a woman. The attackers punched and kicked them and shouted homophobic abuse at them. Both applicants sustained injuries, including bruises, contusions and minor cranio-cerebral trauma – all confirmed in medical examinations undergone by the applicants. They also submitted that they underwent group therapy to deal with the psychological trauma of the attacks. The applicants immediately filed a criminal complaint against the attackers, stating that the assault was based on their sexual orientation. They believed that their attackers must have identified them during the march and then followed them into the metro because, following instructions given by the organisers, they were not wearing any visible signs that could have given away the fact that they had attended the march. Within days, they also presented all the evidence at their disposal, in particular pic-

tures taken by a photographer during the assault and the identification of certain attackers by both the photographer and M.C., the first applicant.

Their file was eventually allocated to the Metro Police Station in April 2007. One witness was subsequently heard and, as one of the attackers was believed to be a football club supporter, the police also attended 29 football matches and carried out random checks at metro stations. However, in 2011 the police stated that they did not intend to institute a criminal prosecution, having found it impossible to identify the culprits and the alleged crimes having in the meantime become statute-barred. The prosecuting authorities subsequently endorsed the police proposal and, ultimately in August 2012, the courts dismissed the applicants' complaint about the decision not to bring criminal proceedings, also finding that the crimes had become time-barred.

Court's assessment and conclusions

Admissibility

The Court found that the **applicants** availed themselves of the remedies which were available and sufficient for the purpose of this application and observed the six-month time-limit in the case; thus, it declared the complaint admissible.

Merits

On the **threshold of severity**, the Court reiterated that ill-treatment must attain a minimum level of severity to fall within the scope of Article 3. The assessment of this minimum is relative as it depends on all the circumstances of the case, such as the nature and context of the treatment, its duration, and its physical and mental effects and, in some instances, the sex, age and state of health of the victim. The

¹²⁸ Article 1 of the Protocol No 12 – General prohibition of discrimination.

¹²⁹ Press-release of 12.04.2016.

treatment is considered “degrading” within the scope of Article 3 if it causes in its victim feelings of fear, anguish and inferiority, if it humiliates or debases an individual, if it breaks the person’s physical or moral resistance or drives him or her to act against his or her will or conscience, or if it shows lack of respect for, or diminishes, human dignity.¹³⁰

In this case, the Court took note of the physical and verbal abuse of the applicants that left them with injuries and the need for a group therapy to deal with the psychological trauma, the feelings of distress, anxiety and debasement that they suffered because of the attack. The Court looked specifically at the role of the homophobic bias in inflicting the trauma to the applicants, and considered that the aim of the physical and verbal abuse “was probably to frighten the applicants so that they would desist from their public expression of support for the LGBTI community.” In this regard, the Court specifically acknowledged that “the LGBTI community in Georgia finds itself in a precarious situation, being subject to negative attitudes towards its members.” Based on that, the Court concluded that the treatment was not compatible with respect for their human dignity and thus reached the requisite threshold of severity to fall within the ambit of Article 3 taken in conjunction with Article 14.¹³¹

On **effectiveness of the investigation**, the Court reiterated that for the investigation to be regarded as “effective”, it should be capable of leading to the establishment of the facts of the case and to the identification and punishment of those responsible, it should be prompt and reasonably expeditious.¹³² Moreover, “when investigating violent incidents, such as ill-treatment, state authorities have a **duty to take all reasonable steps to uncover any possible discriminatory motives** [...]. The respondent state’s obligation to investigate possible discriminatory motives for a violent act is an obligation to use its best endeavours to do so, and is not absolute. The authorities must do whatever is reasonable in the circumstances to collect and secure the evidence, to explore all

practical means of discovering the truth, and to deliver fully reasoned, impartial and objective decisions, **without omitting suspicious facts that may be indicative of violence induced by, for instance, racial or religious intolerance, or violence motivated by gender-based discrimination.**”¹³³

In this case, the Court noted that after receiving the complaint the authorities took no significant steps in the investigation for a period of almost a year, there were significant periods of inactivity on the part of the authorities during the investigation, and more than five years after the initial criminal complaint, the police had not established the identity of the culprits. Furthermore, there were several shortcomings in the investigation, and authorities made no use of the evidence adduced by the applicants, specifically statements, photographs and the identification of some individuals in the group of attackers. More importantly, the authorities did not take reasonable steps to examine the role played by possible homophobic motives behind the attack. “The necessity of conducting a meaningful inquiry into the possibility of discrimination motivating the attack was **indispensable given the hostility against the LGBTI community** in the respondent State and in the light of the applicants’ submissions that **hate speech**, that was clearly homophobic, had been uttered by the assailants during the incident.”¹³⁴ Based on the above, the Court concluded that the investigations into the allegations of ill-treatment were ineffective as they lasted too long, were marred by serious shortcomings, and failed to take into account possible discriminatory motive; thus, found a violation of Article 3, its procedural limb, read together with Article 14.

With regard to other Articles raised by the applicants, Articles 8 and 1 of Protocol No. 12 to the Convention, the Court noted that these complaints were likewise admissible but considered that it has examined the main legal questions of the applicants under Articles 3 and 14, thus no need to give a separate ruling on the merits of the remaining complaints.

¹³⁰ *M.C. and A.C. v. Romania*, §§ 107-108.

¹³¹ *Id.*, §§ 116 – 119.

¹³² *Id.*, § 111.

¹³³ *Id.*, § 113.

¹³⁴ *Id.*, § 124.

Comments

With this case, the Court reiterated the state's duty to conduct an effective investigation into bias motivated crimes, in particular, motivated by bias based on sexual orientation or gender identity. Procedural duty includes taking all reasonable steps to uncover any possible discriminatory motives. The trigger for this procedural duty is the existence of facts or elements of an offense pointing to a possible role of discriminatory overtones in the events. In this case, the Court considered that homophobic hate speech uttered during the incident taken together with the general context of hostility against the LGBTI community in Georgia were clear hate crime indicators that should have triggered investigation into the bias motives.

