



COMPENDIUM

ARTICLE 14 CASES FROM THE EUROPEAN COURT OF HUMAN RIGHTS

1ST MARCH 2017 TO 28TH FEB 2019
(2 YEARS / 37 CASES)

Article 14, European Convention on Human Rights:

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

This *Compendium: Article 14 Cases from the European Court of Human Rights* is published by Equinet, European Network of Equality Bodies. Equinet brings together 49 organisations from across Europe which are empowered to counteract discrimination as national equality bodies across the range of grounds including age, disability, gender, race or ethnic origin, religion or belief, and sexual orientation. Equinet works to enable national equality bodies to achieve and exercise their full potential by sustaining and developing a network and a platform at European level.

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**This designation is without prejudice to positions on status, and is in line with UNSCR 1244/1999 and the ICJ Opinion on the Kosovo declaration of independence.*

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Introduction

Aims

The 2019 Equinet Work Plan for the Equinet Working Group on Equality Law identified that the Group would discuss recent and upcoming case-law of the European Court of Human Rights (ECtHR). The plan included consideration of how equality bodies and Equinet could best contribute to developing the ECtHR's jurisprudence, including increased analysis of Article 14 of the European Convention on Human Rights (ECHR) and issues that are at the cutting edge of equality law and theory.

In pursuit of this aim, the Working Group has monitored Article 14 cases communicated by the ECtHR to identify those that are directly relevant to equality and non-discrimination and the work of equality bodies. The Group sought communicated cases relating to equality and non-discrimination to consider opportunities to contribute by way of a potential third-party intervention (TPI) to the ECtHR.

In order to support this work, the Group has also monitored relevant Article 14 judgments from the ECtHR. This was necessary to support the work of the Group by ensuring that members have an up to date and comprehensive understanding of the existing case-law of the ECtHR. The report therefore considers the sorts of discrimination issues which have recently been considered by the ECtHR; the approach it takes to Article 14 cases; and the intricacies of the legal tests it applies.

The Working Group has historically focussed on EU discrimination law and has frequently called for the adoption of the Horizontal Directive¹ to harmonize discrimination law across sectors. The Article 14 work presents an opportunity to consider the role the Convention plays as a remedy for discrimination issues as it touches on areas beyond the reach of the Equality Directives.² Where relevant this report will draw comparisons with the Directives. The non-discrimination principle in the EU Charter of Fundamental Rights however is beyond the scope of this paper.

To this end, the Working Group has produced a Compendium of two years of Article 14 cases from 1st March 2017 until 28th February 2019 from the ECtHR (Annex A). This time frame was selected as it provided a sufficient sample of cases (37 in total) from which to draw conclusions. It also strikes a balance between the need to consider up-to-date cases in a rapidly changing field whilst allowing sufficient time to reflect on the case-law.

¹ Proposal for a Council Directive on implementing the principle of equal treatment between persons irrespective of religion or belief, disability, age or sexual orientation /* COM/2008/0426 final - CNS 2008/0140 */

² Primarily referring to the Recast Directive (2006/54/EC), The Goods and Services Directive (2004/113/EC), the Racial Equality Directive (2000/43/EC) and the Employment Equality Directive (2000/78/EC)

These reflections are contained in this report along with those on the sample of communicated cases, which give a flavour of some of the pressing discrimination issues of the day as well as the potential direction of travel. The group acknowledges the many useful publications and articles previously written on Article 14 case-law. We anticipate however that this up-to-date report will be of interest and use not only to members of our Working Group but also to lawyers, academics as well as members of NGOs, equality bodies and National Human Rights Institutions.

Emerging themes

The 37 sample cases offer a snapshot of some of the emerging discrimination concerns of the time, some of which are explored in further depth below. There was a collection of cases which arose when individuals and families had moved abroad, which then impacted on private and family life and socio-economic rights. In [Belli and Arquier-Martinez v. Switzerland](#)³ for example, the applicant received non-contributory state benefits for her child who had a disability. However, the benefits stopped when she moved abroad. Her claim of discrimination was not upheld, as the measure was accepted to be justified and within the margin of appreciation. In [Aleksic v Slovenia](#)⁴ the applicant had originally been a citizen of the Republic of Serbia in the Socialist Federal Republic of Yugoslavia. He had permanent residence in Slovenia. He was denied a full Slovenian old-age pension due to a period of around 13 years when he was not a Slovenian citizen. The ECtHR upheld the discrimination claim. In doing so the ECtHR rejected the argument that the discrimination could have been avoided by altering one of the factors in question – for example, by acquiring a nationality – as it would render Article 14 devoid of substance. [Orlandi and Others v Italy](#)⁵ concerned the refusal to register a same sex marriage registered abroad, but after finding a violation of Article 8 of the Convention, the ECtHR did not consider it necessary to examine whether there had also been a violation of Article 14.

Notably, six of the seven race discrimination cases concerned discrimination against Roma people,⁶ mainly in relation to the issue of failure to properly investigate a potential racist motive in criminal allegations or ill-treatment by law enforcement authorities.

In two cases relating to systemic failings in measures taken to address domestic violence,⁷ the ECtHR made findings of serious omissions, passivity and insufficient commitment on the part of the police and judicial authorities, which the ECtHR concluded amounted to discrimination against women, in breach of Article 14 in conjunction with Article 3.

³ *Belli and Arquier-Martinez v. Switzerland*, no. 65550/13

⁴ *Aleksic v Slovenia*, no. 57123/10. [Ribac v Slovenia](#), no. 57101/10 concerned the same issue.

⁵ *Orlandi and Others v Italy*, no. 26431/12

⁶ See [Burlya and Others v. Ukraine](#), no. 3289/10; [Lakatošová and Lakatoš v. Slovakia](#), no. 655/16; [MF v Hungary](#), no. 45855/12; [Škorjanec v. Croatia](#), no. 25536/14; [Lingurar and Others v Romania](#), no. 5886/15 and [Alkovic v Montenegro](#), no. 66895/10.

⁷ See [Bălșan v. Romania](#), no. 49645/09 and [Talpis v Italy](#), no. 41237/14.

Methodology

The compendium in Annex A is based on a search of [the HUDOC database](#) for Article 14 judgments during the relevant time frame. In 36 of the 37 cases, the ECtHR made a substantive finding in relation to Article 14. The exception was [Orlandi and Others v Italy](#), discussed above, in which the Court considered that there was no need to separately examine the complaint under Article 14 in connection with Articles 8 and 12 of the Convention. In one case, [Bălșan v. Romania](#),⁸ the ECtHR considered Article 14 of its own motion.

However, completing an “in text” search for Article 14 produced 98 results (61 additional cases) in which a breach of Article 14 was initially claimed but not determined. This indicates that the ECtHR made a substantive finding on Article 14 arguments in around 37% of cases where Article 14 was argued. The reasons for some of these decisions include: the Grand Chamber was barred from considering a new Article 14 point which had not been put before an earlier Chamber ([Garib v Netherlands](#));⁹ manifestly without reasonable foundation/failure to exhaust domestic remedies on the Article 14 point ([Ndid v United Kingdom](#));¹⁰ and, that there was no need to make a finding on Article 14 due to a separate finding on, for example, Article 8 (see dissenting opinion in [AP Garcon and Nicot v France](#)).¹¹

There were only two Grand Chamber cases within the examined timeframe: [Molla Sali v. Greece](#)¹² (violation Article 14) and [Fabian v Hungary](#)¹³ (no violation Article 14). Two cases were decided by the ECtHR sitting as a Committee; [Lingurar and Others v Romania](#)¹⁴ and [Can v Turkey](#).¹⁵ In both Committee cases a violation of Article 14 was established.

Overall the Court found a violation of Article 14 in 27 out of 37 cases (73%).

Once the initial screening and statistical assessment process had been carried out, the cases were analysed in terms of emerging themes. In this paper we discuss how these themes can contribute to the development of our understanding of Article 14 and its interpretation by the ECtHR.

⁸ *Bălșan v. Romania*, no. 49645/09,

⁹ *Garib v Netherlands*, no. 43494/09, 6 November 2017

¹⁰ *Ndid v United Kingdom*, no. 41215/14, 14 September 2017.

¹¹ *AP Garcon and Nicot v France*, no. 79885/12, 6 April 2017

¹² *Molla Sali v. Greece*, no. 20452/14, 19 December 2018

¹³ *Fabian v Hungary*, no. 78117/13, 5 September 2017

¹⁴ *Lingurar and Others v Romania*, no. 5886/15, 16 October 2018

¹⁵ *Can v Turkey*, no. 2437/08, 25 September 2018

1. Definition of Discrimination

Article 14 provides:

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

The text of the Convention does not define ‘discrimination’. The established jurisprudence of the ECtHR has however clarified its approach to this term. The ECtHR does not habitually use the terminology of “direct and indirect” discrimination which is customary in EU law. However, there are three main approaches described by the Court.

The most frequently used definition is found in the 2007 case of [D.H. and Others v Czech Republic](#):¹⁶

“Discrimination means treating differently, without an objective and reasonable justification, persons in relevantly similar situations.”¹⁷

However in the case of [Thlimmenos v Greece](#)¹⁸ from 2000, the Court also acknowledged that:

“The right not to be discriminated against in the enjoyment of the rights guaranteed under the Convention is also violated when States without an objective and reasonable justification fail to treat differently persons whose situations are significantly different.”

Discrimination can therefore also be defined as “a failure to treat differently persons whose situations are significantly different.”

Finally, the ECtHR has also utilised a slightly different formulation of discrimination, whereby:

“Where a general policy or measure has disproportionately prejudicial effects on a particular group... this may be considered discriminatory notwithstanding that it is not specifically aimed or directed at that group.”¹⁹

This Discussion Paper will explore these definitions and the requirements of Article 14 with reference to some of the 37 cases from 2017 – 2019 and, where appropriate, will compare and contrast to the approach of the Equality Directives.²⁰

¹⁶ *D.H. and Others v. the Czech Republic*, no. 57325/00, 13 November 2007, § 175.

¹⁷ Referring to cases such as [Willis v. the United Kingdom](#), no. 36042/97, 11 June 2002

¹⁸ *Op cit.* 34369/97 6th April 2000 at § 44

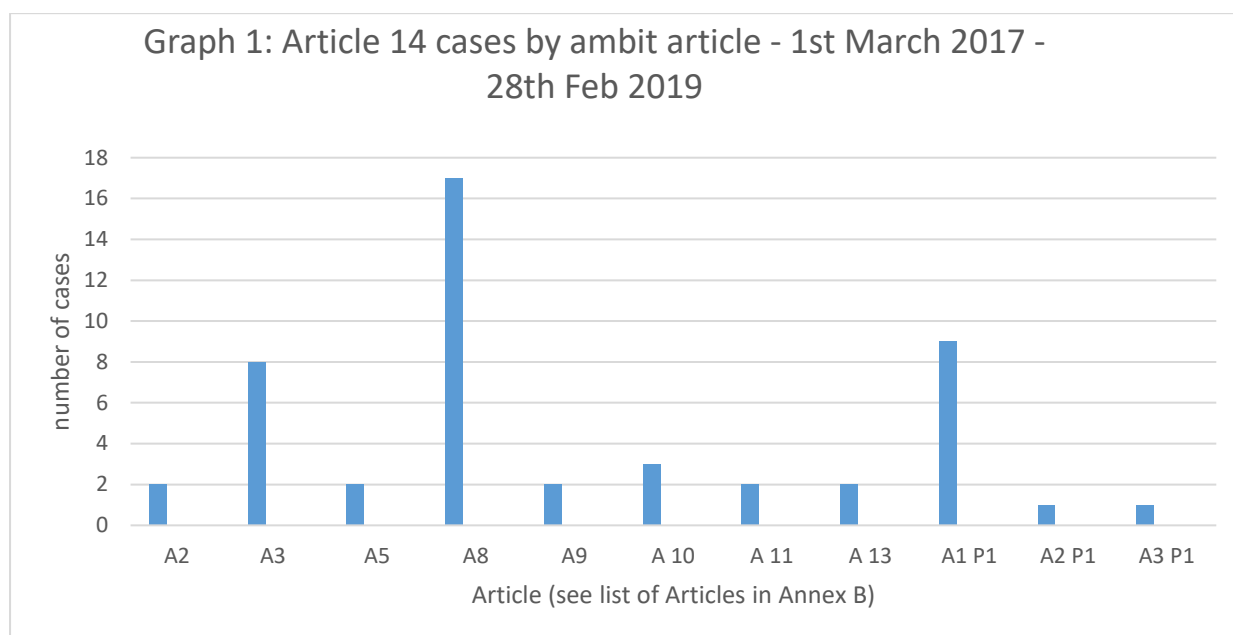
¹⁹ [Hoogendijk v. the Netherlands](#), no. 58641/00, 6 January 2005

²⁰ See footnote 2

2. Ambit Article

Article 14 prohibits discrimination in the enjoyment of one of the other rights guaranteed by the Convention. It is not a freestanding right as such; rather it is only applicable if the facts fall within the wider ambit of another article.²¹ The ECtHR does not have a term of art for this secondary Article so we have used the term “ambit” article to acknowledge that there does not have to be a violation of the secondary Article and it is sufficient that the discrimination falls “within its ambit.” The ECtHR has recently reiterated that “[...] *the application of Article 14 does not necessarily presuppose the violation of one of the substantive rights guaranteed by the Convention, and to this extent it is autonomous.*”²²

As the graph below illustrates, the most commonly argued ambit article in the two-year study was, by a large margin, Article 8 - the right to respect for private and family life, home and correspondence.²³



An ambit article is not required for all forms of protection from discrimination, as is the case of Protocol 12 opened for signature on 4th November 2000 and entered into force on 1st April 2005. It currently has 20 ratifications.²⁴ The Council of Europe has issued an Explanatory Report to Protocol 12.²⁵

²¹ See for example *Abdulaziz, Cabales and Balkandali v United Kingdom* no 9474/81 28th May 1985

²² [Carvalho Pinto de Sousa Morais v Portugal](#), no. 17484/15, 25 July 2017, § 34

²³ See list of the Convention rights in Annexe B.

²⁴ Ratifications: Albania, Andorra, Armenia, Bosnia and Herzegovina, Croatia, Cyprus, Finland, Georgia, Luxembourg, Malta, Montenegro, Netherlands, North Macedonia, Portugal, Romania, San Marino, Serbia, Slovenia, Spain, Ukraine.

²⁵ Council of Europe, 4th November 2000, Explanatory Report to the Protocol No.12 to the Convention for the Protection of Human Rights and Fundamental Freedoms

The “new” Protocol 12 provides a general freestanding prohibition on discrimination, which does not require an ambit article:

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

However, the case-law under Protocol 12 is in its infancy. Six judgments based on Protocol 12 have so far been determined since entry into force. The judgments have so far fallen within a limited range of themes. Five of these were against Bosnia and Herzegovina. Four related to ineligibility to stand for public office and in all four the discrimination claim was upheld. The fifth case against Bosnia and Herzegovina related to criminal sentencing for war crimes and the discrimination case was held to be manifestly without reasonable foundation.

In [Savez Crkava and others v Croatia](#)²⁶ the applicant Churches²⁷ challenged the Government’s refusal to conclude an appropriate agreement with them, which rendered them unable to provide certain religious services and obtain State recognition of religious marriages conducted by them. The applicants argued that this was a breach of their right not to be discriminated against in the exercise of their freedom of religion. However, the ECtHR held that there was a violation of Article 14 taken with Article 9 so there was no need to separately consider Protocol 12.

In the case of [Pilav v Bosnia and Herzegovina](#), the ECtHR clarified:

“[...] the same term “discrimination” from Article 14 was used in Article 1 of Protocol No. 12 as well. Notwithstanding the difference in scope between those provisions, the meaning of this term in Article 1 of Protocol No. 12 was intended to be identical to that in Article 14 [...] The Court sees no reason to depart from the settled interpretation of “discrimination”, as developed in the jurisprudence concerning Article 14 in applying the same term under Article 1 of Protocol No. 12.”²⁸

²⁶ *Savex Crkava and ors v Croatia*, no. 7798/08, 9 December 2010.

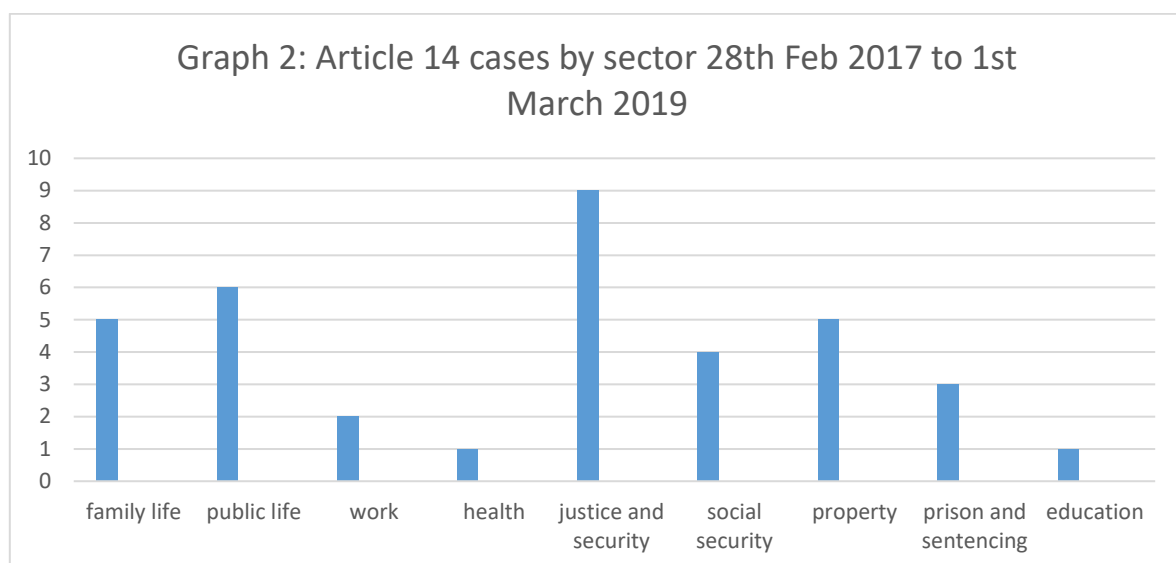
²⁷ Savez crkava “Riječ života” (Union of Churches “The Word of Life”); Crkva cjelovitog evanđelja (Church of the Full Gospel); and Protestantska reformirana kršćanska crkva u Republici Hrvatskoj (Protestant Reformed Christian Church in the Republic of Croatia) (“the applicant churches”), religious communities incorporated under Croatian law, on 4 December 2007.

²⁸ *Pilav v Bosnia and Herzegovina*, no. 41939/07, 9 September 2016, § 40

3. Scope / Sectors

The Equality Directives can broadly be described as applying in the fields of employment and occupation, social security and goods and services.²⁹ In contrast, the Convention has a broader reach. The graph below shows cases by sector. The highest number fall within the traditional civil and political/ public law realm, for example justice and security. However, where an act or measure is inconsistent with the protection contained in Article 14 and the principles underlying the Convention as a whole, the ECtHR will consider private law disputes or socio-economic rights where necessary, a point which was confirmed in [Deaconu v Romania](#):

“The Court is not in principle required to settle disputes of a purely private nature. That being said, in exercising the European supervision incumbent on it, it cannot remain passive where a national Court’s interpretation of a legal act, be it a testamentary disposition, a private contract, a public document, a statutory provision or an administrative practice, appears unreasonable, arbitrary or blatantly inconsistent with the prohibition of discrimination established by Article 14 and more broadly with the principles underlying the Convention.”³⁰

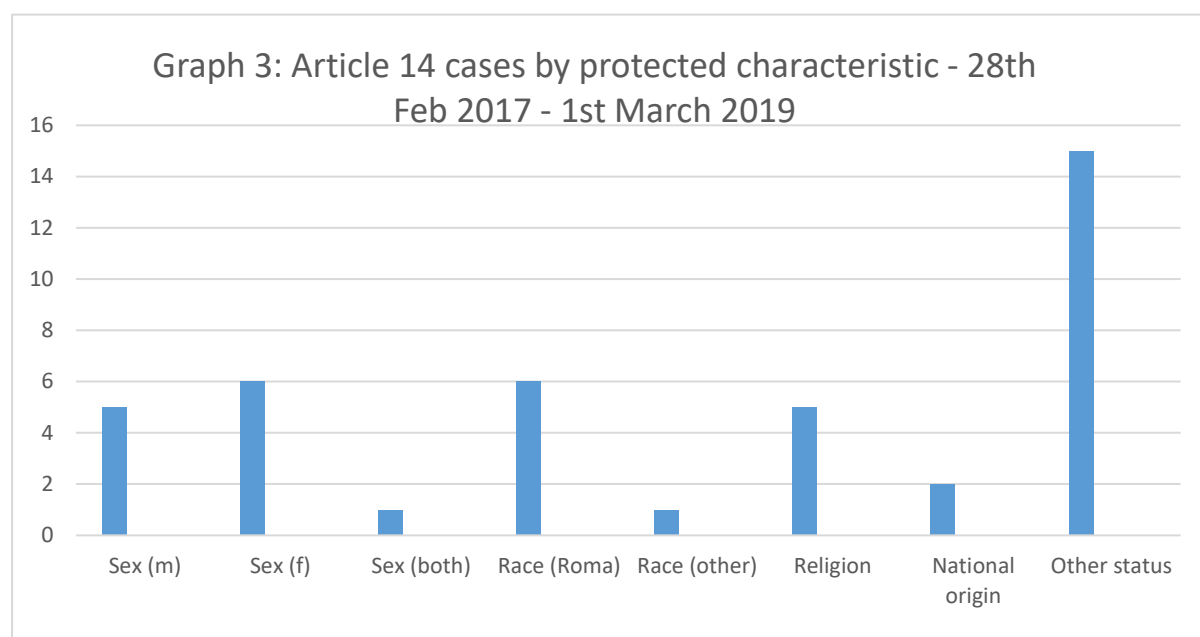


²⁹ The scope of the EU Equality Directives depends on the protected ground. Gender: access to and supply of goods and services and employment and occupation; race: employment, occupation, education, training, membership of and involvement in an organisation of workers or employers, or any organisation whose members carry on a particular profession, including the benefits provided for by such organisations; social protection, including social security and healthcare; social advantages; access to and supply of goods and services which are available to the public, including housing. Religion or belief, disability, age or sexual orientation: employment matters and occupation.

³⁰ *Deaconu and Alexandru Bogdan v. Romania*, no. 66299/12, 29 January 2019, §24.

4. Grounds / Protected Characteristics

The protected characteristics contained in the Equality Directives are sex and gender, racial or ethnic origin, religion or belief, disability, age and sexual orientation. One distinct advantage of arguing a discrimination case under the Convention is the potentially unlimited range of protected characteristics, as can be observed in the following graph.



The category with the largest number was “other status”, perhaps demonstrating the appeal of the flexibility of Article 14. This category contained a range of examples that went from the broader and more ‘traditional’ grounds such as: disability (2, one of which was by association), sexual orientation (4), age (2); to more specific grounds such as place of residence (1), health (HIV) status (1), children born outside marriage (1), category of property ownership (2) and status as a public sector worker (1). The capacity of Article 14 to extend to very specific criteria was particularly demonstrated in the case of [Cerne v Romania](#), where the difference in treatment arose because a prospective electoral candidate was excluded from standing for election owing to amendments in Romanian electoral law. The Court observed that:

“[...] as the candidate of a party not represented in Parliament, the applicant had not been allowed to stand in the by-election, whereas he would have been permitted to do so if his party had already been represented in Parliament. There was therefore a difference of treatment in the present case as regards the applicant’s ability to stand for election as a representative of a political party.”³¹

³¹ *Cerne v. Romania*, no. 43609, 27 February 2018, § 39

There was ultimately a finding of no violation on the basis of objective justification. However, the Court did not appear to hesitate or cite existing case law in accepting that this very specific basis for difference in treatment could amount to “other status.”

In addition, it was notable that there were 12 sex discrimination cases, with almost a 50:50 split between men (five cases, four of which related to their status as a parent) and women (six cases relating to a broader range of issues including redress for domestic violence, discrimination in recruitment, health issues, registration of surname and wearing the full-face veil in public), with one issue affecting both sexes (access to civil registered partnerships).

As discussed above, six of the seven race discrimination cases concerned discrimination against people of Roma origin, mainly around the issue of failure to properly investigate a potential racist motive in criminal allegations or ill-treatment by security services.³²

Some examples of the differences in treatment affecting these groups are discussed extensively below.³³

³² See *supra*, page 3.

³³ See *infra*, for example page 16.

5. Suspect Grounds

Suspect grounds are grounds in relation to which the ECtHR applies a stricter justification test, meaning that the member state will have to put forward very weighty or convincing reasons to justify differences in treatment. However, the ECtHR does not consistently use the term “suspect grounds” in its decisions.³⁴ The concept of suspect grounds is related to, but distinct from, the doctrine of vulnerable groups under Article 14.

Up to and including the 37 study cases, the ECtHR has applied the “very weighty reasons”, “particularly serious reasons” or “particularly convincing and weighty reasons” test in relation to the grounds of race or ethnicity, nationality, birth, sexual orientation, disability, religion and sex.

Established jurisprudence demonstrates that this stricter approach not only concerns the objective aim, but also the proportionality test and the margin of appreciation.³⁵ The margin of appreciation afforded to the responding State in cases involving a suspect ground is usually narrow. However, in some situations the margin of appreciation afforded to the member state may be broader, for example in situations or areas of society where there is little or no consensus among member states,³⁶ or when it comes to general measures of economic or social strategy.³⁷

The reasons why some grounds qualify as suspect vary:

With respect to the ground of **sex**, the ECtHR states that, “*the advancement of gender equality is today a major goal in the member states of the Council of Europe, and therefore very weighty reasons would have to be put forward before such a difference in treatment could be regarded as compatible with the Convention.*”³⁸

In [Wolter and Sarfert v. Germany](#) the ECtHR followed the approach originating from the *Inze* case³⁹ and reaffirmed that “*the member states of the Council of Europe attach great importance to the question of equality between children **born in and out of wedlock** as regards their civil rights. Very weighty reasons would accordingly have to be advanced before a difference of treatment on the grounds of birth outside marriage could be regarded as*

³⁴ See *Carvalho Pinto de Sousa Morais*, cited above, § 45

³⁵ See Chapter 12 for more information about the margin of appreciation.

³⁶ E.g. *Petrovic v. Austria*, no. 20458/92 (N.B. that the ECtHR reached a different conclusion in the case of *Konstatin Markin v. Russia*, no. 30078/06)

³⁷ E.g. *British Gurkha Welfare Society and Others v. the United Kingdom*, no. 44818/11, 15 September 2016, § 81

³⁸ *Ecis v. Latvia*, no. 12879/09, 24 June 2016, § 84 and *Carvalho Pinto de Sousa Morais v. Portugal*, cited above.

³⁹ *Inze v. Austria*, no. 8695/79, 28 October 1987

compatible with the Convention".⁴⁰ This reasoning is extended to similar situations, such as adopted children.⁴¹

In [Carvalho Pinto de Sousa Morais v Portugal](#) the ECtHR reaffirmed that **age** is not equated with other suspect grounds.⁴² In its reasoning, the Court reiterates its statement from the judgment in [British Gurkha Welfare Society](#).⁴³ However in [Deaconu v Romania](#), whilst the ECtHR stopped short of classifying age as a suspect ground, it stated that, "*the Court notes that all brothers, including the applicants, lost their sister in a tragic accident. Under normal circumstances, such a brutal and painful death would have caused all her brothers intense suffering, no matter what their age. However, the brothers' claims for compensation were assessed differently by the Court of last resort on account of their age, a ground that falls within the scope of Article 14. It remains to be determined whether particularly convincing and weighty reasons existed for this difference of treatment*".⁴⁴ The ECtHR does not elaborate on their reasoning for requiring weighty reasons or departing from previous case-law on age discrimination. Arguably *Deaconu* may pave the way for recognition of age as a suspect ground.

In [Ratzenböck and Seydl v. Austria](#)⁴⁵ the ECtHR confirmed its previous case-law⁴⁶ that **sexual orientation** is a suspect ground covered by Article 14.⁴⁷ It should be noted that this judgment is the first decision of the ECtHR concerning discrimination based on the sexual orientation of a heterosexual couple.

⁴⁰ *Wolter and Sarfert v. Germany*, nos. 59752/13 and 66277/13, 23 March 2017, § 58

⁴¹ See *Negrepontis-Giannisis v. Greece*, no. 56759/08, 5 December 2013, § 82

⁴² *Carvalho Pinto de Sousa Morais v Portugal*, cited above

⁴³ *British Gurkha Welfare Society*, cited above

⁴⁴ *Deaconu v Romania*, no. 66299/12, 29 January 2019, § 31 to 33.

⁴⁵ *Ratzenböck and Seydl v. Austria*, no. 28475/12, 26 October 2017

⁴⁶ *Schalk and Kopf v. Austria*, no. 30141/04, 24 June 2010; *Vallianatos and Others v. Greece*, nos. 29381/09 and 32684/09, 7 November 2013; and *Oliari and Others v. Italy*, nos. 18766/11 and 36030/11, 21 October 2015

⁴⁷ *Ratzenböck and Seydl v. Austria*, cited above, § 32

6. Direct Discrimination / Difference in Treatment

Direct discrimination is defined in the EU Equality Directives as occurring where one person is treated less favourably than another is, has been or would be treated in a comparable situation on protected grounds.⁴⁸ Aside from tightly prescribed exceptions such as genuine occupational requirements⁴⁹ or some age discrimination exceptions,⁵⁰ there is ordinarily no defence of objective justification.

As discussed in the introduction, the ECtHR does not habitually use the terms direct and indirect discrimination. Nevertheless, the definition used by the ECtHR which is widely understood to be a form of direct discrimination involves “*treating differently, **without an objective and reasonable justification**, persons in relevantly similar situations*”.⁵¹

In 21 of the 37 cases in the sample period, the ECtHR expressly discussed the test for discrimination. In 17 of those, this “direct discrimination” approach was taken. This was most explicit in [Carvalho Pinto de Sousa Morais v Portugal](#)⁵² and [Bayev and others v Russia](#).⁵³

In the cases studied, the term “relevantly similar situations” is used interchangeably with “analogous situations” and “comparable situations” whilst clarifying that “*the requirement to demonstrate an analogous position does not require that the comparator groups be identical.*”

⁵⁴

The ECtHR has historically not insisted on a strict requirement to find a real or hypothetical comparator. Nonetheless in [Carvalho Pinto de Sousa Morais v Portugal](#)⁵⁵ the fact that the Claimant had an actual comparator of 2 older men who had been treated more favourably, assisted her to establish discrimination. In [Hulya Ebru Demirel v Turkey](#)⁵⁶ the ECtHR held that the decisions of the administrative and judicial authorities finding that the post of security officer was reserved solely for male candidates had amounted to a clear difference of treatment, on grounds of sex, between persons in an analogous situation. The case of [Molla Sali v. Greece](#)⁵⁷ concerned an applicant’s right to inherit under a will made in her favour, in accordance with the Civil Code, by a Greek testator of Muslim faith. Although the applicant’s husband had decided to bequeath his whole estate to her, the Court of Cassation had considered that the Islamic law of succession should be applied to her case. That had the consequence of depriving the applicant of her rights under the will made by her husband,

⁴⁸ See for example Council Directive 2000/43/EC Article 2

⁴⁹ Council Directive 2000/78 Article 4

⁵⁰ Ibid, at Art 6

⁵¹ The Court regularly refers to historic cases such as *Willis v. the United Kingdom*, no. 36042/97, 11 June 2002.

⁵² *Carvalho Pinto de Sousa Morais v Portugal* 17484/15, 25 July 2017

⁵³ *Bayev and Others v. Russia*, nos. 67667/09, 44092/12 and 56717/12, 20 June 2017

⁵⁴ *Alexandru Enache v Romania* 16986/12 §64, 3 October 2017,

⁵⁵ Cited above, § 55

⁵⁶ *Hulya Ebru Demirel v. Turkey*, no. 30733/08, 19 June 2018

⁵⁷ *Molla Sali v. Greece*, no. 20452/14, 19 December 2018

which was rendered without any legal effect. The ECtHR concluded that the applicant, as the beneficiary of a will made in accordance with the Civil Code by a testator of Muslim faith, was in a relevantly similar situation to that of a beneficiary of a will made in accordance with the Civil Code by a non-Muslim testator, and was treated differently on the basis of “other status”, namely the testator’s religion.⁵⁸

In contrast, in [Ratzenbock and Seydl v Austria](#)⁵⁹ the ECtHR found that applicants in a different sex couple were not in a relevantly similar or comparable situation to same-sex couples, who did not have the right to marry and so needed registered partnership as an alternative means of providing legal recognition of their relationship.

⁵⁸ *Molla Sali v. Greece*, cited above, paragraph 141

⁵⁹ *Ratzenbock v. Austria*, no. 28475/12, 26 October 2017

7. Indirect Discrimination

Indirect discrimination has a precise definition in EU law terms. Indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put persons with a protected characteristic at particular disadvantage compared with other persons, unless that provision, criterion or practice is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary.⁶⁰

The ECtHR rarely uses the term ‘indirect discrimination’. Assessing the indirect discrimination cases therefore requires careful scrutiny and is not an exact science. There has been some debate amongst academics and commentators around the approaches used by the Court and the relationship to other legal definitions of discrimination as well as the interaction with positive action and positive obligations. A literature review on this topic is beyond the scope of this paper.

Instead, the starting point involves looking at the cases which did not appear to follow the “difference in treatment”/ direct approach described above.

In two of the thirty-seven cases the ECtHR reiterated that discrimination can also occur where there is a “failure to treat differently persons whose situations are significantly different” (the *Tlimmenos* approach outlined above): [Cassar v Malta](#)⁶¹ (concerning different categories of property owners) and [Enver Sahin v Turkey](#)⁶² (concerning a disabled student requiring reasonable adjustments).

The ECtHR has also used a slightly different approach to defining discrimination:

*“[...] where a general policy or measure which has disproportionate prejudicial effects on a group of individuals can be regarded as discriminatory even if it does not specifically target the group and there is no discriminatory intent. This is only the case however, if such a policy or measure has no objective and reasonable justification.”*⁶³

Examples of this approach can be found in [Belcacemi and Oussar v Belgium](#)⁶⁴ and [Dakir v Belgium](#).⁶⁵ In 2011 Belgium enacted a national ban on face coverings. The applicants were Muslim women who wore a niqab (face veil) due to their religious beliefs and were fined for doing so. They filed an application for suspension and annulment of the law with the Belgian Constitutional Court, which dismissed their cases.⁶⁶ The ECtHR considered that the ban was a form of indirect discrimination (and used that term on this occasion) but that it was justified.

⁶⁰ See for example Council Directive 2000/43/EC Article 2

⁶¹ *Cassar v. Malta*, 50570/13, 30 January 2018

⁶² *Enver Sahin v. Turkey*, no. 23065/12, 30 January 2018

⁶³ *Dakir v. Belgium*, no. 4619/12, 11 July 2017 paragraph 65

⁶⁴ *Belcacemi and Oussar v. Belgium*, no. 37798/13, 11 July 2017 at paragraph 66

⁶⁵ *Dakir v. Belgium*, no. 4619/12, 11 July 2017

⁶⁶ Belgian Constitutional Court 6th December 2012.

The Court held that the aim of ensuring the minimum condition of life in society and of “living together” contributes to the legitimate aim of the protection of the rights and freedom of others. The Court accepted the ban as proportionate to that aim, even though it was controversial and undeniably carried risks in terms of the promotion of tolerance in society.

It is not clear why the ECtHR uses the two subtly different approaches and it is difficult to quantify the impact and whether they might yield different results in substance depending on the circumstances of different cases. For example, could the failure to treat Muslim women differently by granting them an exception to the ban on face covering not reach the same conclusion? Could a disabled student who requires adjustments⁶⁷ in order to access physical premises equally argue that there is a general measure which has a disproportionate prejudicial effect on disabled students? A wider examination testing out the definitions in the context of more examples would be necessary to explore this question more fully.

Furthermore, the concept of “positive obligations” has a role to play in understanding the Court’s approach to indirect discrimination.

⁶⁷ Although on the issue of the limitations on the ECtHR’s role in assessing reasonable adjustments, see the recent case of *Stoian v Romania*, no. 289/14 Committee decision.

8. Positive Obligations

It is noted at the outset that the concept of positive obligations, in the ECtHR context, is distinct from the familiar anti-discrimination law concept of positive (or affirmative) action. The latter refers to measures or policies aimed at promoting substantive equality in favour of members of disadvantaged groups (e.g. quota systems in employment), whereas the former allows for effective protection of rights proclaimed in negatively phrased provisions of the Convention.

Thus, the ECtHR has at an early stage stated that the fundamental rights enshrined in the Convention not only compel the State to abstain from interference, but may also give rise to positive duties on the part of the State which are inherent in the respect of the rights protected by the Convention.⁶⁸ With regard to the right of individuals not to be discriminated against, this concept has proved to be particularly relevant in instances of harm done by State agents or third parties allegedly triggered by racial or other discriminatory motives, in which Article 14, in conjunction with Articles 2, 3 or 8, is held to generate positive duties on the part of the police and judicial authorities to effectively investigate these allegations and to prevent such offences.⁶⁹

Such instances were at stake in eight monitored cases, which related to offences against people from ethnic minority backgrounds⁷⁰ or domestic violence against women.⁷¹ In these cases, the main issue concerned whether the State had discharged its procedural positive obligations, which, in line with previous case-law, was described as follows.

In relation to the ethnic minority cases:

“When investigating violent incidents such as acts of ill-treatment, State authorities have a 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 at hand. Proving racial motivation will admittedly often be difficult in practice. The respondent State’s obligation to investigate possible racist overtones to a violent act is an obligation to use its best endeavours and is not absolute. The authorities must do what 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

⁶⁸ *Marckx v. Belgium* 6833/74, 13 June 1979, at paragraph 31.

⁶⁹ See Janneke Gerards *General Principles of the European Convention on Human Rights*, Cambridge University Press 2019, p. 128.

⁷⁰ *Burlyk and Others v. Ukraine*, no. 3289/10, *Lakatošová and Lakatoš v. Slovakia*, no. 655/16, *Lingurar v. Romania*, no. 5886/15, *MF v. Hungary*, no. 45855/12, *Škorjanec v. Croatia*, no. 25536/14 (discrimination against Roma people) and *Grigoryan and Sergeyeva v. Ukraine*, no. 63409/11 (alleged discrimination because of Armenian origin).

⁷¹ *Bălșan v. Romania* 49645/09 and *Talpis v. Italy* 41237/14.

*objective decisions, without omitting suspicious facts that may be indicative of racially motivated violence*⁷².”

Furthermore, it is noteworthy that the above positive obligation of the State is linked to the Court’s general approach to indirect forms of discrimination, since “[...]treating violence and brutality with a discriminatory intent 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. A failure to make a distinction in the way situations that are essentially different are handled may constitute unjustified treatment irreconcilable with Article 14 of the Convention [...]”.⁷³

As to the precise legal basis of such a positive obligation, it can be either the ambit Article (2, 3 or 8) under its procedural aspect alone or may require examination of the ambit Article in conjunction with Article 14, depending in each case on the facts and the nature of the allegations made.⁷⁴

Apart from the assessment of fulfilment of the procedural obligations of the State as described above, separate scrutiny may be required as to the level of compliance with the positive duties implicit in Article 14 in conjunction with the ambit Article under their substantial aspect. Such duties were found to be breached in a case concerning the role of local and police authorities in a “pogrom” against Roma residents of a village, following a murder allegedly committed by a Romany man.⁷⁵ The mayor and the local police advised the Roma residents to leave as a “pogrom” was about to start and the police were present and passive at the scene of the attack.

The respect of the right of women for equal protection under the law also requires an active role on the part of the State so as to protect them from domestic violence and gender-based violence in general.⁷⁶ Under this rationale, serious omissions, passivity and insufficient commitment of the police and judicial authorities to take appropriate action to address domestic violence amounts to discrimination against women, in breach of Article 14 in conjunction with Article 3.⁷⁷

⁷² *Burlya and Others v. Ukraine*, no. 3289/10, §128. See also *Lakatošová and Lakatoš v. Slovakia* 655/16, §75; *MF v. Hungary*, no. 45855/12, §72; *Škorjanec v. Croatia*, no. 25536/14, §54; and *Grigoryan and Sergeyeva v. Ukraine*, no. 63409/11, §91, with extensive reference to previous casetolaw in all judgments.

⁷³ *Burlya and Others*, cited above, §128; *Lakatošová and Lakatoš*, cited above, §75; *MF*, cited above, §72; and *Škorjanec*, cited above, §53.

⁷⁴ See for example *Škorjanec*, cited above, §37; *Grigoryan and Sergeyeva* cited above, §92 and *Lakatošová and Lakatoš v. Slovakia*, no. 655/16, 77

⁷⁵ *Burlya and Others*, cited above, §§134to136 and 168to170.

⁷⁶ *Opuz v. Turkey*, no. 33401/02, § 191.

⁷⁷ Within the examined period, see *Bălșan v. Romania*, no. 49645/09, §§ 78, 85, 88to89; and *Talpis v. Italy*, no. 41237/14, §§ 141, 145 and 148to149.

In recent years, a new field has emerged in the application of Article 14, namely the interpretation of the ECtHR and its protocols in the light of obligations stemming from the UN Convention for the Rights of Persons with Disabilities (CRPD) and of the requirement for “reasonable accommodation” in particular. This term refers to the “*necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case*”⁷⁸ which persons with disabilities are entitled to expect in order to secure their “*enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms*”.⁷⁹ Such accommodation is aimed at correcting factual inequalities and discrimination on grounds of disability “*includes all forms of discrimination, including denial of reasonable accommodation*”.⁸⁰ This rationale led the ECtHR to establish a breach of Article 14 in conjunction with Article 2 of Protocol 1 (right to education) in a case concerning the failure of the State to make necessary adaptations to enable a disabled student to attend University courses.⁸¹

⁷⁸ Article 2 CRPD

⁷⁹ *Ibid*

⁸⁰ *Ibid*

⁸¹ *Enver Sahin v Turkey*, no. 23065/12, §§ 60 and 62 with reference to recent case-law.