Another important hate crime indicator in this case is the event that directly preceded the attack on the applicants, i.e. the applicants participated in the annual gay march in Bucharest. They must have been deliberately followed by the perpetrators as they did not have any distinctive clothing or badges that would identify them as having participated in the march. It is a regular occurrence that hate crimes and hate incidents take place around pride parades or other events, such as festivals or movie screenings, dedicated to the International Day against Homophobia, Biphobia and Transphobia, observed on 17 May, or a Pride Month, which is usually in June, but can be celebrated during other months as well.

In relation to the pride parades and attacks on the pride participants, in its judgement *Identoba and Others v. Georgia*, the Court also highlighted the state's **positive obligation to protect the freedom to participate in the peaceful assemblies from the bias-motivated violence**, stemming from the Article 11 (freedom of assembly and association). The Convention protects public forms of expression, including through holding a peaceful assembly, and the expression of opinions in relation to campaigning for and raising awareness of the fundamental rights of various sexual minorities.¹³⁵ To give meaning to this freedom, the authorities should not only respect it, i.e. not interfere, but also

¹³⁵ *Identoba and Others v. Georgia*, § 97.

actively protect through positive measures.¹³⁶ Moreover, in this case, the Court emphasized that the authorities have a **heightened burden of protection** of the individuals when there is prior knowledge of public hostility towards the LGBT community.¹³⁷ Given the history of public hostility towards the LGBT community in Georgia, the Court considered that the authorities knew or ought to have known of the risks associated with any public event concerning that vulnerable community.

Association Accept and others v. Romania (Application no. 19237/16) from 1 June 2021

Note on the procedure

The application is by a non-profit association ACCEPT ("the applicant") and five Romanian nationals ("the individual applicants"). The application concerns the alleged failure to protect the applicants from homophobic verbal abuse and threats and to conduct a subsequent effective investigation into the applicants' complaint. It also concerns the consequences of these incidents on the applicants' right to freedom of peaceful assembly. The applicants relied on Articles 3, 8, 11, 13 and 14 of the Convention as well as on Article 1 of Protocol No. 12 to the Convention.

Summary of the facts¹³⁸

During the applicant association's LGBT History Month in February 2013 a screening of a film

involving a same-sex family was held. The other five applicants attended the screening. A protest against the film screening took place at the same time. Fifty or so of the protestors entered the auditorium and disrupted the screening. They shouted insults such as "death to homosexuals", "faggots", and "you filth".

¹³⁶ *Id.*, § 94.

¹³⁷ *Id.*, § 72.

¹³⁸ Press-release of 01.06.2021.

Some were allegedly carrying far-right flags. The intruders seemed to be associated with a far-right political movement, *Noua Dreaptă* (“the New Right”), which is openly opposed to, among other things, same-sex marriage and same-sex adoptions.

The organisers alerted the police, who were present at the scene. They entered the room, confiscated some flags, and left, despite being asked to remain. As the protestors had blocked the projector, the organisers were ultimately forced to cancel the screening. On 5 March 2013 the applicant’s association complained to the police about the incident. An investigation was opened and then closed on 14 October 2014 (the incident was described as an “exchange of views”), a decision that was upheld by the authorities. An investigation into the use of fascist symbols was also discontinued on 11 August 2017. Several complaints by the applicants to the courts were in vain. Overall, there were no indictments.

Court’s assessment and conclusions

Alleged violation of Articles 3, 8 and 14 of the Convention and of Article 1 of the Protocol No. 12 to the Convention.

The Court first assessed the applicability of Article 3, and stressed that ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3. It covers acts of physical ill-treatment, but also the infliction of psychological suffering. Furthermore, the Court reiterated that “discriminatory treatment as such can in principle amount to degrading treatment within the meaning of Article 3 where it attains a level of severity such as to constitute an affront to human dignity.”¹³⁹

In this case, the complaint was based on the psychological effect that the incident allegedly had on the applicants. However, the applicants have not pointed to “any facts that could enable the Court to find that the level of mental suffering that they experienced as a result of the incident came close to the level that the Court has found in other similar cases” (e.g. *M.C. and A.C. v. Romania*, where verbal abuse

was followed by physical assault). Although the counter-demonstrators outnumbered and surrounded the applicants, they were continuously monitored by the police, albeit from the corridor outside the screening room where the incident took place. No acts of physical aggression took place between the applicants and the counter-demonstrators. The verbal abuse, although openly discriminatory and performed within the context of actions that showed evidence of a pattern of violence and intolerance against a sexual minority, were not so severe as to cause the kind of fear, anguish or feelings of inferiority that are necessary for Article 3 to come into play. Thus, the Court found that the minimum level of severity required for Article 3 has not been attained, therefore, rejected the complaint under this article.¹⁴⁰

Nevertheless, treatment that does not reach a level of severity sufficient to bring it under Article 3 may nonetheless breach the “private life” aspect of Article 8, if the effects on the applicant’s physical and moral integrity are sufficiently adverse. The concept of “private life” is a broad term and also covers the physical and psychological integrity of a person. Such elements as a person’s sexual orientation and sexual life fall within the personal sphere protected by Article 8.¹⁴¹ The Court considered that the violent verbal attacks on the applicants, which, moreover, had occurred in the context of evidence of patterns of violence and intolerance against a sexual minority, had attained the level of seriousness required for Article 8 to come into play. Consequently, the Court held that the case falls within the scope of Article 8.