9. Discrimination by Association

The concept of discrimination by association has evolved through the case-law of the Court of Justice of the European Union in relation to both direct⁸² and indirect⁸³ discrimination.

Similarly, discrimination by association has emerged in the case-law of the ECtHR. Although often it is not specified whether the discrimination was direct or indirect, the concept of associative discrimination was accepted in [Belli and Arquier-Martinez v. Switzerland](#)⁸⁴ (disability) in [Molla Sali v. Greece](#)⁸⁵ (religion), [Bayev and others v Russia](#)⁸⁶ (LGBT activists) and [Škorjanec v. Croatia](#)⁸⁷ (race). In the latter of these cases, the ECtHR referred to the relatively recent authority of [Guberina v Croatia](#)⁸⁸ from 2016 and stated: “Moreover, Article 14 of the Convention, in the light of its objective and the nature of the rights which it seeks to safeguard, also covers instances in which an individual is treated less favourably on the basis of another person’s status or protected characteristics”.⁸⁹

⁸² CJEU *Coleman v Attridge Law* C-303/06, 17 July 2008.

⁸³ CJEU *CHEZ Razpredelenie Bulgaria AD* - C-83/14

⁸⁴ *Belli and Arquier-Martinez v. Switzerland*, no. 65550/13 (in French only)

⁸⁵ *Molla Sali v. Greece*, no. 20452/14

⁸⁶ *Bayev and Others v. Russia*, no. 67667/09

⁸⁷ *Škorjanec v. Croatia*, no. 25536/14

⁸⁸ *Guberina v Croatia*, no. 23682/13, §§ 76 to 79

⁸⁹ *Škorjanec v. Croatia* - 25536/14 § 55

10. Burden of Proof

The concept of reversal of burden of proof in EU-law is clear from the text of the Equality Directives. [Article 8 of Directive 2000/43/EC](#) states the following about the burden of proof: *“Member States shall take such measures as are necessary, in accordance with their national judicial systems, to ensure that, when persons who consider themselves wronged because the principle of equal treatment has not been applied to them establish, before a court or other competent authority, facts from which it may be presumed that there has been direct or indirect discrimination, it shall be for the respondent to prove that there has been no breach of the principle of equal treatment”*.⁹⁰

Although not specified in the brief text of Article 14, the ECtHR clarified in *D.H. v the Czech Republic* that:

*“As to the burden of proof in this sphere, the Court has established that once the applicant has shown a difference in treatment it is for the Government to show that it was justified. [...] Moreover, the level of persuasion necessary for reaching a particular conclusion and, in this connection, the distribution of the burden of proof are intrinsically linked to the specificity of the facts, the nature of the allegation made and the Convention right at stake.”*⁹¹

This approach was exemplified in [Ibrogimov v Russia](#)⁹² where the ECtHR accepted that once an applicant established a difference of treatment due to HIV status, the burden was squarely on the Government to provide the objective and reasonable justification and “compelling reasons” for the difference in treatment. In doing so, the ECtHR invoked a European and international consensus to conclude that there was no such reasonable and objective justification.

⁹⁰ Directive 2000/43/EC Article 8

⁹¹ *D.H. and Others v. the Czech Republic*, no. 57325/00, § 177 to 178

⁹² *Ibrogimov v Russia*, no. 32248/12

11. Justification

Justification is required both in relation to direct and indirect forms of discrimination under the Convention. As suggested above, it is unusual in terms of EU discrimination law to have a defence of justification to direct discrimination at all, with the exception of age or genuine occupational requirements.

There was relatively little discussion of legitimate aims in the analysed cases. However, aims which were expressly accepted as legitimate included: the protection and organisation of the country's economic and social system;⁹³ preservation of the minimum condition of life in society / the need to live together as an aspect of the rights and freedoms of others;⁹⁴ and, the need to secure legal certainty / legitimate expectations.⁹⁵ In [Hulya Ebru Demirel v Turkey](#)⁹⁶ the ECtHR expressly held that the refusal to appoint a woman as a security officer simply because she was not a man, did not pursue any legitimate aim. The ECtHR also utilised the concept of genuine and occupational requirements within this definition, by referencing the *Emel Boyraz* case where the ECtHR had stated: *"the Court is aware there may be legitimate requirements for certain occupational activities depending on their nature or the context in which they are carried out. However, in the instant case, [the Court] did not substantiate the grounds for the requirement that only male staff be employed in the post of security officer in the Batman branch of TEDAS"*.⁹⁷

The proportionality assessment, which requires *"a reasonable relationship of proportionality between the means employed and the aim sought to be realised"*⁹⁸ has also been described as requiring "particularly weighty reasons" for the difference of treatment between different groups where there are "suspect grounds". The discussion of proportionality and the relative weight of reasons is therefore closely connected to the discussion of suspect grounds (above) and that of margin of appreciation that now follows.

⁹³ *Aleksic v Slovenia*, no. 57123/10

⁹⁴ *Belcacemi and Oussar v Belgium*, no. 37798/13

⁹⁵ *Wolter and Sarfert v Germany*, no. 59752/13

⁹⁶ *Hulya Ebru Demirel v Turkey*, no. 30733/08

⁹⁷ *Emel Boyraz v Turkey*, no. 61960/08, § 54

⁹⁸ See for example, *Fabris v France*, no 16575/08

12. Margin of Appreciation and Proportionality

The margin of appreciation refers to the room for manoeuvre which the ECtHR is prepared to accord national authorities in fulfilling their obligations under the Convention.⁹⁹ When considering whether a member state has breached a fundamental right the ECtHR applies this doctrine, in order to find a balance between the sovereignty of member states and their obligations under the Convention. The doctrine allows the ECtHR to take into account the fact that the Convention will be interpreted differently in different member states, given their divergent legal, cultural and historical traditions¹⁰⁰ and is a consequence of the subsidiary protection of the Convention.

The principle is well explained in [Handyside v. UK](#), from 1976.¹⁰¹ In this case, the ECtHR had to consider whether a conviction for possessing an obscene article could be justified under Article 10 § 2 as a limitation of the freedom of expression that was necessary for the protection of morals. The ECtHR stated that:

*“By reason of their direct and continuous contact with the vital forces of their countries, state authorities are in principle in a better position than the international judge to give an opinion on the exact content of those requirements of morals as well as on the ‘necessity’ of a ‘restriction’ or ‘penalty’ intended to meet them [...] Nevertheless, Article 10 § 2 does not give the contracting states an unlimited power of appreciation. The Court which is responsible for ensuring the observance of those states’ engagements, is empowered to give the final ruling on whether a ‘restriction’ or ‘penalty’ is reconcilable with freedom of expression as protected by Article 10.”*¹⁰²

Throughout the years, the scope of this doctrine has been defined by the case-law of the ECtHR. This case-law shows that the margin of appreciation may vary from case to case and there are different factors which are of importance. For example, in the [Rasmussen case](#), the ECtHR formulates the criteria that determines this scope: *“The scope of the margin of appreciation will vary according to the circumstances, the subject-matter and its background”*.¹⁰³ In [Pretty v. UK](#) the ECtHR quotes *“the nature of the issues and the importance of the interests at stake”* as also relevant factors.¹⁰⁴ However the final decision as to the observance of the Convention’s requirements rests with the ECtHR.

⁹⁹ S. Greer, The margin of appreciation, interpretation and discretion under the European Convention on Human Rights, Reader in Law, University of Bristol, United Kingdom, Council of Europe publishing 2000, 5.

¹⁰⁰ OSJI, Reform of margin of appreciation, <https://www.justiceinitiative.org/uploads/918a3997-3d40-4936-884b-bf8562b9512b/ECtHR-reform-margin-of-appreciation.pdf>.

¹⁰¹ *Handyside v the United Kingdom*, no. 5493/72, 7 December 1976

¹⁰² *Ibid*, §§ 48 and 49

¹⁰³ *Rasmussen v. Denmark*, no. 8777/79, 28 November 1984, § 40.

¹⁰⁴ *Pretty v. the United Kingdom*, no. 2346/02, 22 April 2002, § 70

When it comes to Article 14, the ECtHR held in different cases the general principle that: “(...) *the Contracting States enjoy a certain "margin of appreciation" in assessing whether and to what extent differences in otherwise similar situations justify a different treatment in law*”.¹⁰⁵ This principle was often recalled in the cases that the Working Group has analysed in the period of study.¹⁰⁶

On the basis of the analysis of the cases from the study period, we can deduce that the following factors are relevant for assessing the relative breadth of the margin of appreciation.

Particular groups

If a restriction on fundamental rights applies to a particularly vulnerable group in society, who have suffered considerable discrimination in the past, then the State's margin of appreciation is substantially narrower, and it must have very weighty reasons for the restrictions in question. This approach has been applied, for example, in the context of those suffering different treatment on the ground of their:

- Sex: “*the margin of appreciation afforded to the State is narrow and in such situations the principle of proportionality does not merely require that the measure chosen should in general be suited to the fulfilment of the aim pursued, but it must also be shown that it was necessary in the circumstances* The Court further reiterates that the advancement of gender equality is today a major goal in the member States of the Council of Europe and very weighty reasons would have to be put forward before such a difference of treatment could be regarded as compatible with the Convention” (in the cases [Hulya Ebru Demirel v Turkey](#) and [Can v. Turkey](#) the Court referred to [Emel Boyraz v. Turkey](#)¹⁰⁷.
- Sexual orientation: “*the Court has held that the State’s margin of appreciation is a narrow one; in other words, such differences require particularly convincing and weighty reasons by way of justification*” ([Bayev and others v Russia](#)¹⁰⁸ and [Ratzenbock and Seydl v Austria](#)¹⁰⁹) or;
- Health: “*the Court has held that people living with HIV are a vulnerable group and that the State should be afforded only a narrow margin of appreciation in choosing*

¹⁰⁵ European Commission of Human Rights 23 July 1968 in the “*Belgian Linguistic*” case, Series A no. 6, p. 35, § 10; the *National Union of Belgian Police* judgment of 27 October 1975, Series A no. 19, p. 20, § 47, and pp. 21 to 22, § 49; the *Swedish Engine Drivers’ Union* judgment of 6 February 1976, Series A no. 20, p. 17, § 47; the *Engel and Others v. the Netherlands* judgment of 23 November 1976, Series A no. 22, p. 31, § 72; and the *Ireland v. the United Kingdom* judgment of 18 January 1978, Series A no. 25, p. 87, § 229.

¹⁰⁶ Monitoring period: from 1st March 2017 to 28th February 2019, for example: *Aleksandr Aleksandrov v Russia*, no.14431/06; *Alexandru Enache v Romania*, no.16986/12; *Belli and Arquier-Martinez v. Switzerland*, no.65550/13, § 92 to 93 and 112; and *Carvalho Pinto de Sousa Morais v Portugal*, no.17484/15 § 44.

¹⁰⁷ *Emel Boyraz*, cited above, § 51

¹⁰⁸ *Bayev and others*, cited above, § 89

¹⁰⁹ *Ratzenbock and Seydl*, cited above, § 32

measures that single out this group for differential treatment on account of their health status” (Ibrogimov v Russie¹¹⁰).

The reason for this approach, is that such groups were historically subject to prejudice with lasting consequences, resulting in their social exclusion. Such prejudice may entail legislative stereotyping which prohibits the individualised evaluation of their capacities and needs.¹¹¹ Regarding sex and sexual orientation, the ECtHR also emphasised the existence of a common ground between the laws of the member states regarding these protected grounds, to justify the limitation of the margin of appreciation.

Nature of the measures

The nature of the measures is also a relevant factor for the ECtHR: the margin of appreciation is wider when it comes to the adoption by the State of general fiscal, economic or social measures, which are closely linked to the State’s financial resources (*Cassar v Malta*¹¹²), general measures of economic or social strategy (*Enver Sahin v Turkey*¹¹³) and measures relating to the field of social security and pensions (*Fabian v Hungary*¹¹⁴ and *Ribac v Slovenia*¹¹⁵). The ECtHR justifies this approach by referring to the direct knowledge of the member states of their society and its needs, because “*the national authorities are in principle better placed than the international judge to appreciate what is in the public interest on social or economic grounds, and the Court will generally respect the legislature’s policy choice unless it is ‘manifestly without reasonable foundation’.*”¹¹⁶

The ECtHR also recognised that the authorities enjoy a wide margin of appreciation, in particular when deciding on custody (*Petrov and X v. Russia*¹¹⁷). However stricter scrutiny is called for with respect to any further limitations, such as restrictions placed by those authorities on parental rights of access, and as regards any legal safeguards designed to secure an effective protection of the right of parents and children to respect for their family life. Such further limitations entail the danger that the family relations between a young child and one or both parents would be effectively curtailed.¹¹⁸

¹¹⁰ *Ibrogimov v Russia*, no. 32248/12, § 19

¹¹¹ McGoldrick, D. (2016). A defense of the margin of appreciation and an argument for its applications by the human rights committee, *International and Comparative Law Quarterly*, 65(1), 21to60.
doi:10.1017/S0020589315000457.

¹¹² *Cassar v Malta*, no. 50570/13, § 77

¹¹³ *Enver Sahin*, cited above, § 54 and 57

¹¹⁴ *Fabian v Hungary*, no. 78117/13, § 115

¹¹⁵ *Ribac v Slovenia*, no. 57101/10, § 53

¹¹⁶ *Fabian*, cited above, § 115

¹¹⁷ *Petrov and X v. Russia*, no. 23608/16, §99

¹¹⁸ *Ibid*

Absence of consensus

In other cases, the non-existence of common ground between the laws of the member states, the application of a democratic decision-making process and the nature of the aim pursued by the contested measures can also justify a wide margin of appreciation (in this case living together) ([Belcacemi and Oussar v Belgium](#)¹¹⁹ and [Dakir v Belgium](#)¹²⁰).

We can conclude that the scope is context dependent and varies from case to case. No fast rules can be identified and much depends on the facts of the case, such as the conflict of rights, the nature of the measures taken by a state, the pursued legitimate aim, etc...

¹¹⁹ *Belcacemi and Oussar*, cited above, §§ 51 to 55

¹²⁰ *Dakir*, cited above, § 57 to 60

13. Gender Perspective

According to the European Institute for Gender Equality (EIGE), gender perspective can be defined as a perspective taking into account gender-based differences when looking at any social phenomenon, policy or process.¹²¹

In the relevant period, roughly half of the cases where sex is the registered discrimination ground were put forward by men, and half by women.¹²²

The cases with male applicants concerned prisoners' rights and fathers' rights, whereas the cases with female applicants were more diverse and concerned protection from domestic violence, security officer positions reserved for men, reduction in awarded damages based on sex and age, ban on wearing full-face veil in public places and ban on keeping maiden names after marriage.

Gender perspective in a case of discrimination based on religion / minority status

There was one case that entailed intersectional discrimination, namely the case of [Molla Sali v. Greece](#). Intersectional discrimination happens when a person is discriminated on the basis of the combination of two (or more) grounds. In this case, such combination resulted from the intersection of sex and religion.

This case could be regarded as intersectional in its nature, even if the Court did not explicitly acknowledge it. EU jurisprudence¹²³ has made clear that EU legislation as stands cannot be understood as encompassing the combination of more than one ground. Nevertheless, the ECtHR has proven to have a more encompassing approach when considering the cases, as demonstrated in this case, as well as *Muñoz Díaz v. Spain* or [S.A.S v. France](#) among others.

The case concerned the application of Sharia law in an inheritance case, as the testator was of the Muslim minority in Greece. This led to a reduction of the widow's inheritance by three quarters. The case is interesting when it comes to the protection of minority rights versus the right of an individual to opt out of such special rights, more specifically the right to free self-identification. Furthermore, the ECtHR states that the wording "other status" in Article 14 may encompass discrimination by association, with relevance also to this case where religion

¹²¹ <https://eige.europa.eu/thesaurus/terms/1197>.

¹²² In this sense, please see Chapter 4.

¹²³ Judgment of the Court of Justice of the European Union, (First Chamber) of 24 November 2016, Case C-443/15, *David L. Parris v Trinity College Dublin and Others*. In this case the Court stated that "a national rule such as that at issue in the main proceedings is not capable of creating discrimination as a result of the combined effect of sexual orientation and age, where that rule does not constitute discrimination either on the ground of sexual orientation or on the ground of age taken in isolation".

was the discrimination ground. When it comes to the gender perspective, this was not the decisive argument in the case, but a supporting one, and it was used more with an intersectional perspective. The ECtHR refers to several international bodies that have expressed their concern about the application of Sharia law to Greek Muslims in Western Thrace and the discrimination thus created, in particular against women and children, not only within that minority as compared with men, but also in relation to non-Muslim Greeks.¹²⁴ Among these bodies were the Committee on the Elimination of All Forms of Discrimination against Women (CEDAW), the UN Human Rights Committee and the Commissioner for Human Rights of the Council of Europe. The ECtHR only refers to the views of these bodies and does not elaborate. The reason for this may be that there were other, more decisive reasons for concluding that the differential treatment in this case was not justified. This is in line with the full-face veil cases, such as [S.A.S v. France](#)¹²⁵ and [Belcacemi and Oussar v Belgium](#), where the ECtHR was reluctant to base (parts of) its reasoning on sex discrimination, and rather relied on other arguments where possible. The ECtHR states that a member state cannot invoke gender equality in order to ban a practice that is defended by the concerned women.¹²⁶ Therefore, the ECtHR avoided taking a stand as regards to intersectional discrimination, while confirming that member states do not have to consider religious practices from a gender perspective, thus allowing them to not take stands on issues that could be considered controversial by member states and various groups.

Structural discrimination and the importance of statistical data

Structural discrimination was the issue in two cases concerning protection from domestic violence ([Bălșan v. Romania](#)¹²⁷ and [Talpis v Italy](#)¹²⁸) with female applicants; in two cases concerning prisoners' rights ([Alexandru Enache v Romania](#)¹²⁹ and [Ecis v. Latvia](#)¹³⁰); and, in three cases concerning fathers' rights ([Leonov v Russia](#),¹³¹ [Leitner v Austria](#),¹³² and [Petrov and X v. Russia](#)¹³³) raised by male applicants. The ECtHR found violations of Article 14 in both domestic violence cases with female applicants, but only in one of the above-mentioned cases with male applicants ([Ecis v. Latvia](#)). In all of the three cases where a violation of Article 14 was found, the Government's use of statistical data or the Government's failure to provide such data was accepted by the ECtHR as evidence in support of the applicant.

As previously noted in Chapter 7, the ECtHR does not expressly distinguish between cases of direct and indirect discrimination, but rather states that a violation of Article 14 may occur

¹²⁴ *Molla Sali*, cited above, § 154

¹²⁵ *S.A.S v. France*, no. 43835/11

¹²⁶ *S.A.S.*, cited above, § 119.

¹²⁷ *Bălșan v. Romania*, no. 49645/09

¹²⁸ *Talpis v Italy*, no. 41237/14

¹²⁹ *Alexandru Enache v Romania*, no. 16986/12

¹³⁰ *Ecis v. Latvia*, no. 12879/09

¹³¹ *Leonov v Russia*, no. 77180/11

¹³² *Leitner v Austria*, no. 55740/10

¹³³ *Petrov and X v. Russia*, no. 23608/16

where there is a difference in the treatment of persons in relevantly similar situations and the difference of treatment has no objective and reasonable justification. It is clearly stated by the ECtHR in [the Hoogendijk case](#)¹³⁴ that if applicants submit undisputed official statistics indicating *prima facie* that a specific rule – although formulated in a neutral manner – in fact affects a clearly higher percentage of women than men, then the burden of proof will shift to the member state. The member state must then show that this is the result of objective factors unrelated to any discrimination on grounds of sex.

The prisoners' rights cases could be considered as examples of direct discrimination, whereas the fathers' rights cases are examples of alleged indirect discrimination. Although submitting statistical data to prove indirect discrimination is not a formal requirement,¹³⁵ it must still be considered important in order to prove indirect discrimination, as shown in [Ecis v. Latvia](#).¹³⁶ In this case, male inmates were placed under a stricter prison regime than female inmates. The Government's failure to provide statistical data showing that female inmates were less violent than male inmates formed a major part of the ECtHR's reasoning that the prison regime based on sex had no objective and reasonable justification. The ECtHR could not accept that all male prisoners were so much more dangerous than women that individual risk assessments were not needed.

In the fathers' rights cases concerning residence orders for children where the authorities enjoy a wide margin of appreciation,¹³⁷ the ECtHR only looked at the residence orders in question, stating initially that the national law was gender neutral in this regard. In [the Leonov case](#) it would seem that statistical data was not part of the submissions. Possibly, if statistical data had been provided showing that such orders were issued in favour of mothers in a disproportionate number of cases, the burden of proof would have shifted and one would have had reason to expect a more structural approach, combined of course with the merits of the cases at hand.