On the **obligation to protect**, the Court examined the authorities’ intervention and its effectiveness during the incident. The incident concerned a group of about 20 people who had been verbally abused by a group of 45 individuals who effectively broke up their event. The police did not stop the intruders, to a large extent, refrained from intervening to de-escalate the situation, and remained outside the room in which the incident occurred, despite being there in sufficient numbers. The Court furthermore noted that “the authorities’ attitude and decision to

139 *Association ACCEPT and others v. Romania*, § 52.

140 *Id.*, §§ 52-57.

141 *Id.*, § 63.

remain aside despite being aware of the content of the slurs [...] seems to indicate a certain bias against homosexuals.”¹⁴² The reports drafted by the police after the events contained no reference to the homophobic insults and described the incident without reference to homophobia. The Court concluded that the authorities had failed to correctly assess the risk incurred by the individual applicants at the hands of the intruders and to respond adequately in order **to protect the individual applicants’ dignity against homophobic attacks by a third party.**¹⁴³

The Court further examined the state **obligation to investigate a possible discriminatory motive behind the events.** It observed that from the very beginning the authorities had clear indications of verbal abuse directed at the individual applicants motivated by sexual orientation, owing to the fact that the police were present during the events. This, according to the Court’s case-law, “mandated for an effective application of domestic criminal-law mechanisms capable of elucidating the possible hate motive with homophobic overtones behind the violent incident.”¹⁴⁴ However, the authorities failed to take effective steps into the investigation despite having several leads. Furthermore, the homophobic nature of the attack had not been duly examined by the authorities. It was only almost two years after the incident that the prosecutor started investigating the allegations that the intruders had exhibited fascist symbols; however, the alleged homophobic reasons for the commission of the acts were not mentioned in the prosecutors’ decisions. The Court also noted that the language used by the authorities (“followers” of same-sex relations, “sympathisers” of far-right organisations) suggested bias on the part of the authorities against the individual applicants. Moreover, the Court noted that the authorities did not examine clear hate crime bias indicators: the homophobic slurs uttered during the attack and the fact that the organisation that seemed to have been behind the attacks was notoriously opposed to homosexual relations. In the Court’s eyes “the necessity of conducting a meaningful inquiry into the

possibility that discriminatory motives had lain behind the abuse was absolute, given the hostility against the LGBT community in Romania.”

Based on the above, the Court concluded that the authorities failed to offer adequate protection in respect of the individual applicants’ dignity (and more broadly, their private life), and to effectively investigate the real nature of the homophobic abuse directed against them. This established that the individual applicants suffered discrimination on the grounds of their sexual orientation; therefore, there has thus been a violation of Article 14, taken in conjunction with Article 8.

Alleged violation of Articles 11 and 14 of the Convention and of Article 1 of Protocol No 12 of the Convention

On the failure to protect the applicants’ right to freedom of peaceful assembly and to investigate the actions that had led to the interruption of their event, the Court reiterated that the right to freedom of peaceful assembly covered both private meetings and meetings in public places, whether static or in the form of a procession; in addition, it could be exercised by individual participants and by the persons organising the gathering. It asserted that the disruption of the screening in this case had amounted to an interference to the applicants’ right to peaceful assembly. The Court considered that the relevant facts were the same as for the complaint under Article 14 taken in conjunction with Article 8. In sum, the Court concluded that the authorities had failed to ensure that the event in question in this case could take place, falling short of their obligations under Article 14 taken in conjunction with Article 11.

Comments

With this case, the Court expanded on the applicability of Article 8 (its “private life” aspect) to the treatment of the verbal abuse and hate speech that do not reach a level of severity sufficient for Article 3. The treatment that affects psychological well-being and dignity falls within the sphere of private life. And for Article 8 to come into play, the sufficiently adverse effect on psychological integrity should be attained. In this case, the Court considered that the violent verbal homophobic attacks on the applicants, especial-

¹⁴² *Id.*, § 112.

¹⁴³ *Id.*, § 113.

¹⁴⁴ *Id.*, § 114.

ly taken in the context of evidence of patterns of violence and intolerance against a sexual minority, had attained the level of seriousness required for Article 8. To this, the authorities maintained that the threats (“death to the homosexuals”) or other remarks towards the applicants had not reached the threshold required by the applicable law to constitute a criminal offence. The Court stated that not “each and every utterance of hate speech must, as such, attract criminal prosecution and criminal sanctions,” however, “comments that amount to hate speech and incitement to violence, and are thus clearly unlawful on the face of things, may in principle require the States to take certain positive measures.”¹⁴⁵ The Court considered that in this case the authorities should have taken reasonable steps to investigate whether the verbal abuse directed towards the individual applicants constituted a criminal offence motivated by homophobia, and reaffirmed the state’s duty to unmask discriminatory motives and examine bias indicators in relation to the treatment that falls under Article 8.

Another important aspect of the case is the Court’s consideration of the investigation’s neutrality and effectiveness in light of the authorities’ clear display of the prejudice against the applicants. The latter was evidenced by the fact that the police reports had not mentioned homophobic abuse and hate speech uttered during the incidents, and the prosecutor’s office had used biased language (“followers” of same-sex relations, “sympathisers” of far-right organisations) or referred to the incident as constituting mere “discussions” or an “exchange of views”. In the eyes of the Court, “this language, far from being neutral or accidental, can suggest bias on the part of the authorities against the individual applicants, which may be seen as indicating that the authorities turned a blind eye to the homophobic overtones of the acts perpetrated, thus jeopardising the accuracy and effectiveness of the domestic proceedings as a whole.”¹⁴⁶ With this, the Court emphasized that a lack of neutrality in the investigation can call into question its effectiveness, which in turn leads to a failure to discharge positive obligation to investigate in an effective manner as required by the standards of the Convention.

145 *Id.*, § 119.

146 *Id.*, § 121.

Aghdgomelashvili and Japaridze v. Georgia (Application no. 7224/11) from 8 October 2020

Note on the procedure

The applicants are two Georgian nationals, whose application concerns their allegedly discriminatory ill-treatment by the police (on the grounds of their actual and/or perceived sexual orientation and gender identity) and lack of the effective domestic investigation into homophobic and/or transphobic motives behind the ill-treatment. The applicants rely on Articles 3, 8 and 14 of the Convention and Article 1 of Protocol No. 12.

Summary of the facts¹⁴⁷

On 15 December 2009, around 17 plain clothes police officers broke into the premises of the Inclusive Foundation, an LGBT non-governmental organization, where approximately eight to ten women were preparing an art exhibition. The police announced that they were there to carry out a search but presented neither a search warrant nor a judicial order. The applicants, both of whom worked for the NGO, as well as their colleagues claim that when they realized they were in the offices of an LGBT organization, the police became aggressive. One of them allegedly seized the mobile phone by force of the first applicant while another reportedly said he would have liked to be able to set the room on fire. The police officers insulted the women who were present, calling them “sick people”, “perverts” and “faggot”, and threatened to reveal their sexual orientation to the public and to hurt their family members. Policewomen then carried out a strip-search on almost all of the women present, including the applicants. No report was drawn up for these searches and the women concerned all felt that this measure had been intended to humiliate them, the police officers not having searched the clothes they ordered them to remove.

The criminal complaint on the abuse of power by the police was lodged by the applicants in January 2010 for police brutality, and at the

147 Press-release of 08.10.2020.

time of the application to the ECtHR has still not been concluded. The requests made by the applicants, who requested the status of victim or wanted investigating authorities to examine the allegedly discriminatory dimensions of the behaviour which had been that of the police during this intervention, remained unanswered.

Court's assessment and conclusions

Alleged inadequacy of the investigation

The Court reiterated that Article 3 requires a state to conduct some form of effective official investigation into cases of an individual suffering treatment infringing Article 3 at the hands of the police or other similar authorities. Furthermore, the authorities have a duty to take all reasonable steps to unmask possible discriminatory motives that might have played a part in the events. In this case, despite the applicants explicitly asking the authorities to take into consideration the discriminatory aspects of the police behaviour, the authorities have not undertaken a single investigative act, and to the date of the Court's consideration of the case, the investigation has not produced any conclusive findings. The Court considered that such "a prohibitive delay is in itself incompatible with the State's obligation under Article 3 of the Convention to carry out an effective investigation." More importantly, the Court considers that such protraction of the investigation exposed the authorities' inability or unwillingness to examine the role played by homophobic and/or transphobic motives in the alleged police abuse. The Court further noted clear hate crime bias indicators such as the police officers' hate speech during the incident that together with the well-documented hostility against the LGBT community in Georgia should have triggered a meaningful inquiry into the possibility that discrimination had been the motivating factor behind the police officers' conduct. The Court thus found that the investigation has been ineffective, and there has accordingly been a violation of Article 3 under its procedural aspect read together with Article 14.

Alleged ill-treatment

The Court considered that the version of the facts provided by the applicants, which the Government did not contest and which the precise and corroborating statements of eye-witnesses have confirmed, has been established beyond a reasonable doubt. It concludes that the behaviour of the police, motivated by homophobic and or transphobic hatred, was seriously inappropriate. The police not only intentionally humiliated and demeaned the applicants with hate speech, but they also threatened them: a threat to use physical force and a threat to make it actual and/or perceived. In addition, strip-searches, for which neither the police nor the government have ever put forward any justification, appeared to be particularly worrying and led the Court to conclude that their sole purpose was to make the applicants humiliated and to punish them for their association with the LGBT community. The behaviour of the police officers necessarily caused the applicants' feelings of fear, anguish and insecurity, which was not compatible with the right to respect for their human dignity. Consequently, the Court also found a violation of the substantive aspect of Article 3 taken together with Article 14.

Comments

With this decision, the Court reaffirmed the state's duty to conduct prompt and effective investigation, including a duty to examine the role played by homophobic and/or transphobic motives in the alleged police abuse. Like in other cases of bias-motivated crimes, the Court has specifically mentioned the authorities' duty to examine the bias indicators, which in this case were homophobic slurs and hate speech. Notably, the Court has also paid attention to the well-documented hostility against the LGBT community in Georgia, which in the Court's view indicated a pressing need to conduct a meaningful inquiry into the possibility that discrimination had been the motivating factor behind the police officers' conduct.

Sabalić v. Croatia (Application no. 50231/13) from 14 January 2021**Note on the procedure**

The applicant is a Croatian national, Ms. Sabalić, who complained of a lack of an appropriate response to homophobic violence by a private party against her, in particular instituting only minor-offence proceedings, failure to investigate and to take into consideration hate motives in determining the punishment, and as a consequence impunity for her aggressor. The applicant relied on Article 3, Article 8 and Article 14.

Summary of the facts¹⁴⁸

On 13 January 2010 Ms. Sabalić was attacked in a Zagreb nightclub by a man, when she refused his advances, adding that she was a lesbian. He severely beat and kicked her, while shouting “All of you should be killed!” and “I will f... you, lesbian!”. She sustained multiple injuries all over her body for which she was treated in hospital.

The aggressor was convicted in minor-offence proceedings of breach of public peace and order and given a fine of 300 Croatian kunas (approximately 40 euros (EUR)). Ms. Sabalić, who had not been informed of those proceedings, lodged a criminal complaint against the offender before the State Attorney’s Office, alleging that she had been the victim of a violent hate crime and discrimination.

The State Attorney’s Office instituted a criminal investigation, but eventually rejected the criminal complaint in July 2011 because the offender had already been prosecuted in the minor-offence proceedings and his criminal prosecution would therefore amount to double jeopardy. The domestic courts upheld this decision.