However, in [Petrov and X v. Russia](#) an analytical note was submitted showing that residence orders in respect of children of all ages were granted to the mother in 71.43% of cases and to the father in 28.57% of cases; while residence orders in respect of young children were given to the mother in 97.22% of cases. The ECtHR did not reflect upon this data and had the same approach as in the *Leonov* case. Although the outcome in these two cases may be regarded as satisfactory, a structural gender sensitive approach might have led to a more thorough examination of possible bias in the national proceedings.

In the domestic violence cases, statistical data was used demonstrating the prevalence of the problem, leading the ECtHR to criticise the member states' passivity and unresponsiveness.

¹³⁴ *Hoogendijk v. the Netherlands*, no. 58641/00

¹³⁵ See *D.H. and others v. The Czech Republic*, cited above, § 188.

¹³⁶ *Ecis v. Latvia*, no. 12879/09

¹³⁷ *Leonov v. Russia*, no. 77180/11, § 65

The ECtHR held that, through this lack of response and commitment, the authorities had effectively condoned these serious acts. For example, in [Bălșan v. Romania](#) the ECtHR considered that there was: *“prima facie evidence that domestic violence mainly affected women and that the general and discriminatory passivity of the authorities created a climate that was conducive to domestic violence”*.¹³⁸

¹³⁸ Cited above, § 86

14. Influence of International Law

It is of interest to note that in 9 of the cases that were analysed¹³⁹, the influence of international law featured prominently in the ECtHR's findings and final conclusion.

In most of the cases¹⁴⁰, a separate section is dedicated, within the facts, to relevant international sources (law, practice documents or materials).

These judgments include reference to international law understood in a broad sense, that is, not only to Conventions or Treaties like the CEDAW, the CRPD, the International Covenant on Economic, Social and Cultural Rights (ICESCR), the International Labour Organization (ILO) Conventions and EU law, but also to its practice. Such is the case for example of reports or concluding remarks of:

- The CEDAW Committee;¹⁴¹
- Conclusions of UN Special Rapporteurs;¹⁴²
- Recommendations of the UN Committee on the Elimination of Racial Discrimination (CERD) to Slovakia¹⁴³;
- Reports of the European Commission against Racism and Intolerance (ECRI)
- Opinions of the Council of Europe's Advisory Committee for the Protection of National Minorities on the problems faced by Roma Population, including in Ukraine and Slovakia¹⁴⁴;
- Opinions from NGO's (Women against Violence (WAVE)¹⁴⁵, Amnesty International¹⁴⁶).

¹³⁹ *Alexandru Enache v Romania*, no. 16986/12; *Bălșan v. Romania*, no. 49645/09; *Belli and Arquier-Martinez v. Switzerland*, no. 65550/13; *Burlya and Others v. Ukraine*, no. 3289/10; *Carvalho Pinto de Sousa Morais v Portugal*, no. 17484/15; *Enver Sahin v Turkey*, no. 23065/12; *Lakatošová and Lakatoš v. Slovakia*, no. 655/16.

¹⁴⁰ *Bălșan*, cited above; *Belli and Arquier-Martinez*, cited above; *Burlya and Others*, cited above; *Carvalho Pinto de Sousa Morais*, cited above; *Enver Sahin*, cited above; *Lakatošová and Lakatoš*, cited above; *MF v Hungary*, no. 45855/12; *Talpis v Italy*, no. 41237/14.

¹⁴¹ Made to Romania and Italy on domestic violence and women victims of violence (*Bălșan v. Romania* and *Talpis v Italy* respectively); or against Portugal regarding gender stereotypes (*Carvalho Pinto de Sousa Morais*).

¹⁴² Conclusions of UN Special Rapporteur on violence against women, its causes and consequences, drawn up following its official visit to Italy in 2012 (*Talpis v Italy*) or conclusions of the UN Special Rapporteur on the independence of Judges and lawyers in Portugal on the need to avoid reproduction of prejudices in Court rulings (*Carvalho Pinto de Sousa Morais v Portugal*).

¹⁴³ To take effective measures to prosecute hate crimes as well as the investigation, prosecution and punishment of all racially motivated crimes.

¹⁴⁴ *Burlya and Others v. Ukraine* and *Lakatošová and Lakatoš v. Slovakia*, both cited above.

¹⁴⁵ Report on Italy, published by the non-governmental organization WAVE (Women against Violence) in 2015 (*Talpis v Italy*, cited above).

¹⁴⁶ Amnesty International's 2016/2017 annual report on Romania, which included data on domestic violence (*Bălșan v. Romania*, cited above).

Other international documents or materials are also included, such as guidelines,¹⁴⁷ surveys¹⁴⁸ or practical guides¹⁴⁹. The ECtHR even relies, in [Belli and Arquier-Martinez v. Switzerland](#), on the analysis of the legislation of 34 member states of the Council of Europe regarding social security related to non-contributory benefits, as well as on relevant provisions of comparative and EU law¹⁵⁰, to conclude there is no violation of Article 14 in conjunction with Article 8.

Therefore, in a number of these cases, the ECtHR uses the above-mentioned international sources as relevant data and proof of the situation in the member state, such as violence against women in Italy;¹⁵¹ the prevailing existence of prejudices among the judiciary in Portugal;¹⁵² the problems faced by the Roma population in Ukraine and Slovakia;¹⁵³ and the recommendations made to those member states to address them. In all these cases, it led the Court to conclude there had been a violation of Article 14 in conjunction with other articles.

The influence of and need for different sources of international law and practice is expressly mentioned by the ECtHR in [Bălșan v. Romania](#), where it stated that when considering the definition and scope of discrimination against women, it must have regard to the provisions of more specialised legal instruments and the decisions of international legal bodies on the question of violence against women.¹⁵⁴ It therefore considered that the domestic authorities had acted in a way that was inconsistent with international standards on violence against women and domestic violence, ultimately concluding that there was a discriminatory attitude towards the applicant as a woman.¹⁵⁵

In [Enver Sahin v Turkey](#) the ECtHR states that the Convention should, so far as possible, be interpreted in harmony with other rules of international law of which it forms part. Going further, it adds that under Article 14, the ECtHR must have regard to the changing conditions of international and European law and respond, for example, to any emerging consensus as to the standards to be achieved. It therefore agrees that Article 14 must be read in the light of the international texts mentioned in the case, in particular, the CRPD.

¹⁴⁷ [2008 guidelines adopted by the Council of the European Union on violence against women and girls](#) (*Bălșan v. Romania*, cited above).

¹⁴⁸ EU-wide survey carried out by the FRA in 2012, which includes data on violence suffered by women in Romania (*Bălșan v. Romania*).

¹⁴⁹ Practical Guide on Prosecuting Hate Crimes published by the Office for Democratic Institutions and Human Rights of the Organization for Security and Co-operation in Europe (OSCE/ODIHR) in 2014 (*MF v Hungary*, cited above).

¹⁵⁰ Section on international law, §§ 28 to 43.

¹⁵¹ *Talpis v Italy*, cited above

¹⁵² *Carvalho Pinto de Sousa Morais v Portugal*, cited above.

¹⁵³ *Burlya and Others v. Ukraine* and *Lakatošová and Lakatoš v. Slovakia*, both cited above.

¹⁵⁴ §§ 79 and 81.

¹⁵⁵ § 85.

15. Monitoring the Communicated Cases in 2019

In 2019 the Equinet Working Group on Equality Law (WG) monitored the communicated cases of the ECtHR related to Article 14, with the aim of identifying a case suitable for a potential third-party intervention (TPI) by Equinet.

Overall, 134 cases containing an Article 14 claim were communicated to the ECtHR within the period from 1 January 2019 to 17 December 2019. The WG considered seven cases in detail for a potential TPI, though ultimately decided not to proceed with a TPI in any of the seven.

A TPI would allow Equinet the opportunity to submit comparative data on any issue relevant to discrimination and equal treatment, relying on its direct access to information from Equinet members – national equality bodies (NEBs). On the other hand, there are several obstacles to submitting a TPI.

Some of those obstacles relate to the communicated case itself and the ECtHR's procedure for submitting a TPI. The WG hesitated to consider a case for TPI if the communication was missing important information relating to the facts of the case.

Sometimes the questions formulated by the ECtHR and addressed to the member state indicated that the case may be inadmissible, hence a TPI would not have been worthwhile. On other occasions, the communicated cases had limited relevance to Article 14; other provisions of the Convention were more prominent. It is also necessary to request leave to intervene within a 12-week timeframe from the Court's communication to the member state.

Other obstacles lay on the part of Equinet or external factors. For example, Equinet's internal procedure requires agreement (or at least no veto) on a selected case from all the Equinet's members and the Equinet Executive Board. Sometimes other non-governmental organisations are interested in a particular case and would submit their TPI. In such a case it is debatable whether another TPI from the Equinet would be of assistance to the ECtHR.

In spite of these obstacles, on 7th July 2020, the European Court of Human Rights granted permission for Equinet to intervene in the case of [Toplak and Mrak v Slovenia](#).¹⁵⁶ The case concerns accessibility of polling stations to persons with disabilities and raises complaints in terms of Article 3 of Protocol No.1 to the ECHR read alone and in conjunction with Article 14, Article 1 of Protocol No.12 and Article 13 of the ECHR. Equinet's submission¹⁵⁷ provides the Court with information about international human rights standards and trends regarding the right to vote for persons with disabilities as well as information about legislation and practice

¹⁵⁶ *Frank Toplak and Iztok Mrak v Slovenia*, no. 34591/19 and 42545/19

¹⁵⁷ Available at: https://equineteurope.org/wp-content/uploads/2020/07/FINAL_TPI-28-07-2020.pdf

at national level in contracting states. A decision on the outcome of the case is awaited and the Legal Working Group will then assess its impact. In the meantime the group continues monitoring communicated cases and building on the expertise developed during this process.

16. Subsequent Cases

The study period ended on 31st March 2019 to facilitate conclusion of this work. However this paper acknowledges that the ECtHR has continued to develop Article 14 jurisprudence and has also published a [Guide on Article 14 of the European Convention on Human Rights and on Article 1 of Protocol 12](#).¹⁵⁸ Some important cases (please do not read the following as an exhaustive list) have recently been decided which are of relevance to some of the themes explored in this paper. For example;

- a. [J.D. and A v United Kingdom](#)¹⁵⁹ concerned a shortfall in housing benefit for a woman who required a safe room under a sanctuary scheme to protect herself and her son from her violent ex-partner (The ECtHR re-examined the margin of appreciation in Article 14 cases and reiterated that *“in the context of Article 14 in conjunction with Article 1 Protocol 1, although the margin of appreciation in the context of general measures of economic or social policy is, in principle, wide, such measures must nevertheless be implemented in a manner that does not violate the prohibition of discrimination as set out in the Convention and complies with the requirement of proportionality”*).¹⁶⁰
- b. In [Volodina v Russia](#)¹⁶¹, the ECtHR criticised the continued failure to adopt legislation to combat domestic violence. The ECtHR held that by tolerating for many years a climate which was conducive to domestic violence, the Russian authorities failed to create conditions for substantive gender equality that would enable women to live free from fear of ill-treatment or attacks on their physical integrity and to benefit from the equal protection of the law.
- c. In [Stoian v Romania](#)¹⁶² the first applicant has quadriplegia and relies on a wheelchair to mobilise. The second applicant is his mother and primary carer. The first applicant argued that he did not have physical access to the school environment and that no reasonable accommodation had been made. Both applicants alleged that they were victims of ill treatment and that there was no effective remedy. The ECtHR held that there had been no violation of Article 8 taken alone or together with Article 14. In doing so, they noted the Third-Party interventions which confirmed the lack of infrastructure for children with a disability as well as the international standards for the protection of persons with disabilities, in particular, the UN Convention on the Rights of Persons with Disabilities. The Government accepted there had been delays in ensuring accessibility of school buildings. The ECtHR reiterates that inclusive education is widely accepted to be the most appropriate means of guaranteeing

¹⁵⁸ European Court of Human Rights, 31st December 2019

¹⁵⁹ *J.D. and A v United Kingdom*, no. 32949/17

¹⁶⁰ *Ibid*, § 88

¹⁶¹ *Volodina v Russia* no. 41261/17

¹⁶² *Stoian v. Romania*, no. 289/14

inclusion and non-discrimination in the field of education. However the ECtHR was satisfied that the domestic authorities complied with their obligation to provide reasonable accommodation “not imposing a disproportionate or undue burden” and, within their margin of appreciation, to allocate resources in order to meet the educational needs of children with disabilities.

17. Conclusion and General Observations

This report has analysed two years of judgments from the ECtHR where it has made a substantive decision on Article 14 as well as one year of communicated cases. The report has analysed these cases to establish recent developments in the approach of the ECtHR, bearing in mind that the text of the Convention is a ‘living instrument’. Given that the focus of the Equinet Working Group is on EU equality law, we have, where appropriate, drawn comparisons with discrimination law under the directives as interpreted by the CJEU. The following key points have emerged:

- Overall, there was a violation of Article 14 in the vast majority of cases where substantive consideration was given to the Article 14 claim (73%). However, it has to be borne in mind that such substantive consideration was only given in 38% of cases where Article 14 was initially argued. Recognition of the importance to discrimination victims of having the discriminatory treatment acknowledged and publicly declared is an essential component of the vindication of rights. These figures therefore emphasise the importance of developing detailed Article 14 arguments at admissibility stage and of making clear the reasons why Article 14 requires separate consideration (Chapter 1).
- In recognition of the status of the non-discrimination principle, the ECtHR did not accept the argument that a discrimination victim could have avoided the discrimination by altering the protected characteristic, for example by acquiring another nationality, as to do so would render Article 14 devoid of its purpose (Chapter 1).
- Article 14 was most frequently argued as falling within the ambit of Article 8, the right to respect for private and family life (Chapter 2).
- The Convention has broad scope enabling discrimination arguments to be made in a wide range of sectors. Within the study period, Article 14 was most frequently argued in the context of justice and security. Although primarily concerned with civil and political rights in public and administrative law, the ECtHR expressed that it cannot remain passive where a national court’s interpretation of a legal act - be it a testamentary disposition, a private contract, a public document, a statutory provision or an administrative practice - appears unreasonable, arbitrary or blatantly inconsistent with the prohibition of discrimination established by Article 14 and more broadly with the principles underlying the Convention (Chapter 3).
- The Equality Directives have a limited portfolio of protected characteristics, whereas the cases analysed demonstrate the flexibility of Article 14 in terms of protected characteristics, as “other status” was the most frequently argued characteristic. ‘Other status’ ranged from the broader characteristics such as disability, to the very specific such as particular types of property ownership. The second most frequently

argued characteristic was sex followed by race (Roma discrimination cases), religion, national origin and race (other) (Chapter 4).

- There was gender balance in case-law relating to discrimination on the grounds of sex, with almost 50% of the claims brought by men, often seeking greater contact/residence rights in relation to their children. The ECtHR considered for the first time a sexual orientation discrimination case brought by a heterosexual couple (Chapter 4).
- The “very weighty reasons” test is applied only to “suspect grounds cases” and although there were no new suspect grounds established in the sample cases, the ECtHR was noted to also swiftly apply the “very weighty reasons” approach to age discrimination without analysis of its historical status as expressly not a “suspect ground”. This perhaps paves the way for future development in the case-law (Chapter 5).
- It is apparent from the case-law analysis that the ECtHR does not consistently require of discrimination law the same level of precision and definition as required under the Directives, instead often focusing on the substance of the complaint. The question of whether the facts of the case point to direct or indirect discrimination is at times open to interpretation. It is not clear whether this is a question of semantics, or whether there are further reaching consequences which may evolve over time (Chapters 6 and 7).
- The concept of positive obligations played a central role in some of the indirect discrimination cases with states called upon to take active steps to uncover racist motivation and prejudice in criminal investigations and acknowledging that passivity and failure to take action in domestic violence cases is a form of discrimination against women. In [Enver Sahin v Turkey 23065/12](#) the ECtHR drew on the CRPD to develop the concept of failure to make reasonable adjustments as a form of discrimination in the context of positive obligations (Chapter 8).
- The concept of discrimination by association was further explored in relation to four protected characteristics: disability, religion, sexual orientation and race (Chapter 9).
- Justification is applied in relation to both direct and indirect forms of discrimination cases and the sample cases contained examples where the following were accepted as legitimate aims: the protection and organisation of the country’s economic and social system; the need to assure the minimum condition of life in society and the need to live together as an aspect of the rights and freedoms of others; and the need to secure legal certainty/ legitimate expectation (Chapter 11).
- The margin of appreciation can be viewed as narrower when dealing with marginalised groups and areas where there is common ground between member states. A broader margin of appreciation is at times afforded in cases involving general fiscal, economic or social measures, economic or social strategy or in the field of social security and pensions (Chapter 12).
- There were several examples where the ECtHR acknowledged structural discrimination affecting groups such as women and prisoners. There was one case

where the gender perspective was highly influential on the outcome of the case, but where the discrimination ground was not sex ([Molla Sali v. Greece](#)) (Chapter 13).

- The sample cases provided numerous examples to demonstrate the ECtHR's practice of citing not just international law instruments, but also the wider practice of the UN Committees and special rapporteurs. In [Bălșan v. Romania](#) the ECtHR expressly acknowledged the important influence of these specialised legal instruments and emerging international consensus on standards (Chapter 14).
- Overall, the 37 judgments offer a snapshot of some of the emerging discrimination concerns of the time which are mirrored in some of the themes which emerged in the 7 communicated cases selected for potential intervention, which concerned forced eviction of Roma people, LGBT rights, failure of authorities to take action to combat domestic abuse, complexities surrounding surrogacy, discrimination on the grounds of HIV status and the voting rights of adults deprived of their legal capacity interpreted in light of the influence of the UNCRPD (Chapters 1 and 15).
- Equinet has channelled the expertise developed during the study period and has submitted its first intervention to the European Court of Human Rights in the case of [Toplak and Mrak v Slovenia](#). A decision on the outcome of the case is awaited and the Legal Working Group will then assess the impact of the submission and in the meantime continues monitoring communicated cases (Chapter 15).
- Finally, it has to be acknowledged that the period of study ended in March 2019 and the ECtHR has continued the journey of Article 14 case-law. Several important judgments have been issued since then, some of which have been summarised in Chapter 16.
 - The first in relation to reasonable adjustments in education ([Stoian v Romania 289/14](#));¹⁶³ and the second in relation to shortfall in housing benefit for a woman who required a safe room under a sanctuary scheme, to protect herself and her son from her violent ex-partner ([J.D. and A v United Kingdom 32949/17](#)).¹⁶⁴ The latter also re-examined the margin of appreciation in Article 14 cases and reiterated that *"in the context of Article 14 in conjunction with Article 1 Protocol 1, although the margin of appreciation in the context of general measures of economic or social policy is, in principle, wide, such measures must nevertheless be implemented in a manner that does not violate the prohibition of discrimination as set out in the Convention and complies with the requirement of proportionality"*.¹⁶⁵

Overall, it is clear that discrimination under Article 14 is broader in scope and follows broader definitions than concepts within the equality directives and that the ECtHR applies a fluid approach to interpretation. Perhaps this approach is a means of respecting

¹⁶³ *Stoian v. Romania*, no. 289/14

¹⁶⁴ *J.D. and A v United Kingdom*, no.32949/17 and 34614/17

¹⁶⁵ Cited above, §89

the living instrument doctrine and ensuring that Article 14 is not rendered devoid of its underlying purpose.

Annex A: Compendium of Article 14 Cases from the European Court of Human Rights 1st March 2017 to 28th Feb 2019

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This section provides a list of the cases that the working group analysed, in alphabetical order. There may be varying levels of detail of the cases, depending on the relevance of the case to the questions under consideration in this paper.

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PART A

Date and Court: 27 March 2018, Third Section

Facts of the case: Applicant was sentenced to one-year imprisonment. He was given a custodial sentence instead of a non-custodial sentence because he did not have a permanent residence in Moscow or in Moscow Region. He claims he had been discriminated against by the trial court.

Ambit of which article: Article 14 + 5.

Protected characteristic argued: (1) “particular circumstances” of the offence. According to the Court this ground was not discriminatory on the face of it. (2) The Court has previously recognised that the “place of residence constitutes an aspect of personal status for the purposes of Article 14” [25]

Did the Court consider Article 14 as well as substantive argument? Yes §§ 17, 22, 23, 25, 28.

Violation or not? Violation of Articles 5 + 14.

Principal reason for finding a violation of Article 14 or not: The Government failed to indicate what legitimate aim the difference in treatment pursued and how it was capable of being objectively and reasonably justified. The factors they highlighted were simply explanations of the mechanisms which led to the difference in treatment complained of. The district court did not justify why the benefit of a non-custodial sentence should have been conditional on the applicant’s ability to have a permanent residence outside his home region and near the place where he had been tried and sentenced.