Court’s assessment and conclusions**Admissibility**

Assessing the applicability of Article 3 to this case, the Court reiterated the general principles stemming from its case-law while also par-

ticularly highlighting the role of the discriminatory motive in such assessment. In particular, the assessment of a minimum level of severity of ill-treatment required by Article 3 depends on all circumstances of the case, such as the duration of the treatment, its physical or mental effects and, in some cases, the sex, age and state of health of the victim. “A discriminatory treatment as such can in principle amount to degrading treatment within the meaning of Article 3, where it attains a level of severity such as to constitute an affront to human dignity. [...] **Discriminatory remarks and racist insults must in any event be considered as an aggravating factor** when considering a given instance of ill-treatment in the light of Article 3.”¹⁴⁹ In this case, the applicant was violently attacked (pushed against a wall, then hit all over her body, which continued even after she fell to the ground), which led to multiple physical injuries, including contusion on the head, a haematoma on the forehead, abrasions of the face, forehead and area around the lips, neck strain, contusion on the chest and abrasions of both palms and knees. Furthermore, the attack was influenced by the applicant’s sexual orientation as it started after the applicant revealed her sexual orientation to the attacker. Thus, the Court concluded that the treatment, to which the applicant was subjected and which was directed at her identity and undermined her integrity and dignity, aroused in her feelings of fear, anguish and insecurity, fall under Article 3.

Merits

In light of the injuries sustained by the applicant and the hate motivation behind the violence, the Court decided to examine the complaint under Article 3, taken in conjunction with Article 14, and not under other Articles raised by the applicant. Like in similar cases before, the Court reiterated the state’s procedural obligation to investigate and take all reasonable steps to unmask possible discriminatory motives “when confronted with cases of violent incidents triggered by suspected discriminatory attitudes, including those related to the victim’s **actual or perceived sexual orientation or other protected characteristics.**”¹⁵⁰ These procedural require-

148 Press-release of 14.01.2021.

149 *Sabalić v. Croatia*, § 65.

150 *Id.*, § 93.

ments imply the duty to institute and conduct an investigation capable of leading to the establishment of the facts and of identifying and – if appropriate – punishing those responsible.¹⁵¹ Specifically in case of a possible hate crime, compliance with the state’s positive obligations requires that the domestic legal system must demonstrate its capacity to enforce criminal law against the perpetrators of such violent acts.¹⁵² Importantly, when the official investigation has led to the institution of proceedings in the national courts, the national courts should not under any circumstances be prepared to allow grave attacks on physical and mental integrity to go unpunished, or for serious offences to be punished by excessively light punishments.¹⁵³ In this regard, **the role of the national courts** is “to ensure that a State’s obligation to protect the rights of those under its jurisdiction is adequately discharged, which means that it must retain its supervisory function and intervene in cases of manifest disproportion between the gravity of the act and the punishment imposed.”¹⁵⁴

Applying these principles to this case, the Court found that already at the initial stages of the proceedings, the authorities were confronted with clear indications of violence motivated or at least influenced by the applicant’s sexual orientation, which required the police to lodge a criminal complaint with the State Attorney’s Office, a competent authority to conduct further investigations into hate crime indicators. The authorities failed to do so. The Court observed that the minor offences proceedings that were instituted instead did not in any manner address the hate crime element to the physical attack against the applicant and the sentence was manifestly disproportionate to the gravity of the ill-treatment suffered by the applicant. The authorities justified that the criminal prosecution could not be pursued on the grounds of double jeopardy; however, the Court reiterated that the principle of legal certainty in criminal matters is not absolute, and the authorities can reopen a case to the detriment of an accused where, among other things, a “fundamental defect” had been detected in

151 *Id.*, § 96.

152 *Id.*, § 95.

153 *Id.*, § 97.

154 *Id.*, § 109.

the proceedings (Article 4 § 2 of Protocol No. 7). In this case, the Court found that both the failure to investigate the hate motives behind the violent attack or to take into consideration such motives in determining the aggressor’s punishment had amounted to “fundamental defects” in the proceedings within the meaning of Article 4 § 2 of Protocol No. 7. The Court noted that the domestic authorities could have corrected the situation, for instance, by terminating or annulling the unwarranted set of minor-offence proceedings, voiding their effects, and then re-examining the case.

Based on the above, the Court found that the authorities failed to discharge adequately and effectively their procedural obligation under the Convention, which is contrary to their duty to combat impunity for hate crimes; therefore, there has been a violation of Article 3 under its procedural aspect in conjunction with Article 14.

Comments

With this case, the Court reiterated the specific duty of the state to combat hate crime, which among other aspects, implies that the criminal justice system should be able to adequately investigate and sanction hate crimes. The Court pointed out that the nature of hate crime is particularly destructive of fundamental human rights and thus the authorities have a duty to conduct the official investigation with vigour and impartiality to reassert continuously society’s condemnation of hate crimes and to maintain the confidence of minority groups in the ability of the authorities to protect them from the discriminatory motivated violence. Without a strict approach from the authorities, hate crimes “would unavoidably be treated on an equal footing with ordinary cases without such overtones, and the resultant indifference would be tantamount to official acquiescence to or even connivance with hate crimes.”¹⁵⁵ The response that the authorities took in this case, in the eyes of the Court, could be considered rather a response that fosters a sense of impunity for the acts of violent hate crime, than a procedural mechanism showing that such acts are not tolerated.

155 *Id.*, § 95.

As a further matter, in this case, the Court highlighted the specific role of the national courts to ensure that grave attacks on physical and mental integrity do not go unpunished, or punished by excessively light punishments. In this regard, the role of the national courts is to ensure that the authorities are adequately discharging their obligation to protect the rights of those under its jurisdiction, which means that the national courts should intervene in cases of manifest disproportion between the gravity of the act and the punishment imposed.

V.

Intersectionality

B.S. v. Spain
(Application no. 47159/08)
from 24 July 2012

Note on the procedure

The applicant is a woman of Nigerian origin, B.S., who has been lawfully resident in Spain since 2003. She complained that the national police officers had verbally and physically abused her when stopping her for questioning, and on the domestic courts' inadequate investigation of the events. She relied on Articles 3 and 14 of the Convention.

Summary of the facts¹⁵⁶

On 15 July 2005 the applicant was on a street in the El Arenal area near Palma de Mallorca, where she worked as a prostitute. Two police officers asked her to provide her identity and to leave, which she did immediately. Shortly afterwards, in the same location, the same police officers approached her and after she tried to run away, caught up with her, hit her on the left thigh and the wrists with a truncheon and again asked for her identity papers; one of the officers racially abused her. On 21 July 2005 the same police officers again stopped and questioned her and one of them hit her on the left hand with a truncheon.

The applicant lodged a complaint. At the request of the investigating judge, the police produced an incident report, which among other things denied that the police officers used humiliating language or physical force. In a decision of 17 October 2005 the investigating judge made a provisional discharge order and discontinued the proceedings on the ground that there was insufficient evidence of a criminal offence. The applicant applied for a review of that decision, complaining

that the police officers had displayed a discriminatory attitude, which was refused on the same grounds. The appellate body annulled the decision and ordered the institution of minor-offence proceedings against the two police officers. On 11 March 2008, during the public hearing where the defendants were not formally identified by the applicant, the investigating judge acquitted the police officers.

In another instance, the applicant was stopped for questioning again on 23 July 2005. She lodged a criminal complaint two days later, alleging that she had been beaten on the hand and knee with a truncheon, and that she had been targeted because of her race. She stated that she had been forcibly taken to the police station for the purpose of signing a statement acknowledging that she had resisted the authorities. On 22 February 2006 the investigating judge made a provisional discharge order and discontinued the proceedings on the ground that there was insufficient evidence of a criminal offence. B.S. applied for a review of that decision. That and her subsequent appeal were unsuccessful.

Court's assessment and conclusions

Effectiveness of the investigations carried out by the national authorities

The Court observed that while the applicant's complaints had indeed been investigated, the investigating judges had done no more than request reports from the police headquarters and had relied solely on those reports in discontinuing the proceedings. Furthermore, the reports had been produced by the Balearic Islands chief of police, who was the official superior of the accused police officers. The Court further noted that as at the public hearing on 11 March 2008, the defendants had not been formally identified by the applicant, the hearing could not be regarded as satisfying the requirements of Article 3 (as it had not provided an opportunity to identify the police

¹⁵⁶ Press-release of 24.07.2012.

officers involved). Neither investigating judges nor the Audiencia Provincial investigated medical reports of the applicant's injuries, but simply disregarded them on the grounds that they were undated or not conclusive as to the cause of the injuries. Lastly, the investigating judges did not take any measures to identify or hear evidence from witnesses, nor did they investigate the applicant's allegations regarding her transfer to the police station. This led the Court to conclude that the investigative steps taken had not been sufficiently thorough and effective to satisfy the requirements of Article 3, and found a violation of Article 3 as regards the effectiveness of the investigation.

Investigation into the existence of a possible link between racist attitudes and police actions

The Court noted that in her complaints dated 21 and 25 July 2005 the applicant mentioned the racist remarks allegedly made to her by the police, such as “get out of here you black whore”, and submitted that the officers had not stopped and questioned other women carrying on the same activity but having a “European phenotype”. Those submissions were not examined by the courts dealing with the case, which merely adopted the contents of the reports by the police without carrying out a more thorough investigation into the alleged racist attitudes. The Court considered that the decisions made by the domestic courts failed “to take account of the applicant's **particular vulnerability inherent in her position as an African woman working as a prostitute**.”¹⁵⁷ Therefore, the Court found that the authorities failed to comply with their duty under Article 14 taken in conjunction with Article 3 to take all possible steps to ascertain whether or not a discriminatory attitude might have played a role in the events. There has accordingly been a violation of Article 14 taken in conjunction with Article 3 in its procedural aspect.

Comments

With this case, the Court for the first time introduced an intersectional interpretation of discrimination in its jurisprudence. The Court's reasoning does not explicitly refer to the term “intersectionality”, however it took a clear **intersectional approach** in this case. Referring to the failure of the authorities to take into account the applicant's

“particular vulnerability inherent in her position as an African woman working as a prostitute”, the Court explicitly recognized the specific vulnerability of the applicant that is formed by the intersection of the applicant's race and gender, along with her professional status. In other words, these are not individual personal characteristics, such as gender and race, but their intersection that make the applicant particularly vulnerable, thus must be looked in their entirety and not separately. Her position as “an African woman working as a prostitute” makes her vulnerable to discriminatory acts in a different way that women of other origins or men of African origin may experience.¹⁵⁸ Therefore, the Court emphasized that the Spanish authorities should have taken this specific vulnerability into account when investigating the possible discriminatory motives behind the incident.

While taking an intersectional approach, the Court, nevertheless, used the term “particular vulnerability” instead of “intersectional discrimination.” In its jurisprudence, the Court has originally used the concept of vulnerability in relation to Roma people and subsequently extended its scope to people with disabilities, asylum seekers, and people with HIV. The concept of vulnerability allows the Court to address inequality more substantively by recognizing that historically marginalized and disadvantaged groups are at a greater exposure to ill-treatment because of social prejudices and institutional discrimination. However, the jurisprudence of the Court uses vulnerability as a fixed and segmented marker. By adopting intersectionality as an interpretative criterion in this case, the Court avoided essentializing the applicant vulnerability; in other words, vulnerability should not be considered a permanent and categorical condition but a layered and dynamic one. Adopting intersectionality as an interpretative criterion not only enables consideration of the social structures and power relations that shape the experience of marginalized people, but also consideration of how individual experiences vary according to multiple combinations of privilege, power, and vulnerability.¹⁵⁹

¹⁵⁷ *B.S. v. Spain*, § 62.