PART B

Discussion of “suspect grounds”? § 18. In order for an issue to arise under Article 14 there must be a difference in the treatment of persons in analogous, or relevantly similar, situations. However, only differences in treatment based on a personal characteristic (or “status”) by which persons or groups of persons are distinguishable from each other are capable of triggering the application of Article 14. The words “other status” in the text of this provision have generally been given a wide meaning, and their interpretation has not been limited to characteristics which are personal in the sense that they are innate or inherent. The words “other status” (and *a fortiori* the French equivalent *toute autre* situation) have been given a wide meaning so as to include, in certain circumstances, a distinction drawn on the basis of a place of residence.

Discussion of comparators/ like for like? The Court just mentioned that a distinction has been made between offenders on account of a personal characteristic.

(Direct or indirect) discrimination argued: Discrimination form not specified.

Influence of EU or UN law? No

Influence of gender perspective? No

Test applied for considering discrimination: §22: “ Accordingly, the present case must be taken to concern an individual decision which, according to the applicant, introduced a difference in treatment based on his place of residence. The Court must therefore examine whether the respondent State put forward an objective and reasonable justification for the alleged difference in treatment.”

Discussion of margin of appreciation? The Court just mentioned that “[19] As a general rule, the Contracting State enjoys a margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a different treatment”.

Discussion of justification? The main principles of justification were explained by the Court at § 22 and examined in §§ 25 to 30, concluding in the latter paragraph: “Accordingly, it has not been shown that the difference in treatment pursued a legitimate aim or had an objective and reasonable justification. There has therefore been a violation of Article 14 of the Convention, taken in conjunction with Article 5”.

Discussion of the absence of positive measures as a basis to find discrimination? No

Any other issue of note? The Court mentioned the burden of proof very briefly: § 20 As to the burden of proof in relation to Article 14 of the Convention, the Court has held that once the applicant has demonstrated a difference in treatment, it is for the Government to show that it was justified (see *D.H. and Others*, cited above, § 177).

[Alekseyev and Others v. Russia, no. 14988/09, 65548/10, 30650/12](#)

PART A

Date and Court: Third section, 27 November 2018

Facts of the case: The case originated in fifty-one applications against the Russian Federation. The applicants complained of the ban on holding lesbian, gay, bisexual and transgender (LGBT) public events imposed by the domestic authorities and of a lack of effective remedies in that respect. They also alleged that the authorities treated in a discriminatory manner their requests to be permitted to hold these events.

Ambit of which article Articles 14 and 11, 13.

Protected characteristic argued: Sexual orientation, gender identity (LGBT)

Did the Court consider Article 14 as well as substantive argument? Yes, §§ 19 to 22

Violation or not? Violation 14 and 11, 13

Principal reason for finding a violation of Article 14 or not: The Court reached the same conclusions as in the case [Alekseyev v. Russia, no. 4916/07](#). The ban on holding LGBT public assemblies had not corresponded to a pressing social need and had thus not been necessary in a democratic society. Furthermore, the applicants had suffered unjustified discrimination on the grounds of sexual orientation and had been denied an effective domestic remedy in respect of their complaints concerning a breach of their freedom of assembly (§ 21).

PART B

Discussion of “suspect grounds”? No

Discussion of comparators/ like for like? No

Direct or indirect discrimination argued: Direct

Influence of EU or UN law? No

Influence of gender perspective? No

Test applied for considering discrimination: No

Discussion of margin of appreciation? No

Discussion of justification? See the reasoning for finding a violation (summarised above, so § 21)

Discussion of the absence of positive measures as a basis to find discrimination? No

[Aleksic v Slovenia, no. 57123/10](#)

PART A:

Date and Court: 19th February 2019 Fourth Section

Facts of the case The Applicant complains under Article 14 of the Convention taken in conjunction with Article 1 of Protocol No. 1, concerning a refusal to grant to him an old-age pension between May 1992 and February 2003 because he had not had Slovenian citizenship at that time.

Ambit of which article: Article 14 + Article 1 of Protocol 1

Protected characteristic argued: Nationality

Did the Court consider Article 14 as well as substantive argument? Yes [§§ 35 to 44]

Violation or not? Yes

Principal reason for finding a violation of Article 14 or not: The difference in treatment complained of had no objective and reasonable justification.

PART B

Discussion of “suspect grounds”? No

Discussion of comparators/ like for like? No

Direct or indirect discrimination argued: Direct discrimination

Influence of EU or UN law? No

Influence of gender perspective? No

Test applied for considering discrimination: No

Discussion of margin of appreciation? No

Discussion of justification? §38: “The Court accepts that the difference in treatment complained of pursued at least one legitimate aim, namely the protection and organisation of the country’s economic and social system.”

Discussion of the absence of positive measures as a basis to find discrimination? No

Any other issue of note? §43: “Lastly, the Court cannot accept the Government’s argument that the applicant could have obtained citizenship and the pension rights earlier had he given up his Serbian citizenship following his 1999 application for citizenship (see paragraph 33 above). The prohibition of discrimination enshrined in Article 14 of the Convention is meaningful only if, in each particular case, the applicant’s personal situation in relation to the criteria listed in that provision is taken into account exactly as it stands. To proceed otherwise, by dismissing the victim’s claims on the ground that he or she could have avoided the discrimination by altering one of the factors in question – for example, by acquiring a nationality – would render Article 14 devoid of substance.”

[Alexandru Enache v Romania, no. 16986/12](#)

PART A

Date and Court: 3rd October 2017 Fourth Section

Facts of the case: The applicant complained of discrimination in the exercise of his right to respect for his family life on the grounds that under Romanian law only convicted mothers of children under the age of one could request a stay of execution of their prison sentence.

Ambit of which article: Articles 14 + 8

Protected characteristic argued: Sex / convicted fathers

Did the Court consider Article 14 as well as substantive argument? Yes

Violation or not? Violation Art 3 and no violation art 8 + 14

Principal reason for finding a violation of Article 14 or not: §77: “The Court accepts that motherhood has specific features which need to be taken into consideration, sometimes by means of protective measures .”

PART B

Discussion of “suspect grounds”? In joint partly dissenting judgment only

Discussion of comparators/ like for like? Lengthy discussion at §§ 64 - 69

Direct or indirect discrimination argued: Direct discrimination

Influence of EU or UN law? CEDAW §§ 71 and 77. European and international instruments addressing the need of women for protection in prison environment and of pregnancy and motherhood.

Influence of gender perspective? Yes, see §§ 75 to 79

Test applied for considering discrimination: §64: “In order for an issue to arise under Article 14 there must be a difference in the treatment of persons in analogous or comparable situations. The requirement to demonstrate an analogous position does not require that the comparator groups be identical. It has to be established that the applicant, having regard to the particular nature of his complaint, was in a comparable situation to others treated differently.”

Discussion of margin of appreciation? Broad margin of appreciation afforded to the respondent State in this area

Discussion of justification? Yes, §§ 70 to 79 there is a reasonable relationship of proportionality between the means employed and the legitimate aim pursued

Discussion of the absence of positive measures as a basis to find discrimination? No

Any other issue of note? Concurring and a joint partly dissenting opinion

[Alkovic v Montenegro, no. 66895/10](#)

PART A

Date and Court: 05 December 2017 Second Section

Facts of the case: The case concerns a series of apparently ethnically and/or religiously motivated attacks against Mr. Alkovic by his neighbours. Mr Alkovic is Muslim and has Roma ethnicity.

Ambit of which article: Articles 14 + 8 and 9 +13 (no assessment)

Protected characteristic argued: Ethnicity/religion

Did the Court consider Article 14 as well as substantive argument? Yes, § 66

Violation or not? Violation 14 + 8, no violation of 9 +13

Principal reason for finding a violation of Article 14 or not: § 73: “The manner in which the criminal-law mechanisms were implemented in the present case by the judicial authorities was defective to the point of constituting a violation of the respondent State’s obligations under Article 8 of the Convention in conjunction with Article 14 of the Convention.”

PART B

Discussion of “suspect grounds”? No

Discussion of comparators/ like for like? No

Direct or indirect discrimination argued: No

Influence of EU or UN law? No

Influence of gender perspective? No

Test applied for considering discrimination: § 66. The Court also reiterates that it is part of the authorities’ responsibilities under Article 14, taken in conjunction with Articles 2, 3 or 8, to investigate the existence of a possible link between racist attitudes and acts of violence.

Discussion of margin of appreciation? No

Discussion of justification? No

Discussion of the absence of positive measures as a basis to find discrimination? § 65

Any other issue of note? No

[Bălșan v. Romania, no. 49645/09](#)

PART A

Date and Court: 23 May 2017 Fourth section

Facts of the case: The applicant reported that her ex-husband had been violent towards her throughout their marriage. During their divorce proceedings his assaults against her had intensified and she made various complaints to the police. Before the Court the applicant complained that she had been subjected to violence by her husband and that the State authorities had done little to stop it or to prevent it from happening again.

Ambit of which article: Articles 14 + 3

Protected characteristic argued: Sex (f)

Did the Court consider Article 14 as well as substantive argument? Yes [§§72 to 89] The Court considered Article 14 of its own motion

Violation or not? Violation of Article 14 read in conjunction with Article 3

Principal reason for finding a violation of Article 14 or not: The applicant's husband repeatedly subjected her to violence and allegedly threatened to kill her and the authorities were well aware of what was going on. However, the domestic authorities have deprived the national legal framework of its purpose by their finding that the applicant provoked the domestic violence against her, that the violence did not present a danger to society and therefore was not severe enough to require criminal sanctions, and by denying the applicant's request for a court-appointed lawyer. In doing so, the domestic authorities have also acted in a way that was inconsistent with international standards on violence against women and domestic violence in particular. Also, the domestic authorities' showed passivity by failing to consider any protective measures for the applicant, despite her repeated requests to the police. Therefore, bearing in mind the particular vulnerability of victims of domestic violence, the Court considered that the authorities should have looked into the applicant's situation more thoroughly [§§80 to 82].

PART B

Discussion of "suspect grounds"? No

Discussion of comparators/ like for like? No

Direct or indirect discrimination argued: Direct discrimination

Influence of EU or UN law? Yes:

- UN-CEDAW art. 1, 2
- Council of Europe - Istanbul Convention art. 3, 49, 54, 56
- EU guidelines on violence against women and girls
- CEDAW Committee, concluding comments on Romania
- EU-wide survey carried out between March and September 2012 by the European Union Agency for Fundamental Rights (FRA)
- Annual Report 2016-2017 on Romania of Amnesty International
- § 67 & 81 Inconsistency of State with international standards on VAW and domestic violence in particular.
- § 79 When defining discrimination against women, take into account provisions of specialized legal instruments and decisions of international bodies on VAW. Expressly mentions that findings of the Court are in line with those of the CEDAW Committee.

Influence of gender perspective? §79 "When considering the definition and scope of discrimination against women, the Court has also found that it must have regard, in addition to the more general meaning of discrimination as determined in its case-law, to the provisions of more specialised legal instruments and the decisions of international legal bodies on the

question of violence against women (see [Opuz, v Turkey, no. 33401/02](#), § 185). In that context it must be stressed that the Istanbul Convention defines for its purposes violence against women as a form of discrimination against women (paragraph 42)."

Test applied for considering discrimination: N/A

Discussion of margin of appreciation? No

Discussion of justification? No

Discussion of the absence of positive measures as a basis to find discrimination?

§78 "The Court has already held that failure by a State to protect women against domestic violence breaches their right to equal protection under the law and that this failure does not need to be intentional"

Any other issue of note? §72 "Having regard to the particular circumstances of this case and the nature and substance of the applicant's complaints, the Court considered it appropriate to communicate of its own motion a complaint under Article 14 of the Convention read in conjunction with Article 3."

[Bayev and others v Russia, no. 67667/09](#)

PART A

Date and Court: 20 June 2017 Third section

Facts of the case: The applicants alleged that the legislative ban on "propaganda of non-traditional sexual relations aimed at minors" violated their right to freedom of expression and was discriminatory.

Ambit of which article: Articles 14 + 10

Protected characteristic argued: Sexual orientation

Did the Court consider Article 14 as well as substantive argument? Yes §§ 87 to 92

Violation or not? Violation of Article 10 as well as Article 14 + 10

Principal reason for finding a violation of Article 14 or not: § 91. The legislative provisions in question embodied a predisposed bias on the part of the heterosexual majority against the homosexual minority and that the Government have not offered convincing and weighty reasons justifying the difference in treatment.

PART B

Discussion of "suspect grounds"? Indirectly at § 89. The Court has stressed that differences based solely on considerations of sexual orientation are unacceptable under the Convention.

Discussion of comparators/ like for like? No

Direct or indirect discrimination argued: Direct §90

Influence of EU or UN law? No

Influence of gender perspective? No

Test applied for considering discrimination: §88 “In order for an issue to arise under Article 14 there must be a difference in treatment of persons in relevantly similar situations. Such a difference of treatment is discriminatory if it has no objective and reasonable justification; in other words, if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realised.”

Discussion of margin of appreciation? §89 “Specifically in regard to differences in treatment based on sexual orientation, the Court has held that the State’s margin of appreciation is a narrow one; in other words, such differences require particularly convincing and weighty reasons by way of justification (see [X and Others v. Austria](#), cited above, § 99, and the cases cited therein). The Court has stressed that differences based solely on considerations of sexual orientation are unacceptable under the Convention”

Discussion of justification? Only really under Article 10

Discussion of the absence of positive measures as a basis to find discrimination? No

Any other issue of note? The legislation at hand thus states the inferiority of same-sex relationships compared with opposite-sex relationships (§ 90).

[Belcacemi and Oussar v Belgium, no. 37798/13](#)

PART A

Date and Court: 11 July 2017, Second Section

Facts of the case: Belcacemi and Oussar are Muslim women who wear a niqab (face veil) due to their religious belief. They were fined based on a municipal face covering ban. In 2011 Belgium enacted a national ban on face coverings. They filed an application for suspension and annulment of the Law with the Belgian Constitutional Court which, however, dismissed their cases. They contested this law before the Court.

Ambit of which article: Relying on Articles 8 (right to respect for private and family life), 9 (freedom of thought, conscience and religion), and 10 (freedom of expression), taken separately and together with Article 14 (prohibition of discrimination) of the European Convention on Human Rights, Ms Belcacemi and Ms Oussar complained about the ban on wearing the full-face veil.

Ms Belcacemi and Ms Oussar also relied on Articles 3 (prohibition of inhuman or degrading treatment), 5 § 1 (right to liberty and security), 11 (freedom of assembly and association) and Article 2 of Protocol No. 4 (freedom of movement) to the Convention, taken separately or together with Article 14 (prohibition of discrimination).

Protected characteristic argued: Religion

Did the Court consider Article 14 as well as substantive argument? Yes with regard to the alleged violation of Articles 8, 9 & 14; article 10 & 14. See §§ 64, 65, 66, 67 and 69.

The Court considered that Article 2 Protocol No. 4, Article 11, Article 3 and Article 5 are not applicable and that claims based on these articles are manifestly ill-founded (the Court refers to article 35 § 3 and 4 ECHR to support this conclusion).

Violation or not? No violation of all the invoked articles.

Principal reason for finding a violation of Article 14 or not:

The Court considered that the ban consists an indirect discrimination on the basis of religion, but is justified by:

- A legitimate aim (the necessity to assure the minimum condition of life in society as contributing to the legitimate aim of the protection of the rights and freedom of others) (§§ 48 & 49 and also §§ 140 to 142 of [S.A.S v. France 43835/11](#));
- and is necessary in a democratic society: regards the proportionality of the restriction, the Court noted that that the sanction for non-compliance with the ban under Belgian law could range from a fine to a prison sentence. The main sanction was the fine, being the lightest penalty. Imprisonment was reserved for repeat offenders and was not applied automatically. In addition, the offence was classified as “hybrid” in Belgian law, partly under the criminal law and partly administrative. Thus, in the context of administrative action, and contrary to what the applicants had contended, alternative measures were possible and taken in practice at municipal level. Moreover, the present application did not concern a specific sanction imposed on the applicants themselves. Consequently, having regard to the broad margin of appreciation afforded to the Belgian authorities, the Court found that the ban under the Law of 1 June 2011, even though it was controversial and undeniably carried risks in terms of the promotion of tolerance in society, could be regarded as proportionate to the aim pursued, namely the preservation of the conditions of “living together” as an element of the “protection of the rights and freedoms of others”. (§§ 51 to 62)

PART B

Discussion of “suspect grounds”? No

Discussion of comparators/ like for like? Not really, the Court explains the way indirect discrimination works: the Court reiterated that a general policy or measure which had

disproportionate prejudicial effects on a group of individuals (in this case Muslim women who wear a face veil due to religious motives) could be regarded as discriminatory – even if it did not specifically target the group and there was no discriminatory intent – if that policy or measure lacked “objective and reasonable” justification, if it did not pursue a “legitimate aim” or if there was no “reasonable relationship of proportionality” between the means used and the aim pursued. [66 and 67]

Direct or indirect discrimination argued: Indirect discrimination

The Court reiterated that a general policy or measure which had disproportionate prejudicial effects on a group of individuals (in this case Muslim women who wear a face veil due to religious motives) could be regarded as discriminatory – even if it did not specifically target the group and there was no discriminatory intent – if that policy or measure lacked “objective and reasonable” justification, if it did not pursue a “legitimate aim” or if there was no “reasonable relationship of proportionality” between the means used and the aim pursued (§ 66 and § 161 of the [S.A.S. v. France](#) case).

Influence of EU or UN law? The general principles of the anti-discrimination legislation (indirect discrimination, justification).

Influence of gender perspective? No

Test applied for considering discrimination: The main principles of justification were explained by the Court: § 66 The Court reiterated that a general policy or measure which had disproportionate prejudicial effects on a group of individuals could be regarded as discriminatory – even if it did not specifically target the group and there was no discriminatory intent – if that policy or measure lacked “objective and reasonable” justification, if it did not pursue a “legitimate aim” or if there was no “reasonable relationship of proportionality” between the means used and the aim pursued.

Discussion of margin of appreciation? Yes, in this case the Court gives a broad margin of appreciation to the State: Under Article 9 of the Convention the State had a broad margin of appreciation to whether and to what extent a restriction on the right to manifest one religion or convictions was “necessary”. In adopting the provisions in question, the Belgian State had sought to respond to a practice that it considered to be incompatible, in Belgian society, with social communication and more generally the establishment of human relations, which were indispensable for life in society. It was a matter of protecting a condition of interaction between individuals which for the State was essential to ensure the functioning of a democratic society. The question whether the full-face veil was accepted in the Belgian public sphere was thus a choice of society. As it had emphasised in *S.A.S. v. France*, the Court explained that in such cases it had to show reserve in its scrutiny of Convention compliance, in this case in assessing a decision taken democratically within Belgian society. It noted that the decision-making process leading to the ban in question had taken several years and had been marked by comprehensive debate in the lower house of Parliament and by a detailed

examination of the various interests by the Constitutional Council. In addition, there was currently no consensus in such matters among the member States of the Council of Europe, whether for or against a blanket ban of the full-face veil, thus justifying a broad margin of appreciation for the Belgian State (§ 51 to 55).

Discussion of justification? The Court considered that the ban consists indirect discrimination on the basis of religion, but is justified by:

- A legitimate aim (the necessity to assure the minimum condition of life in society as contributing to the legitimate aim of the protection of the rights and freedom of others) (§ 48 & 49 and also § 140- 142 of the SAS v. France case);
- and is necessary in a democratic society: Leaving a wide margin of appreciation to the national authorities, the Court holds that the decision on whether or not to prohibit the wearing of full-face veil in public places is «a choice of society». The contested Law aims to protect a form of interaction which, according to Belgian authorities, is necessary to assure the functioning of a democratic society. Indeed, in their view, it concerns a practice incompatible with «the modalities of social communication, and more generally the establishment of human relations indispensable for life in society» (§ 53).

Discussion of the absence of positive measures as a basis to find discrimination? No

Any other issue of note? No

[Belli and Arquier-Martinez v. Switzerland, no. 65550/13](#)

PART A

Date and Court: Third section, 11 December 2018

One or two sentences to sum up the complaint: The applicants are Swiss nationals. The second applicant is the mother and guardian of the first applicant, an adult who has had a disability since birth. While they lived in Switzerland, the first applicant received benefits based on her disability (a special invalidity benefit and a disability allowance). After they moved to Brazil her entitlement to the benefits was discontinued. Under the terms of the relevant legislation the payment of non-contributory benefits is subject to a requirement of habitual residence in Switzerland.

Ambit of which article: Articles 14 + 8

Protected characteristic argued: Disability coupled with the type of benefits (contributory or not contributory)

Did the Court consider Article 14 as well as substantive argument? Yes, §§ 89 to 113

Violation or not? Not admissible Article 8, No violation 14 + 8

Principal reason for finding a violation of Article 14 or not: In view of the wide margin of appreciation in economic and social matters and the respect due in principle to the legislature's policy choice (habitual residence in Switzerland was required to be entitled to a certain disability allowance and a special invalidity benefit), the reasons given to justify the difference in treatment did not appear unreasonable (§ 112)

PART B

Discussion of "suspect grounds"? Type of benefits (§ 98)

Discussion of comparators/ like for like? Yes (§ 99-102)

Direct or indirect discrimination argued: Indirect (§ 97)

Influence of EU or UN law?