¹⁵⁸ <https://strasbourgothers.com/2012/10/17/racial-discrimination-in-strasbourg-part-ii-intersectionality-and-context/>

¹⁵⁹ Toward the Implementation of Intersectionality in the European Multilevel Legal Praxis: *B. S. v. Spain*, by MariaCaterina La Barbera, Marta Cruells López, first published: 30 October 2019, <https://onlinelibrary.wiley.com/doi/full/10.1111/lasr.12435>.

VI. Gender-based hate crimes

Gender-based hate crimes are criminal offences motivated by bias against a person's gender. For gender-based hate crimes, one of the motivating factors is the perpetrator's perceptions of gender norms. Gender-based hate crimes are a consequence of gender inequalities and disproportionately target women, as well as anyone perceived as not complying with prevailing gender norms. Victims may be selected solely due to their gender, or on the basis of multiple identity traits, such as their gender, ethnicity and religion. Gender-based hate crimes may also target people or property due to their association, professional affiliation with or activism on gender issues, such as women's rights groups and civil society organizations working with victims of violence. Gender-based hate crimes often seek to intimidate and suppress ways of life or expressions of identity that are perceived as not complying with traditional gender norms. They have a significant, long-lasting impact on the victims, and undermine security and social cohesion by perpetuating gender inequalities.¹⁶⁰

In light of the above definition of gender-based hate crime, endorsed by OSCE/ODIHR, it is important to differentiate between **gender-based violence and gender-based hate crime**. Gender based violence (or sexual and gender-based violence) refers to any act that is perpetrated against a person's will and is based on gender norms and unequal power relationships. It includes physical, emotional or psychological and sexual violence, and denial of resources or access to services. Violence includes threats of violence and coercion.¹⁶¹ Cases of gender-based violence can constitute

gender-based hate crime, but not automatically and not always; such classification and thus response depend on individual assessment of each case. For a gender-based violence to be considered and treated as a hate crime the perpetrator must have demonstrated a gender bias immediately before, during or immediately after the incident. The indicators of gender bias can be found answering these questions, developed by OSCE/ODIHR:

Do the victims or witnesses perceive the incident as motivated by bias based on the victim's gender?

- Were there comments, written statements, gestures or graffiti that indicate bias? This can include the use of gender-based insults, tropes, stereotypes and prejudices, such as those related to women's roles in the public or private spheres.
- Was the targeted property a place of professional, legal, cultural or health significance, such as a women's rights organization, an LGBTI association, a family planning clinic and/or other places that might be frequented by individuals of a specific gender?
- Was the property previously targeted in a gender-based hate incident or crime? In the case of an attack against property, was an object or symbol left at the scene that can be perceived as offensive or threatening on the basis of gender?
- What was the nature of the violence? Were symbols representing a specific gender targeted?
- Does the suspect belong to a hate group that targets people based on their gender? This could include movements characterized by misogynistic views (such as "incels"), violent men's rights activists and

¹⁶⁰ Gender-Based Hate Crime factsheet, OSCE/ODIHR, March 2021, <https://www.osce.org/odihr/480847>

¹⁶¹ Sexual and gender based violence (SGBV) prevention and response, Emergency Handbook, UNHCR, <https://emergency.unhcr.org/entry/51693/sexual-and-gender-based-violence-sgbv-prevention-and-response>

groups advocating intolerance against people based on their gender. Does the suspect's background or criminal record show that they have committed similar incidents in the past?

- Was the victim a women's rights, feminist or LGBTI activist, or a human rights defender dealing with the protection and safety of specific groups on the basis of gender?
- Did the incident take place on a date of significance either for the perpetrator or the affected communities (e.g., International Women's Rights Day or during the 16 Days of Activism against Gender Based Violence Campaign)?
- Is there any other clear motive? The lack of other motives is also a reason to consider a bias motivation.¹⁶²

In its jurisprudence, the Court has considered a number of cases of violence targeted against women. The so-called "classic" gender-based hate crime case is the case *B.S. v. Spain*,¹⁶³ in which a woman of Nigerian origin has been ill-treated and insulted by patrolling police officers near the place where she worked as a prostitute, on two occasions. She alleged that she had suffered ill-treatment and had been discriminated against on account of her skin colour and her gender, whereas women with a "European phenotype" carrying out the same activity in the same area had not been approached by the police. Police officers made the racist remarks, namely, "get out of here you black whore" (an indicator of gender and ethnic origin bias), during interaction with her. In this case, the Court found a violation of Article 3 as the authorities failed to investigate her complaints against the police's actions, and a violation of Article 14 taken in conjunction with Article 3 as the authorities failed "to take account of the applicant's particular vulnerability inherent in her position as an African woman working as a prostitute" and thus failed to comply with their duty to take all possible steps to ascertain whether or not a discriminatory atti-

tude might have played a role in the events. In this case, gender intersects with another personal characteristic of the applicant, namely her ethnic origin, and the Court has stressed the importance for the authorities to look at it in their entirety and not separately, thus, undertaking an intersectional approach.

In another series of cases considered by the Court, the Court analysed the cases of gender-based violence against women from the angle of the authorities' duty to prevent and protect women from domestic violence and the duty to investigate such instances without discrimination. This last aspect addresses in particular the inaction of the law enforcement authorities to prevent domestic violence and unresponsiveness or inadequacy of a response by the judicial system to sanction it. The authorities tend to underestimate domestic violence thus essentially endorse it, and the underlying reasons for that are preconceived ideas concerning the role of women in the family, custom or tradition, and ideas that this is a family matter with which the authorities cannot interfere. The Court noted that the authorities do not fully appreciate the seriousness and extent of the problem of domestic violence and its discriminatory effect on women. The Court considered gender-based violence as a form of discrimination against women.