- § 28 to 44, part of section II dedicated to international law and practice
- UN CRPD; International Covenant on Economic, Social and Cultural Rights, ILO Invalidity, Old-Age and Survivors' Benefits Convention, 1967 (No. 128), European Convention on Social Security

Influence of gender perspective? No

Test applied for considering discrimination: No

Discussion of margin of appreciation? Yes (§§ 92 to 93, 112)

Discussion justification? See the reasoning for finding a violation (summarised above, so § 112)

Discussion of the absence of positive measures as a basis to find discrimination? No

Any other issue of note? No

[Bradshaw and Others v. Malta, no. 37121/15](#)

PART A

Date and Court: 23 October 2018 Third section,

One or two sentences to sum up the complaint: The applicants alleged that they had been suffering an ongoing interference with their property rights in breach of Article 1 of Protocol No. 1 to the Convention. They also considered that they were being discriminated against with regard to the enjoyment of their property, since as the law stood, they were obliged to renew their rent agreement on a yearly basis, while people having commercial rents had been freed from such obligation through amendments introduced to the Civil Code in 2009.

Ambit of which article: Article 14 + Article 1 of Protocol No. 1

Protected characteristic argued: Landlords of controlled property leased out as band clubs

Did the Court consider Article 14 as well as substantive argument? Yes, §§ 77 to 84

Violation or not? Violation Article 1 of Protocol No. 1 but not 14 + Article 1 of Protocol No. 1

Principal reason for finding a violation of Article 14 or not:

The Court could not conclude that further amelioration to the applicants' situation would not ensue until 2028, even more so in the light of the violation upheld by the Court in relation to Article 1 of Protocol No. 1. The current existing difference in treatment, in law, complained of by the applicants, could at this stage be considered reasonably justified. (§ 83)

PART B-

Discussion of "suspect grounds"? No. (§ 77)

Discussion of comparators/ like for like? Yes (§ 77)

Direct or indirect discrimination argued: Direct discrimination

Influence of EU or UN law? No

Influence of gender perspective? No

Test applied for considering discrimination: No

Discussion of margin of appreciation? Only in a concurring opinion

Discussion of justification? See the reasoning for finding a violation (summarised above, §§ 76 to 84)

Discussion of the absence of positive measures as a basis to find discrimination? No

Any other issue of note? No

[Burlya and Others v. Ukraine, no. 3289/10](#)

PART A

Date and Court Fourth section, 6 November 2018 (Final: 6 February 2019)

Facts of the case: The applicants 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, 14 of the Convention and Article 1 of Protocol No. 1.

Ambit of which article: Articles 14 + 3, 8, 13

Protected characteristic argued: Ethnic origin (Roma)

Did the Court consider Article 14 as well as substantive argument? Yes, §§ 19 to 22

Violation or not? Violation 14 + 3 (first group of the applicants – who had been present in the village in the run-up to the attack and had had to flee their homes), Violation 14 + 8 (second group of the applicants – who had been away from their homes at the time of the events in question)

The Court did not find it necessary to examine Art 13 separately because it is subsumed by the already examined complaints under Articles 3 and 8 of the Convention.

Principal reason for finding a violation of Article 14 or not: Article 3 + 14: the role of the police, who had chosen not to protect the applicants but had advised them to leave before the pogrom was such as to constitute an affront to the applicants' dignity sufficiently serious as to be categorised as "degrading" treatment (substantive aspect). The domestic investigation into the attack had been characterised by a number of serious omissions. Despite clear evidence to the effect that the attack targeted members of a specific ethnic group, it had been investigated as an ordinary disturbance. There was no evidence that the authorities had conducted any investigation into anti-Roma prejudice as a likely motive of the crime (procedural aspect). (§§ 134, 144)

Article 8 + 14: The same conclusions were valid for the second group of applicants. The only difference between them being that they had been absent from the village at the time of events and had only returned to the village later to find their homes damaged. The applicants had been displaced from their homes as a result of the attack. There could be no doubt, therefore, that the damage caused to the applicants' houses constituted grave and unjustified interferences with the applicants' right to respect for their private and family life and home. The lack of any objective reason for the authorities' failure to protect the applicants, the authorities' role in the attack, the absence of an effective domestic investigation; and the general background of prejudice against Roma in Ukraine were sufficient for the Court to find that there has been a violation of Article 8, taken in conjunction with Article 14 of the Convention, 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. (§§ 168 to 171)

PART B

Discussion of "suspect grounds"? No

Discussion of comparators/ like for like? No

Direct or indirect discrimination argued: Direct discrimination

Influence of EU or UN law?

- Second report on Ukraine by the European Commission against Racism and Intolerance (ECRI), adopted on 14 December 2001 (§ 59); third report (§ 60) on Ukraine by the ECRI, adopted on 29 June 2007.
- First opinion of the Council of Europe's Advisory Committee on the Framework (§ 61) Convention for the Protection of National Minorities regarding Ukraine's compliance with the Convention for the Protection of Human Rights and Fundamental Freedoms, published on 27 November 2002; The Advisory Committee's second opinion on Ukraine, issued on 30 May 2008 (§ 62 and 145)

Influence of gender perspective? No

Test applied for considering discrimination: No (omission of the state's obligations, see the reasoning for finding a violation summarised above)

Discussion of margin of appreciation? No

Discussion of justification? See the reasoning for finding a violation (summarised above, so §§ 134, 144; 168 to 171)

Discussion of the absence of positive measures as a basis to find discrimination? No

Any other issue of note? No

[Can v Turkey, no. 2437/08](#)

PART A

Date and Court: 28th September 2018 Second Section

Facts of the case: The applicant complained that her application to be a security officer was rejected on the basis that she was not a man.

Ambit of which article: Articles 14 + 8

Protected characteristic argued: Sex (f)

Did the Court consider Article 14 as well as substantive argument? Yes [§§ 27 to 30]

Violation or not? Yes

Principal reason for finding a violation of Article 14 or not: the difference in treatment complained of had no objective and reasonable justification.

PART B

Discussion of "suspect grounds"? No

Discussion of comparators/ like for like? No

Direct or indirect discrimination argued: Direct discrimination

Influence of EU or UN law? See gender perspective

Influence of gender perspective? CEDAW § 20

Test applied for considering discrimination: §29 “The Court notes that in the case of *Emel Boyraz* which raised the same issues as those in the present case, it held that this difference in treatment between women and men, of which the applicant had been a victim, was not objectively and reasonably justified under Article 14.”

Discussion of margin of appreciation? No

Discussion of justification? §30 “The mere fact that security officers had to work on night shifts and in rural areas and might be required to use firearms and physical force under certain conditions could not in itself justify the difference in treatment between men and women. Besides, Ms Can worked as a security officer between 1 April 2003 and 19 March 2004 and that there was nothing in that case file to indicate that the applicant had failed to fulfil her duties as a security officer in TEDAŞ because of her sex.”

Discussion of the absence of positive measures as a basis to find discrimination? No

Any other issue of note? No

[Carvalho Pinto de Sousa Morais v Portugal, no. 17484/15](#)

PART A

Date and Court: 25 July 2017 Fourth Section

Facts of the case: The applicant alleged that the Supreme Administrative Court’s decision to reduce the amount initially awarded to her in respect of non-pecuniary damage had amounted to discrimination on the grounds of sex and age.

Ambit of which article: Articles 14 + 8

Protected characteristic argued: Sex (f) and age

Did the Court consider Article 14 as well as substantive argument? Yes, §§ 44 to 56

Violation or not? Violation of 14 + 8, did not separately consider Art 8

Principal reason for finding a violation of Article 14 or not: “The wording of the Supreme Administrative Court’s judgment when reducing the amount of compensation cannot be regarded as an unfortunate turn of phrase, as asserted by the Government. [...] the applicant’s age and sex appear to have been decisive factors in the final decision, introducing a difference of treatment based on those grounds” (§ 53)

PART B

Discussion of “suspect grounds”? §45 It has not, to date, suggested that discrimination on grounds of age should be equated with other “suspect” grounds of discrimination, as per British Gurkha welfare society case.

Discussion of comparators/ like for like? §55 Had two actual comparators (older men)

Direct or indirect discrimination argued: Direct

Influence of EU or UN law? §54 CEDAW concluding observations on Portugal (Section III Relevant International Law (§§ 25 to 28), UN (CEDAW), CoE (Istanbul Convention) & UN Special Rapporteur.

Influence of gender perspective? See above §26 on gender stereotyping

Test applied for considering discrimination: §44 “The Court has established in its case-law that in order for an issue to arise under Article 14, there must be a difference in treatment of persons in analogous or relevantly similar situations. Such a difference in treatment is discriminatory if it has no objective and reasonable justification; in other words, if it does not pursue a legitimate aim or if there is no reasonable relationship of proportionality between the means employed and the aim sought to be realised.”

Discussion of margin of appreciation? §44 “Contracting States enjoy a certain margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a difference in treatment”

Discussion of justification? No

Discussion of the absence of positive measures as a basis to find discrimination? No

Any other issue of note? See lengthy joint dissenting opinion of judges Ravarani and Bosnjak. See also discussion of stereotypical ideas of older women’s sexuality (§52).

[Cassar v Malta, no. 50570/13](#)

PART A

Date and Court: 30 January 2018, Fourth section

Facts of the case: Two Maltese nationals were not able to live in a house they owned because there was a tenant there whom the law did not allow them to evict and the amount of controlled rent they received was too low.

Ambit of which article: Article 14 + Article 1 Protocol 1 collectively

Protected characteristic argued: Protection of property

Did the Court consider Article 14 as well as substantive argument? Yes, §§ 77 to 82

Violation or not? Violation A1P1 and 14 + A1P1

Principal reason for finding a violation of Article 14 or not: By applying an across-the-board legislative measure which failed to treat the applicants (whose property was large, of a high standard and in a sought after area) differently, the State violated the applicants' right not to be discriminated against in the enjoyment of their rights under Article 1 of Protocol No. 1 to the Convention.

PART B

Discussion of "suspect grounds"? No

Discussion of comparators/ like for like? Yes, § 78: "According to its case-law, the Court will have to examine whether the failure to treat the applicants differently from other property owners (who received less than EUR 185) pursued a legitimate aim. If it did the Court will have to examine whether there was a reasonable relationship of proportionality between the means employed and the aim sought to be realised. A violation will ensue if there is no reasonable and objective justification for not treating the applicants differently to other property owners (who received less than EUR 185)."

Direct or indirect discrimination argued: Indirect

Influence of EU or UN law? No

Influence of gender perspective? No

Test applied for considering discrimination: "The Court reiterates that the right not to be discriminated against in the enjoyment of the rights guaranteed under the Convention is also violated when States without an objective and reasonable justification fail to treat differently persons whose situations are significantly different." (§ 77)

Discussion of margin of appreciation? "The Contracting States enjoy a certain margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a different treatment in law. That margin is wider when it comes to the adoption by the State of general fiscal, economic or social measures, which are closely linked to the State's financial resources. However, it is ultimately for the Court to decide, in the light of the circumstances of the case in question, whether such measures are compatible with the State's obligations under the Convention and its Protocols." (§ 77)

Discussion of justification? "Thus, as admitted by the Government the sole aim of the law was to increase rents which were lower than EUR 185. This decision appears to have been solely based on a random choice of a numerical figure, with no real legitimate aim save that of creating an artificial distinction." (§ 79)

Discussion of the absence of positive measures as a basis to find discrimination? No

Any other issue of note? No

[Cernea v Romania, no. 43609/10](#)

PART A

Date and Court: Judgment 27 February 2018, Section Four

Facts of the case: Exclusion of a political party from by-election for failing to reach electoral threshold at last election

Ambit of which article: Article 14 + Article 3 Protocol 1 collectively

Protected characteristic argued: Other ground - Not standing for a party represented in Parliament

Did the Court consider Article 14 as well as substantive argument? Yes

Violation or not? No violation

Principal reason for finding a violation of Article 14 or not: The Court found in particular that the Electoral Law amendment which had had the effect of limiting Mr Cernea's right to stand in the by-election on the grounds that he was not standing for a political party represented in Parliament had been objectively and reasonably justified. The amendment had had the purposes of protecting the structure of Parliament and preventing the fragmentation of the political spectrum represented there following the general elections. It had not infringed the very essence of the people's right to freedom of expression and had therefore not been disproportionate to the legitimate aim pursued.

PART B

Discussion of "suspect grounds"? No

Discussion of comparators/ like for like? No

Direct or indirect discrimination argued: Direct discrimination

Influence of EU or UN law? No

Influence of gender perspective? No

Test applied for considering discrimination: § 33: "The Court reiterates that discrimination means treating differently, without an objective and reasonable justification, persons in similar situations. "No objective and reasonable justification" means that the distinction in issue does not pursue a "legitimate aim" or that there is not a "reasonable relationship of proportionality between the means employed and the aim sought to be realised" (see, among

many other authorities, *Sejdić and Finci v. Bosnia-Herzegovina* [GC], nos. 27996/06 and 34836/06, § 42, ECHR 2009). The scope of a Contracting Party's margin of appreciation in this sphere will vary according to the circumstances, the subject matter and the background (see *Andrejeva v. Latvia* [GC], no. 55707/00, § 82, ECHR 2009)."

Discussion of margin of appreciation? No

Discussion of justification? Yes, §§ 33 and 41 to 46

Discussion of the absence of positive measures as a basis to find discrimination? No

Any other issue of note? No

[Dakir v Belgium, no. 4619/12](#)

PART A

Date and Court: 11 July 2017 Second section

Facts of the case: The applicant complained that the ban on wearing in public places clothing designed to conceal the face deprived her of the possibility of wearing the full-face veil.

Ambit of which article: Articles 8, 9, 10 + 14

Protected characteristic argued: Sex and religion- Muslim women

Did the Court consider Article 14 as well as substantive argument? Yes, briefly [§§ 63 to 67]

Violation or not? No violations

Principal reason for finding a violation of Article 14 or not: [§66] In the instant case, whilst it may be true that the ban imposed by the by-laws has more restrictive consequences for the exercise by certain Muslim women of some of their fundamental liberties, the measure has an objective and reasonable justification for the same reasons as those which the Court has set out previously- [SAS v France](#)

PART B

Discussion of "suspect grounds"? No

Discussion of comparators/ like for like? No

Direct or indirect discrimination argued: Indirect

Influence of EU or UN law? No

Influence of gender perspective? No

Test applied for considering discrimination: The Court reiterates that a general policy or measure which has disproportionate prejudicial effects on a group of individuals can be regarded as discriminatory even if it does not specifically target the group and there is no discriminatory intent. This is only the case, however, if such policy or measure has no “objective and reasonable” justification, that is, if it does not pursue a “legitimate aim” or if there is not a “reasonable relationship of proportionality” between the means employed and the aim sought to be achieved

Discussion of margin of appreciation? No

Discussion of justification? [§66]: In the instant case, whilst it may be true that the ban imposed by the by-laws has more restrictive consequences for the exercise by certain Muslim women of some of their fundamental liberties, the measure has an objective and reasonable justification for the same reasons as those which the Court has set out previously (see §§ 52 to 62; compare *S.A.S. v. France*, cited above, § 161).

Discussion of the absence of positive measures as a basis to find discrimination? No

Any other issue of note? Extensive reference to / influence of [SAS v France](#)

[Deaconu v Romania, no. 66299/12](#)

PART A

Date and Court: 29 January 2019, Fourth Section

Facts of the case: The applicants complained that they had suffered discrimination on grounds of age regarding the award of compensation for non-pecuniary damage in connection with their sister’s death.

Ambit of which article: Article 14 + Article 1 of Protocol 1

Protected characteristic argued: Age

Did the Court consider Article 14 as well as substantive argument? Yes [§§ 25 to 26]

Violation or not? Yes

Principal reason for finding a violation of Article 14 or not: [§38] In the Court’s view, the wording of the judgment when dismissing the applicants’ claim cannot be regarded as an unfortunate turn of phrase. Therefore, the Court finds that, in the absence of any reasonable justification, the dismissal of the applicants’ claims for compensation on the sole ground that they did not suffer as much as their older brothers owing to their young age amounted to discrimination.

PART B

Discussion of “suspect grounds”? No

Discussion of comparators/ like for like? No

Direct or indirect discrimination argued: Direct discrimination

Influence of EU or UN law? No

Influence of gender perspective? No

Test applied for considering discrimination: [§30] As noted in paragraph 22 above, the Court has established in its case-law that, in order for an issue to arise under Article 14, the first condition is that there must be a difference in the treatment of persons in relevantly similar situations.

Discussion of margin of appreciation? No

Discussion of justification? [§33] It remains to be determined whether particularly convincing and weighty reasons existed for this difference of treatment. 36. Moreover, without basing its findings on expert reports or any psychological evaluations of the applicants, which would have allowed for a much more objective justification of the different treatment of the applicants in comparison to their older brothers, the Bucharest Court of Appeal set an arbitrary minimum age of fourteen years as a starting point for feeling pain and being negatively affected by the loss of their sister.

Discussion of the absence of positive measures as a basis to find discrimination? No

Any other issue of note? No

[Ecis v. Latvia, no. 12879/09](#)

PART A

Date and Court: 10 January 2019, Fifth section

Facts of the case: Different prison regime for men and women convicted of the same crimes

Ambit of which article: Articles 14 and 8

Protected characteristic argued: Sex (m)

Did the Court consider Article 14 as well as substantive argument? Yes. [§§ 77 to 95]

Violation or not? Violation of Article 14, read in conjunction with Article 8 of the Convention

Principal reason for finding a violation of Article 14 or not: There was a difference in treatment concerning men and women who were convicted of serious or especially serious crimes. The men were subjected to a stricter prison regime which

affects the restrictions on prisoners' family life, in particular, with regard to their right to prison leave on compassionate grounds (§ 80).

Providing for specific needs for female prisoners in order to achieve substantive gender equality may be justified under Article 14 (§ 86).

However, a blanket ban for men to leave the prison, even for attending a funeral of a family member, was not conducive to the goal of ensuring that the distinctive needs of women prisoners are taken into account (§§ 92 and 93).

PART B-

Discussion of "suspect grounds"? No

Discussion of comparators/ like for like? Yes [§86]

Direct or indirect discrimination argued: Direct

Influence of EU or UN law? No

Influence of gender perspective? Yes. Providing for specific needs for female prisoners in order to achieve substantive gender equality may be justified under Article 14 [§86]

Test applied for considering discrimination:

Justification test. The government had not supplied data for its arguments. Furthermore, the Court referred to its case-law emphasising the need for an individualised risk assessment of all detainees with regard to prison leave.

Discussion of margin of appreciation? No

Discussion of justification? Yes

Discussion of the absence of positive measures as a basis to find discrimination? No

Any other issue of note? No

[Enver Sahin v Turkey, no. 23065/12](#)

PART A

Date and Court: Judgment 30 January 2018, Section Two

Facts of the case: Failure to conduct concrete individual assessment of disabled student's needs regarding access to university premises

Ambit of which article: Article 14 + Article 2 Protocol 1 collectively

Protected characteristic argued: Disability

Did the Court consider Article 14 as well as substantive argument? Yes, § 54 and 55

Violation or not? Violation 14 + A2P1 collectively but not 14 + 8 (no separate assessment)

Principal reason for finding a violation of Article 14 or not: The Government had failed to demonstrate that the national authorities, including, in particular, the academic and judicial authorities, reacted with the requisite diligence to ensure that the applicant could continue to exercise his right to education on an equal footing with other students and, consequently, to strike a fair balance between the competing interests at stake.

Accordingly, there has been a violation of Article 14 of the Convention read in conjunction with Article 2 of Protocol No. 1 to the Convention.

PART B

Discussion of “suspect grounds”? No

Discussion of comparators/ like for like? No

Direct or indirect discrimination argued: Direct discrimination

Influence of EU or UN law? Section II B Relevant International Law (§§ 19 to 21). Also §§53, and 55 to 59, CRPD, §§ 60, 63 and 64.

Influence of gender perspective? No

Test applied for considering discrimination: § 54: As regards Article 14 of the Convention, the Court reiterates that discrimination means treating differently, without an objective and reasonable justification, persons in relevantly similar situations, and that a difference of treatment is devoid of any “objective and reasonable justification” where it does not pursue a “legitimate aim” or there is no “reasonable relationship of proportionality between the means employed and the aim sought to be realised” However, Article 14 of the Convention does not prohibit a member State from treating groups differently in order to correct “factual inequalities” between them; indeed in certain circumstances a failure to attempt to correct inequality through different treatment may in itself give rise to a breach of the Article of economic or social strategy.

§ 55. Also under Article 14 of the Convention, the Court must have regard to the changing conditions of international and European law and respond, for example, to any emerging consensus as to the standards to be achieved. In that connection, the Court notes the importance of the fundamental principles of universality and non-discrimination in the exercise of the right to education, which are enshrined in many international texts. It further emphasises that those international instruments have recognised inclusive education as the most appropriate means of guaranteeing the aforementioned fundamental principles, as such education is geared to promoting equal opportunities for all, including persons with disabilities (see *Çam*, cited above, § 64, and the references therein). Inclusive education indubitably forms part of the States’ international responsibility in this sphere.

Discussion of margin of appreciation? Yes, § 53 and 57 States enjoy a margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a different treatment and a wide margin is usually allowed to the State under the Convention when it comes to general measures of economic or social strategy

Discussion of justification? No

Discussion of the absence of positive measures as a basis to find discrimination? Yes, § 58

Any other issue of note? No

[Fabian v Hungary, no. 78117/13](#)

PART A

Date and Court: 5 September 2017 Grand Chamber

Facts of the case Suspension of old age pension on the grounds that he continued to be employed in public sector

Ambit of which article: Article 14 + Article 1 Protocol 1

Protected characteristic argued: Other status – public sector workers

Did the Court consider Article 14 as well as substantive argument? Yes

Violation or not? No violation A1P1, no violation Art 14 and A1P1

Principal reason for finding a violation of Article 14 or not: The Court finds that the applicant has not demonstrated that, as a member of the civil service whose employment, remuneration and social benefits were dependent on the State budget, he was in a relevantly similar situation to pensioners employed in the private sector.

PART B-

Discussion of “suspect grounds”? No

Discussion of comparators/ like for like? § 130 to 132:

130. Turning to the circumstances of the present case, the Court observes that it concerns old-age pensions under the Hungarian compulsory social-security pension scheme, to which both State employees and private-sector employees were affiliated and to which they contributed in the same way and to the same extent. This scheme provided for pension entitlements for both groups, regardless of whether they had previously worked in the public or the private sector. Accordingly, old-age pensions disbursed to employees in the public sector originated from the same source as pension payments to employees working in the private sector. Nevertheless, this is not in itself sufficient to establish that the situations of persons in receipt of a pension

and employed in the civil service after retirement and those in receipt of a pension but re-employed in the private sector were relevantly similar for the purposes of the assessment of the present case.

131. The Court observes firstly that, following the entry into force of section 83/C of the 1997 Pensions Act, it was the applicant's post-retirement employment in the civil service that entailed the suspension of his pension payments. It was precisely the fact that, as a civil servant, he was in receipt of a salary from the State that was incompatible with the simultaneous disbursement of an old-age pension from the same source. As a matter of financial, social and employment policy, the impugned bar on simultaneous accumulation of pension and salary from the State budget had been introduced as part of legislative measures aimed at correcting financially unsustainable features in the pension system of the respondent State. Steps taken to reform deficient pension schemes had, in turn, been part of action taken with the aim of reducing public expenditure and debt. This did not prevent the accumulation of pension and salary for persons employed in the private sector, whose salaries, in contrast to those of persons employed in the civil service, were funded not by the State but through private budgets outside the latter's direct control. As already stated in paragraph 126 above, it was the distinction between the sources of the salaries of employees in the public and private sectors that led the Court to conclude in *Panfile* that those two categories of persons could hardly be regarded as being in an analogous or relevantly similar situation within the meaning of Article 14.

132. The Court further notes that, under Hungarian national law, employment in the civil service and employment in the private sector were treated as distinct categories (see paragraph 20 above). Moreover, the applicant's specific profession within the civil service was difficult to compare with any in the private sector and no relevant comparisons were suggested by him. Finally, as regards his employment relationship, the State did not function only as regulator and standard-setter but was also his employer. In line with the considerations stated in paragraph 127 above, the Court regards it as significant that it was for the State to lay down, in that capacity as employer, the terms of employment for its personnel and, as manager of the Pension Fund, the conditions for disbursement of pensions.

Direct or indirect discrimination argued: Direct

Influence of EU or UN law? No

Influence of gender perspective? No

Test applied for considering discrimination: The requirement to demonstrate an analogous position does not require that the comparator groups be identical. An applicant must demonstrate that, having regard to the particular nature of his or her complaint, he or she was in a relevantly similar situation to others treated differently. However, not every

difference in treatment will amount to a violation of Article 14. Firstly, the Court has established in its case-law that only differences in treatment based on an identifiable characteristic, or “status”, are capable of amounting to discrimination within the meaning of Article 14.

Discussion of margin of appreciation? Wide margin of appreciation of the State in the field of social security and pensions

Discussion of justification? Only in joint concurring judgment

Discussion of the absence of positive measures as a basis to find discrimination? No

Any other issue of note? Concurring and a joint dissenting judgment

[Grigoryan and Sergeyeva v Ukraine, no. 63409/11](#)

PART A

Date and Court: 28 March 2017 Fourth Section

Facts of the case The applicants alleged that they had been detained unlawfully and ill-treated whilst in detention for reasons arising out of ethnic prejudice and that there had been a failure to effectively investigate their allegations of ill-treatment.

Ambit of which article: 14 + 3

Protected characteristic argued: Ethnic origin (ethnic Armenian)

Did the Court consider Article 14 as well as substantive argument? Yes, § 90 to 98

Violation or not? Violation of Article 14 taken in conjunction with article 3

Principal reason for finding a violation of Article 14 or not: The authorities took no serious steps to investigate the applicant’s allegations that the police officers had proffered insults related to his ethnic origin while ill-treating him and, in particular they did not questioned the officers involved in the events on this specific point [§§ 94 to 95].

PART B

Discussion of “suspect grounds”? No

Discussion of comparators/ like for like? No

Direct or indirect discrimination argued: Direct discrimination

Influence of EU or UN law? No

Influence of gender perspective? No

Test applied for considering discrimination? No

Discussion of margin of appreciation? No

Discussion of justification? No

Discussion of the absence of positive measures as a basis to find

discrimination? [§1] “Lastly, the Court considers that the authorities’ duty to investigate the existence of a possible link between racist attitudes and an act of violence is an aspect of their procedural obligations arising under Article 3 of the Convention, but it may also be seen as implicit in their responsibilities under Article 14 of the Convention to secure the fundamental values enshrined in Article 3 without discrimination. Owing to the interplay of the two provisions, issues such as those in the present case may fall to be examined under one of the two provisions only – with no separate issue arising under the other – or may require examination under both Articles. This is a question to be decided in each case on its facts and depending on the nature of the allegations made (see [Bekos and Koutropoulos v. Greece](#), no. 15250/02, § 70, ECHR 2005-XIII (extracts)).”

Any other issue of note? No

[Hulya Ebru Demirel v Turkey, no. 30733/08](#)

PART A

Date and Court: 3 December 2018, Second section

Facts of the case: HD sat an examination in order to become a civil servant. She was successful in the examination and she was appointed to the post of security officer in the Kilis branch of TEDAS (State-run electricity company). TEDAS informed her that she would not be appointed to the post of security officer as she did not fulfil the requirement of 1) being a man and 2) having completed military services.

Ambit of which article: Article 14 + 8, Article 6 § 1

Protected characteristic argued: Sex

Did the Court consider Article 14 as well as substantive argument? Yes, by referring to another comparable case: Emel Boyraz [§§ 32 to 35]

Violation or not? Violation of article 14 in conjunction with Article 8

No violation of article 6 § 1 on account of conflicting decisions but violation on account of absence of adequate reasoning in the rectification decision.

Principal reason for finding a violation of Article 14 or not: Relying exclusively on the applicant’s sex to exclude her from the post.

[§34] The Court reiterates that in Emel Boyraz it held that the decisions of the administrative and judicial authorities finding that the post of security officer was reserved solely for male candidates had amounted to a clear difference of treatment, on grounds of sex, between persons in an analogous situation (see Emel Boyraz, cited above, § 52). After thoroughly examining whether there were reasonable and objective grounds that justified such a difference of treatment, the Court held in that case that the impugned difference of treatment had not pursued a legitimate aim (ibid., §§ 53-56).

[§35] In the instant case, the Court observes that the administrative authorities and the Twelfth Division of the Supreme Administrative Court reviewing the conformity of the impugned administrative decision with the law both considered that the post of security officer in the Kilis branch of TEDAŞ had been reserved for men and that therefore the applicant, as a woman, had been excluded. What is more, the decision of the Twelfth Division of the Supreme Administrative Court did not adduce any reasons other than the applicant's sex for her not having been appointed to the post in question. The present case is, therefore, identical to Emel Boyraz in which the Court concluded that the decisions of the administrative and judicial authorities had amounted to a discriminatory difference in treatment in breach of Article 14 taken in conjunction with Article 8 of the Convention (ibid., § 56). Accordingly, and for the detailed reasons elaborated on in Emel Boyraz, the Court concludes that there has been a violation of Article 14 taken in conjunction with Article 8 resulting from the refusal of the authorities to appoint, and then their subsequent dismissal of the applicant from the post of security officer.

PART B

Discussion of “suspect grounds”? No

Discussion of comparators/ like for like? A distinction has been made between men and women who are civil servants.

Direct or indirect discrimination argued: Discrimination form has not been mentioned, although according to what is stated [§§ 34 and 35] (see above), this would be a case of direct discrimination.

[§50] The Court reiterates that in order for an issue to arise under Article 14 there must be a difference in the treatment of persons in comparable situations. Such a difference of treatment is discriminatory if it has no objective and reasonable justification; in other words, if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realised. The notion of discrimination within the meaning of Article 14 also includes cases where a person or group is treated, without proper justification, less favourably than another, even though the more favourable treatment is not called for by the Convention.

Influence of EU or UN law? Referral to European Social Charter & UN Convention on the Elimination of All Forms of Discrimination against Women in the part about relevant domestic and International law, but not referred to as such in the merits of the case.

Influence of gender perspective? Yes, the Court refers to the *Emel Boyraz* case, in particular § 51 of this case: “The Court further reiterates that the advancement of gender equality is today a major goal in the member states of the Council of Europe and very weighty reasons would have to be put forward before such a difference of treatment could be regarded as compatible with the Convention.

Test applied for considering discrimination:

Yes theoretical basis as prescribed by EU law:

- 1) Difference in treatment? “difference in treatment”, on grounds of sex, between persons in an analogous situation. In this case: yes
- 2) Justification: objectively and reasonably justified. By referring to the *Emel Boyraz* case (§ 54 of this case) the Court uses the concept of genuine and occupational requirements without naming it as such. The concept is used as a part of the analysis of the justification: “The Court is aware that there may be legitimate requirements for certain occupational activities depending on their nature or the context in which they are carried out. However, in the instant case, neither the administrative authorities nor the Twelfth Division of the Supreme Administrative Court substantiated the grounds for the requirement that only male staff be employed in the post of security officer in the Batman branch of TEDAŞ” (§ 54 of the *Emel Boyraz* case and also §§ 34 and 35 of the *Hüla Ebru Demirel* case).

Conclusion in this case: no legitimate aim.

Discussion of margin of appreciation? Yes, by referring to the *Emel Boyraz* case § 51: The Contracting State enjoys a margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a different treatment. The scope of the margin of appreciation will vary according to the circumstances, the subject-matter and the background to the case, but the final decision as to observance of the Convention’s requirements rests with the Court.

Where a difference of treatment is based on sex, the margin of appreciation afforded to the State is narrow and in such situations the principle of proportionality does not merely require that the measure chosen should in general be suited to the fulfilment of the aim pursued, but it must also be shown that it was necessary in the circumstances. The Court further reiterates that the advancement of gender equality is today a major goal in the member states of the Council of Europe and very weighty reasons would have to be put forward before such a difference of treatment could be regarded as compatible with the Convention.

Discussion of justification? See response to question about “Test applied for considering discrimination” above

Any other issue of note? Interesting analysis of the Court about the applicability of article 8 (again by referring to the *Emel Boyraz* case, § 44: In the Court’s view, the concept of “private life” extends to aspects relating to personal identity and a person’s sex is an inherent part of his or her identity. Thus, a measure as drastic as a dismissal from a post on the sole ground of sex has adverse effects on a person’s identity, self-perception and self-respect and, as a result, his or her private life. The Court therefore considers that the applicant’s dismissal on the sole ground of her sex constituted an interference with her right to respect for her private life. Besides, the applicant’s dismissal had an impact on her “inner circle” as the loss of her job must have had tangible consequences for the material well-being of her and her family (see *Oleksandr Volkov*, cited above, § 166). The applicant must also have suffered distress and anxiety on account of the loss of her post. What is more, the applicant’s dismissal affected a wide range of her relationships with other people, including those of a professional nature and her ability to practise a profession which corresponded to her qualifications. Thus, the Court considers that Article 8 is applicable to the applicant’s complaint.

[Ibrogimov v Russia, no. 32248/12](#)

PART A

Date and Court 15 May 2018, Third Section.

Facts of the case Applicant took a mandatory blood test with a view to obtaining a health certificate to support his application for a temporary residence permit in Russia. He was found to be HIV-positive. He received from Russian authorities an exclusion order on the ground that he was HIV-positive. He left Russia to comply with the exclusion order.

Ambit of which article Articles 14 & 8.

Protected characteristic argued: Other Status (individual health status)

Did the Court consider Article 14 as well as substantive argument?

Yes, [§§ 18, 19, 20, 21, 22 and 23].

Violation or not? Violation of articles 14 & 8.

Principal reason for finding a violation of Article 14 or not

No individualised judicial assessment on relevant facts has been made. The applicant was excluded solely because he is HIV positive. The Court reiterates that, in the light of the overwhelming European and international consensus geared towards abolishing the outstanding restrictions on entry, stay and residence of HIV-positive non-nationals who

constitute a particularly vulnerable group, the respondent Government failed in their duty to put forward compelling reasons or any objective justification for their differential treatment for health reasons.

[§21] The exclusion order against him had not been preceded by an individualised judicial assessment of all the relevant facts but rather on a predetermined classification of the entire group of vulnerable individuals as a threat to public health which is incompatible with the protection against discrimination enshrined in Article 14 of the Convention.

[§22] The Court reiterates that the decisions declaring the applicant's presence in Russia undesirable set no time-limit on his exclusion from the Russian territory, it was issued in 2011 and has remained effective to date. As it was issued in connection with his infection with HIV, which is by today's medical standards a lifetime condition, it had the effect of a permanent ban on his re-entry to Russia. The Court reiterates that the imposition of a residence prohibition of unlimited duration is an overly rigorous measure which it has found to be disproportionate to the aim pursued in many previous cases (*ibid.*, § 110, with further references).

[§23] The Court reiterates that, in the light of the overwhelming European and international consensus geared towards abolishing the outstanding restrictions on entry, stay and residence of HIV-positive non-nationals who constitute a particularly vulnerable group, the respondent Government failed in their duty to put forward compelling reasons or any objective justification for their differential treatment for health reasons (*ibid.*, § 111). 24. The applicant has therefore been a victim of discrimination on account of his health, in violation of Article 14 of the Convention taken in conjunction with Article 8.

PART B

Discussion of “suspect grounds”? [§18] A distinction made on account of an individual's health status, including such conditions as HIV infection, is covered – either as a disability or a form thereof – by the term “other status” in the text of Article 14 of the Convention (*ibid.*, § 91). Article 14 of the Convention taken in conjunction with Article 8 is therefore applicable in the present case.

Discussion of comparators/ like for like? It is quite clear in this case that a distinction has been made between aliens wishing to remain in Russia with HIV and without HIV.

Direct or indirect discrimination argued The applicant was treated differently from other aliens wishing to remain in Russia solely on account of his HIV-positive status and that the burden is on the Government to provide an objective and reasonable justification for that difference in treatment à discrimination form is not specified.

Influence of EU or UN law? Reference to an “established European consensus” à § 20. The Court has found that the expulsion of HIV-positive individuals did not reflect an established European consensus and had no support in other member states, Russia being the only

member state of the Council of Europe and one of sixteen States world-wide that enforced deportation of HIV-positive non-nationals.

Influence of gender perspective? No

Test applied for considering discrimination

General known principles:

[§19] The Court further notes that the applicant was treated differently from other aliens wishing to remain in Russia solely on account of his HIV-positive status (*ibid.*, §§ 95 to 97) and that the burden is on the Government to provide an objective and reasonable justification for that difference in treatment (*ibid.*, § 98).

Discussion of margin of appreciation? In this case the Court concluded that States have a narrow margin of appreciation:

[§19] The Court has held that people living with HIV are a vulnerable group and that the State should be afforded only a narrow margin of appreciation in choosing measures that single out this group for differential treatment on account of their health status (see *I.B. v. Greece*, no. [552/10](#), § 81, ECHR 2013, and [Novruk and Others](#), cited above, § 100).

Discussion of justification? Disproportionate measure. Link to European and international consensus to conclude that there is no reasonable and objective justification

[§22] The Court reiterates that the decisions declaring the applicant's presence in Russia undesirable set no time-limit on his exclusion from the Russian territory, it was issued in 2011 and has remained effective to date. As it was issued in connection with his infection with HIV, which is by today's medical standards a lifetime condition, it had the effect of a permanent ban on his re-entry to Russia. The Court reiterates that the imposition of a residence prohibition of unlimited duration is an overly rigorous measure which it has found to be disproportionate to the aim pursued in many previous cases (*ibid.*, § 110, with further references).

[§23] In sum, the Court reiterates that, in the light of the overwhelming European and international consensus geared towards abolishing the outstanding restrictions on entry, stay and residence of HIV-positive non-nationals who constitute a particularly vulnerable group, the respondent Government failed in their duty to put forward compelling reasons or any objective justification for their differential treatment for health reasons (*ibid.*, § 111).

Discussion of the absence of positive measures as a basis to find discrimination? No

Any other issue of note? No

PART A

Date and Court: 11 December 2018, Third section.

One or two sentences to sum up the complaint: Relying on Article 2, in conjunction with Article 14 of the Convention, the applicants alleged, in particular, that the Slovak authorities had failed to consider properly the alleged racial overtones of the crime committed against them and their family members. They furthermore challenged the lack of reasoning in the sentencing judgment. In addition, they alleged, under Article 2, in conjunction with Article 13 of the Convention, that they had not been able actively to participate in the criminal proceedings.

Ambit of which article: Articles 14 + 2, (2 + 13)

Protected characteristic argued: Ethnic origin (Roma)

Did the Court consider Article 14 as well as substantive argument? Yes, §§. 75 to 78., 85 to 87, 91 to 96

Violation or not? Violation Art 2 and 14 + 2

Principal reason for finding a violation of Article 14 or not: The prosecuting authorities failed to examine a possible racist motive in the face of powerful racist indicators and in particular failed to give any reasons whatsoever whether the attack of 16 June 2012 against the applicants and their family had or had not been motivated by racial hatred. In the absence of any reaction by the courts to the limited scope of the investigation and prosecution, the adequacy of the action taken by the authorities dealing with the investigation and prosecution in this case was impaired to an extent that is irreconcilable with the State's obligation in this field to conduct vigorous investigations, having regard to the need to continuously reassert society's condemnation of racism in order to maintain the confidence of minorities in the ability of the authorities to protect them from the threat of racist violence. (§ 96)

PART B

Discussion of "suspect grounds"? No

Discussion of comparators/ like for like? No

Direct or indirect discrimination argued: Direct

Influence of EU or UN law?

UN's General Policy Recommendation No. 13 of ECRI; concluding observations in respect of Slovakia of UN Committee on the Elimination of Racial Discrimination (2013, 2018) [§ 59 to 64 and 64].

Influence of gender perspective? No

Test applied for considering discrimination: No (omission of the state's obligations, see the reasoning for finding a violation summarized above)

Discussion of margin of appreciation? No

Discussion of justification? See the reasoning for finding a violation (summarised above, so § 96)

Discussion of the absence of positive measures as a basis to find discrimination? Yes

Any other issue of note? No

[Leitner v Austria, no. 55740/10](#)

PART A

Date and Court: 8 June 2017, Fifth Section

Facts of the case: The applicant alleged, in particular, under Article 8 read in conjunction with Article 14 of the Convention that he was discriminated against, compared to the mother, regarding the granting of custody for their children.

Ambit of which article: Articles 14 + 8

Protected characteristic argued: Sex (m)

Did the Court consider Article 14 as well as substantive argument? 14 + 8 taken together, no need to separately consider Article 8

Violation or not? Violation of 14 + 8

Principal reason for finding a violation of Article 14 or not: The applicant's children were born out of wedlock, so he had no possibility to obtain shared custody at all, as this was not foreseen by the law. He also had no possibility to obtain sole custody, as the national courts considered that the mother of his children did not endanger their well-being. Previously ruled on this issue in [Sporer v. Austria](#), no. 35637/03

PART B

Discussion of "suspect grounds"? No

Discussion of comparators/ like for like? No

Direct or indirect discrimination argued: Direct discrimination

Influence of EU or UN law? No

Influence of gender perspective? No

Test applied for considering discrimination: No

Discussion of margin of appreciation? No

Discussion of justification? No

Discussion of the absence of positive measures as a basis to find discrimination? No

Any other issue of note? No substantive arguments as the issue had previously been determined in *Sporer*

[Leonov v Russia, no. 77180/11](#)

PART A

Date and Court: 10 April 2018, Third Section Chamber.