In particular, in a case *Opuz v. Turkey* (2009),¹⁶⁴ the applicant, is a Turkish woman alleged that the Turkish authorities failed to protect the right to life of her mother, who was killed by Ms. Opuz's husband, and that they were negligent in the face of the repeated violence, death threats and injury to which she herself was subjected by him. She further complains about the lack of protection of women against domestic violence under Turkish domestic law. The Court found that the Turkish authorities failed in their positive obligation to protect the right to life of the applicant's mother within the meaning of Article 2 as they have not displayed due diligence in their measures to prevent the killing and failed to conduct a prompt investigation of the killing. The Court also found that there had been a violation of Article 3 as a result of the authorities' failure to take protective meas-

162 Gender-Based Hate Crime factsheet, OSCE/ODIHR, March 2021, <https://www.osce.org/odihr/480847>

163 The case is analysed in details in the section *Intersectionality*.

164 *Opuz v. Turkey*, Application no. 33401/02.

ures in the form of effective deterrence against serious breaches of the applicant's personal integrity by her ex-husband. In relation to the lack of protection of women against domestic violence, the Court noted that domestic violence affected mainly women and that the general and discriminatory judicial passivity in Turkey created a climate that was conducive to domestic violence. Bearing that in mind, the violence suffered by the applicant and her mother could be regarded as gender-based, which constituted a form of discrimination against women. The overall unresponsiveness of the judicial system and impunity enjoyed by the aggressors, as found in the applicant's case, indicated that there was insufficient commitment to take appropriate action to address domestic violence. The Court therefore concluded that there had been a violation of Article 14, in conjunction with Articles 2 and 3.¹⁶⁵

In another case, **Mudric v. the Republic of Moldova** (2013),¹⁶⁶ the applicant, a Moldovan woman, divorced from her husband for 22 years, alleged that in February 2010 her ex-husband broke into her house, beat her up and, moving in permanently, abused her until January 2011 when the police removed him. She alleged that the authorities had tolerated the abuse to which she had been subjected in her home, relying on her ex-husband's mental illness as an excuse for not enforcing the various court protection orders against him. The Court found that the manner in which the authorities had handled the case, notably the long and unexplained delays in enforcing the court protection orders and in subjecting the applicant A.M. to mandatory medical treatment, amounted to a failure to comply with their positive obligations under Article 3. The applicant also alleged that the authorities had failed to apply domestic legislation intended to protect her against domestic violence, as a result of preconceived ideas concerning the role of women in the family. As a result, the Court found that the authorities' actions were not a simple failure or delay in dealing with violence against the applicant, but amounted to repeatedly condoning such violence and reflected a discriminatory attitude towards her as a woman. The authorities

did not fully appreciate the seriousness and extent of the problem of domestic violence and its discriminatory effect on women. Thus, the Court also found a violation of Article 14 in conjunction with Article 3.

In the case **Talpis v. Italy** (2017),¹⁶⁷ concerning domestic violence to which a mother of two was subjected and which resulted in the murder of her son and her own attempted murder, the applicant complained, inter alia, of a failure by the Italian authorities to comply with their duty to protect her against the acts of domestic violence inflicted on her. The Court found, in particular, that by failing to take prompt action on the complaint lodged by the applicant, the 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 the applicant 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 the applicant 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 Article 3. Finally, the Court found that the applicant had been the victim of discrimination as a woman on account of the inaction of the authorities, which had underestimated the violence in question and thus essentially endorsed it; in breach of Article 14 taken in conjunction with Articles 2 and 3.¹⁶⁸

¹⁶⁵ *Id.*, § 184 - 202.

¹⁶⁶ *Mudric v. the Republic of Moldova*, Application no. 74839/10.

¹⁶⁷ *Talpis v. Italy*, Application no. 41237/14.

¹⁶⁸ Press-release of 02.03.2017.

List of cases on hate speech

Garaudy v. France, Application no. 65831/01 from 24 June 2003 (decision on the admissibility)

Marla M'Bala v. France, Application no. 25239/13 from 20 October 2015 (decision on the admissibility)

Williamson v. Germany, Application no. 64496/17 from 8 January 2019 (decision on the admissibility)

Pastörs v. Germany, Application no. 55225/14 from 3 October 2019 (decision on the admissibility)

Pavel Ivanov v. Russia, Application no. 35222/04 from 20 February 2007 (decision on the admissibility)

Balsytė-Lideikienė v. Lithuania, Application no. 72596/01 from 4 November 2008

Hösl-Daum and Others v. Poland, Application no. 10613/07 from 7 October 2014 (decision on the admissibility)

Atamanchuk v. Russia, Application no. 4493/11 from 11 February 2020

Norwood v. the United Kingdom, Application no. 23131/03 from 16 November 2004 (decision on the admissibility)

İ.A. v. Turkey, Application no. 42571/98 from 13 September 2005

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Belkacem v. Belgium, Application no. 34367/14 from 27 June 2017 (decision on the admissibility)

E.S. v. Austria, Application no. 38450/12 from 25 October 2018

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Altıntaş v. Turkey, Application no. 50495/08 from 10 March 2020,

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Stomakhin v. Russia, Application no. 52273/07 from 9 May 2018

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admissibility)

Jersild v. Denmark, Application no. 15890/89
from 23 September 1994

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15948/03 from 10 July 2008

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from 16 July 2009

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from 20 April 2010 (decision on the
admissibility)

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27510/08 from 15 October 2015 (Grand
Chamber)

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20373/17 from 22 January 2019 (decision on
the admissibility)

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2034/07 from 15 March 2011

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*Magyar Tartalomszolgáltatók Egyesülete
and Index.hu Zrt v. Hungary*, Application no.
22947/13 from 2 February 2016

Belkacem v. Belgium, Application no. 34367/14
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