Facts of the case: The applicant submitted that the issuance of a residence order regarding his son in favour of the boy's mother – despite the fact that she had a criminal record, bad living conditions and a dissolute close family – had shown the inequality between men and women in the sphere of childcare which prevailed in Russia. He claimed that there existed an assumption in favour of mothers which was very difficult to rebut.

Ambit of which article: Articles 14 & 8.

Protected characteristic argued: Sex (M).

Did the Court consider Article 14 as well as substantive argument? Yes, [§84]

Violation or not? No violation of Article 8 [§77] No violation of Article 8 & 14 [§90]

Principal reason for finding a violation of Article 14 or not: The residence order was based on an individual assessment of the best interests of the child and not on a general assumption in favour of the mother.

[§88] the residence order was based on an assessment of the best interests of the child in the particular circumstances of the case, rather than on a general assumption in favour of mother.

In particular, the domestic courts found that the child had lived with his mother at her place of residence for a long time. They considered that, given his young age and the length of his residence with the mother, a change to his established way of life would have a negative impact on his psychological state.

[§89] The Court is therefore satisfied that, as regards the examination of the application for a residence order, no difference of treatment on account of sex existed either in the law or in the decisions applying it in the applicant's case.

Discussion of "suspect grounds"?

[§87] The Court observes at the outset that Russian law does not make any distinction between the sexes, both men and women being equally eligible to obtain a residence order in respect of their child, irrespective of the child's age.

See also [88] and [89] quoted above.

Discussion of comparators/ like for like? See response Discussion of "suspect grounds"

Direct or indirect discrimination argued: The court accepted that Article 14 is applicable without further explanation

Influence of EU or UN law? No

Influence of gender perspective? No

Importance of gender equality is highlighted

[§85] Very weighty reasons need to be put forward before a difference in treatment on the ground of sex can be regarded as compatible with the Convention

Test applied for considering discrimination: (e.g. theoretical basis? Rationale applied?)

General principles were put forward:

[§84] It is the Court's established case-law that in order for an issue to arise under Article 14 there must be a difference in the treatment of persons in relevantly similar situations. Such a difference of treatment is discriminatory if it has no objective and reasonable justification; in other words, if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realised.

Discussion of margin of appreciation?

The general principles were highlighted by the Court:

[§84] The Contracting State enjoys a margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a different treatment. The scope of the margin of appreciation will vary according to the circumstances, the subject matter and its background, but the final decision as to the observance of the Convention's requirements rests with the Court

Discussion of justification?

Again the general principles were highlighted:

[§84] It is the Court's established case-law that in order for an issue to arise under Article 14 there must be a difference in the treatment of persons in relevantly similar situations. Such a difference of treatment is discriminatory if it has no objective and reasonable justification; in other words, if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realised.

Discussion of the absence of positive measures as a basis to find discrimination? No

Any other issue of note? No

[Lingurar v Romania, no. 5886/15](#)

PART A

Date and Court: 16 October 2018, Fourth section

Facts of the case: The applicants argued that the police's use of violence against them was because of their Roma ethnic origins.

Ambit of which article: Articles 14 + 3

Protected characteristic argued: Ethnic origin Roma

Did the Court consider Article 14 as well as substantive argument? Yes

Violation or not? Yes Article 14 + 3 torture

Principal reason for finding a violation of Article 14 or not: The Court was unable to establish whether or not there had been a racist motive for the excessive police force. There had however been no investigation into potential racist motives.

PART B

Discussion of "suspect grounds"? No

Discussion of comparators/ like for like? No

Direct or indirect discrimination argued: Direct

Influence of EU or UN law? No

Influence of gender perspective? No

Test applied for considering discrimination: The Court considered that the Romanian authorities had failed in their obligation, imposed by Article 14, to take all the necessary measures to investigate whether there had been a racist motive in the organisation of the police operation of 8 November 2005.

Discussion of margin of appreciation? None

Discussion of justification? No

Discussion of the absence of positive measures as a basis to find discrimination? No

The Court considered that the Romanian authorities had failed in their obligation, imposed by Article 14, to take all the necessary measures to investigate whether there had been a racist motive in the organisation of the police operation of 8 November 2005.

Any other issue of note? No

[MF v Hungary, no. 45855/12](#)

PART A

Date and Court: 31 October 2017, Fourth Section

Facts of the case: The applicant alleged that he had been ill-treated by the police and that the investigation into his related complaint had been ineffective, in breach of Article 3 of the Convention. Moreover, he submitted under Article 14 read in conjunction with Article 3 that he had been discriminated against on account of his Roma origin.

Ambit of which article: Articles 14 + 3

Protected characteristic argued: Race- Roma origin

Did the Court consider Article 14 as well as substantive argument? Yes

Violation or not? Violation of Article 3 and Violation of Article 3 + 14 regarding investigation but not in relation to substantive allegation

Principal reason for finding a violation of Article 14 or not: [§69] having assessed all relevant elements, the Court does not consider that it has been established beyond reasonable doubt that racist attitudes played a role in the applicant's treatment by the police.

[§76] Despite the applicant's consistent allegations, there is no evidence that the authorities carried out any examination into the question of possible racial motives. In particular, nothing was done to verify the statements of the applicant that he had been racially abused.

PART B

Discussion of "suspect grounds"? No

Discussion of comparators/ like for like? No

Direct or indirect discrimination argued: Direct

Influence of EU or UN law? Prosecuting Hate Crimes – A Practical Guide, published by the Office for Democratic Institutions and Human Rights of the Organization for Security and Co-operation in Europe (OSCE/ODIHR) [§§ 29, 30, 75]

Influence of gender perspective? No

Test applied for considering discrimination: See below on positive obligations

Discussion of margin of appreciation? No

Discussion of justification? No

Discussion of the absence of positive measures as a basis to find discrimination? [§72] The Court considers that when investigating violent incidents, 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. Admittedly, proving racial motivation will often be extremely difficult in practice. The respondent State's obligation to investigate possible racist overtones to a violent act is an obligation to use best endeavours and not absolute. The authorities must do what 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 a racially induced violence.

Treating racially motivated violence and brutality on an equal footing with cases lacking any racist overtones would be tantamount to turning a blind eye to the specific nature of acts which are particularly destructive of fundamental human rights. A failure to make a distinction in the way in which situations which are essentially different are handled may constitute unjustified treatment irreconcilable with Article 14 of the Convention.

Any other issue of note? Burden of proof, § 67. The Court reiterates that in assessing evidence it has adopted the standard of proof "beyond reasonable doubt" (see paragraph 43 above); nonetheless, it has not excluded the possibility that in certain cases of alleged discrimination it may require the respondent Government to disprove an arguable allegation of discrimination and – if they fail to do so – find a violation of Article 14 of the Convention on that basis. However, where it is alleged – as in the present case – that a violent act was motivated by racial prejudice, such an approach would amount to requiring the respondent Government to prove the absence of a particular subjective attitude on the part of the person concerned. While in the legal systems of many countries proof of the discriminatory effect of a policy or decision will dispense with the need to prove intent in respect of alleged discrimination in employment or the provision of services, that approach is difficult to transpose to a case where it is alleged that an act of violence was racially motivated (see [Nachova and Others](#), cited above, § 157).

[Molla Sali v. Greece, no. 20452/14](#)

PART A

Date and Court: 19 December 2018, Grand chamber

Facts of the case: The applicant's inheritance, following the death of her husband, was reduced due to the Greek courts reliance on Sharia law. This resulted in her husband's will being annulled, on the basis that he was of the Greek Muslim minority.

The applicant submitted that making access to the civil courts by members of the Muslim minority conditional upon forfeiting their status as members of that minority would amount to creating a segregationist system in which Sharia law would apply by default to all members of the Muslim minority. Such an approach would contradict the fundamental principle of the law of minorities allowing freedom of choice to accept or refuse the use of a special right intended to protect the minority

Ambit of which article: Article 14 read in conjunction with Article 1 of Protocol No. 1

Protected characteristic argued: Discrimination by association on the ground of religion

Did the Court consider Article 14 as well as substantive argument? Article 14 was the substantive argument

Violation or not? Violation

Principal reason for finding a violation of Article 14 or not:

Application of Shariah law was not proportionate to the aim pursued

PART B

Discussion of “suspect grounds”? Yes, § 134

Discussion of comparators/ like for like? Yes (§§ 138 to 141)

Direct or indirect discrimination argued: Direct

Influence of EU or UN law?

The Court referred to Council of Europe Framework Convention for the Protection of National Minorities and to international law on the protection of minorities in general.

It also referred to UN Convention CEDAW and statements from the UN Human rights Committee and to the Charter of Fundamental Rights of the European Union, Article 1, 2 and 21 and CJEU cases Coleman (C-303/06) and CHEZ Razpredelenie Bulgaria AD (C-83/14).

Influence of gender perspective? Yes

Test applied for considering discrimination: No

Discussion of margin of appreciation? No

Discussion of Justification? The Court found that the difference of treatment suffered by the applicant, as a beneficiary of a will drawn up in accordance with the Civil Code by a testator of Muslim faith, as compared to a beneficiary of a will drawn up in accordance with the Civil Code by a non-Muslim testator, had no objective and reasonable justification (§ 142). The Court did not conclude whether the aim was legitimate, as it found that the measure in any event was not proportionate to the aim pursued (§ 143).

Discussion of the absence of positive measures as a basis to find discrimination? No

Any other issue of note? Discrimination by association on the ground of religion was considered to be encompassed by the term “other status” in Article 14

Protection of minorities should not be contrary to the right to self-identification

[Orlandi and Others v Italy, no. 26431/12](#)

PART A

Date and Court: 14 December 2017, First section

Facts of the case: Refusal to register same-sex marriages contracted abroad

Ambit of which article: Articles 8, 12 and 8 and 14 collectively

Protected characteristic argued: Sexual orientation

Did the Court consider Article 14 as well as substantive argument? No, § 212

Violation or not? Violation Art 8

Principal reason for finding a violation of Article 14 or not: § 212. The Court did not consider Art 14

PART B

N/A

[Petrov and X v. Russia, no. 23608/16](#)

PART A

Date and Court: 23 October 2018, Third section

Facts of the case: The applicants alleged, in particular, that the refusal to make a residence order in the first applicant’s favour in respect of the second applicant had violated their right to respect for their family life, and had, moreover, amounted to discrimination on grounds of sex.

Ambit of which article: Articles 8 and 14

Protected characteristic argued: Sex (M)

Did the Court consider Article 14 as well as substantive argument? Yes, §§ 124 to 130

Violation or not? Violation Article 8 but not 14

Principal reason for finding a violation of Article 14 or not: The Court noted that the residence order was based on an assessment of the best interests of the child in the particular circumstances of the case, rather than on a general assumption in favour of mothers [§128]

PART B

Discussion of “suspect grounds”? No

Discussion of comparators/ like for like? Yes

Direct or indirect discrimination argued: Direct

Influence of EU or UN law? No

Influence of gender perspective? No (apart from sex being the discrimination ground)

Test applied for considering discrimination: Decided on the facts (the assessment of the residence order itself)

Discussion of margin of appreciation? Yes (briefly)

Discussion of justification? No

Discussion of the absence of positive measures as a basis to find discrimination? No

Any other issue of note? No

[Ratzenbock and Seydl v Austria 28475/12](#)

PART A

Date and Court: 26 October 2017 Fifth Section

Facts of the case: The applicants alleged, relying on Article 14 of the Convention taken in conjunction with Article 8, that they had been discriminated against on the basis of their sex and sexual orientation because they had been denied access to a registered partnership, legal institution exclusively reserved for same-sex couples.

Ambit of which article: Articles 14 + 8

Protected characteristic argued: Sex, sexual orientation

Did the Court consider Article 14 as well as substantive argument? 14 + 8 taken together

Violation or not: No violation 14 + 8

Principal reason for finding a violation of Article 14 or not: The Court considers that the applicants, being a different-sex couple to which the institution of marriage is open while being excluded from concluding a registered partnership, are not in a relevantly similar or

comparable situation to same-sex couples who, under the current legislation, have no right to marry and need the registered partnership as an alternative means of providing legal recognition to their relationship.

PART B

Discussion of “suspect grounds”? [§32] Sexual orientation is a concept covered by Article 14. The Court has repeatedly held that, just like differences based on sex, differences based on sexual orientation require “particularly convincing and weighty reasons” by way of justification

Discussion of comparators/ like for like? [§31] Requirement to demonstrate an analogous position does not require that the comparator groups be identical. An applicant must demonstrate that, having regard to the particular nature of his or her complaint, he or she was in a relevantly similar situation to others treated differently. However, not every difference in treatment will amount to a violation of Article 14. The Court accepts that different-sex couples are in principle in a relevantly similar or comparable position to same-sex couples as regards their general need for legal recognition and protection of their relationship

Direct or indirect discrimination argued: Direct

Influence of EU or UN law? No

Influence of gender perspective? No

Test applied for considering discrimination: [§31] The Court has established in its case-law that only differences in treatment based on an identifiable characteristic, or “status”, are capable of amounting to discrimination within the meaning of Article 14. Secondly, a difference of treatment is discriminatory if it has no objective and reasonable justification; in other words, if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realised

Discussion of margin of appreciation? [§32] Where a difference in treatment is based on sex or sexual orientation, the State’s margin of appreciation is narrow

Discussion of justification? [§42] The Court considers that the applicants, being a different-sex couple to which the institution of marriage is open while being excluded from concluding a registered partnership, are not in a relevantly similar or comparable situation to same-sex couples who, under the current legislation, have no right to marry and need the registered partnership as an alternative means of providing legal recognition to their relationship. There has therefore been no violation of Article 14 taken in conjunction with Article 8 of the Convention.

Discussion of the absence of positive measures as a basis to find discrimination? No

Any other issue of note? A concurring and a joint dissenting judgment

PART A

Date and Court: 5 December 2017 Fourth Section

Facts of the case: Mr. Ribac complaint **that** the refusal to grant him an old-age pension between November 1998 and April 2003 because he had not had Slovenian citizenship constituted discrimination on the grounds of nationality, contrary to Article 14 of the Convention taken in conjunction with Article 1 of Protocol No. 1.

Ambit of which article: Article 14 + Article 1 Protocol 1

Protected characteristic argued: Nationality

Did the Court consider Article 14 as well as substantive argument? Art 14 and A1P1 read collectively

Violation or not? Violation Art 14 + A1P1 collectively

Principal reason for finding a violation of Article 14 or not: §66. “The Court reiterates that, while being mindful of the broad margin of appreciation enjoyed by the State in the field of social security very weighty reasons would have to be put forward to justify the difference in treatment based exclusively on the grounds of nationality. The Court cannot discern any such reasons in the present case. There is accordingly no objective and reasonable justification for the difference in treatment.”

PART B

Discussion of “suspect grounds”? No

Discussion of comparators/ like for like? § 59 to 60. Having dismissed the Government’s above arguments, the Court cannot but accept that between November 1998 and April 2003 the applicant’s situation with regard to retirement benefits was similar to that of retired YPA military personnel with Slovenian citizenship.

Direct or indirect discrimination argued: Direct discrimination

Influence of EU or UN law? No

Influence of gender perspective? No

Test applied for considering discrimination: No

Discussion of margin of appreciation? [§66] mindful of the broad margin of appreciation enjoyed by the State in the field of social security

Discussion of justification? Legitimate aim = the protection and organisation of the country’s economic and social system. The Court takes note of the Government’s arguments that the

difference in treatment that was meant to secure that aim was justified because, firstly, nationals of other former SFRY republics were assumed to have participated in aggression against Slovenia (see paragraph 49 above), and secondly, their rights were the subject of succession negotiations and there was therefore no reason for Slovenia to assume responsibility pending the conclusion of a succession agreement (see paragraph 50 above).

On the facts these were not applicable here.

Discussion of the absence of positive measures as a basis to find discrimination? No

Any other issue of note? No

[Škorjanec v. Croatia, no. 25536/14](#)

PART A

Date and Court: 28 March 2017, Second Section

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

Ambit of which article: Articles 14 + 3

Protected characteristic argued: Race (Roma)

Did the Court consider Article 14 as well as substantive argument? Yes [§§ 52 to 72]

Violation or not? Yes. Violation of Article 3 under its procedural aspect in conjunction with Article 14 of the Convention [§72].

Principal reason for finding a violation of Article 14 or not:

The prosecuting authorities confined their investigation and analysis to the hate-crime element of the violent attack against the applicant's partner and failed to carry out a thorough assessment of the relevant situational factors and the link between the applicant's relationship with a partner of Roma origin and the racist motive for the attack on them. Indeed, the police lodged a criminal complaint only with regard to the attack on the applicant's partner treating the applicant merely as a witness, although she had also sustained injuries in the course of the same attack while in his company [§67].

Also, in its assessment of the available information concerning the violent attack on the applicant, the State Attorney's Office emphasised the fact that the applicant was not of Roma origin herself and could therefore not be considered a victim of a hate crime. It did so without

conducting further interviews or obtaining the relevant information related to the applicant's specific complaints [§68]

PART B

Discussion of "suspect grounds"? No

Discussion of comparators/ like for like? No

Direct or indirect discrimination argued: Direct discrimination by association

Influence of EU or UN law? No

Influence of gender perspective? No

Test applied for considering discrimination:

[§53] ".... Treating racially motivated violence and brutality on an equal footing with cases lacking any racist overtones would be tantamount to turning a blind eye to the specific nature of acts which are particularly destructive of fundamental human rights. A failure to make a distinction in the way in which situations which are essentially different are handled may constitute unjustified treatment irreconcilable with Article 14 of the Convention (see Abdu, cited above, § 44)."

[§55]: "In this connection it should be reiterated that not only acts based solely on a victim's characteristics can be classified as hate crimes. For the Court, perpetrators may have mixed motives, being influenced as much or more by situational factors as by their biased attitude towards the group to which the victim belongs (see Balázs, cited above, § 70). Moreover, Article 14 of the Convention, in the light of its objective and the nature of the rights which it seeks to safeguard, also covers instances in which an individual is treated less favourably on the basis of another person's status or protected characteristics (see Guberina, cited above, § 78)."

[§56] "It accordingly follows that the obligation on the authorities to seek a possible link between racist attitudes and a given act of violence, which is part of the responsibility incumbent on States under Article 3 taken in conjunction with Article 14 of the Convention, 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."

Discussion of margin of appreciation? No

Discussion of justification? No

Discussion of the absence of positive measures as a basis to find discrimination?

[§2] "[...] the authorities' duty to investigate the existence of a possible link between a discriminatory motive and an act of violence can fall under the procedural aspect of Article 3

of the Convention, but may also be seen to form part of the authorities' positive responsibilities under Article 14 to secure the fundamental values enshrined in Article 3 without discrimination. Owing to the interplay of Articles 3 and 14 of the Convention in the context of violence motivated by discrimination, issues such as those raised by the present case may fall to be examined under Article 3 alone, with no separate issue arising under Article 14, or may require examination of Article 3 in conjunction with Article 14. This is a question to be decided in each case depending on the facts and the nature of the allegations made (see, for example, *B.S. v. Spain*, no. 47159/08, § 59, 24 July 2012)."

Any other issue of note? No

[Talpis v Italy, no. 41237/14](#)

PART A

Date and Court: 2 March 2017 First Section

Facts of the case: 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 and that had led to an attempt to murder her and the death of her son.

Ambit of which article: Articles 14 + 2, 3

Protected characteristic argued: Sex (F)

Did the Court consider Article 14 as well as substantive argument? Yes [§§ 140 to 149]

Violation or not? Violation of article 14 taken with conjunction with articles 2 and 3

Principal reason for finding a violation of Article 14 or not: According to the Court, by underestimating, through their complacency, the seriousness of the violent acts in question, the Italian authorities in effect condoned them. The applicant was therefore a victim of discrimination, as a woman, in breach of Article 14 of the Convention. The Court considered that the applicant provided *prima facie* evidence, backed up by undisputed statistical data, that domestic violence primarily affects women and that, despite the reforms implemented, a large number of women are murdered by their partners or former partners (femicide) and, secondly, that the socio-cultural attitudes of tolerance of domestic violence persist [§145]

PART B

Discussion of "suspect grounds"? No

Discussion of comparators/ like for like? No

Direct or indirect discrimination argued: No

Influence of EU or UN law? Yes

[§57] Concluding Comments of CEDAW Committee concerning Italy, adopted at its 49th session

[§58] Istanbul Convention, art. 3

[§59] Conclusions of the UN Special Rapporteur on violence against women, its causes and consequences, drawn up following his official visit to Italy (from 15 to 26 January 2012),

[§60] Report by NGO WAVE (Women against Violence)

[§129] Istanbul Convention

[§134] Reference by applicant to international legislation relevant to the case

[§145] Reference by the Court to Conclusions of UN Special Rapporteur and to international text mentioned [§148]

Influence of gender perspective?

[§141] “The Court reiterates that, according to its case-law, a State’s failure to protect women against domestic violence breaches their right to equal protection before the law and that this failure does not need to be intentional”

Test applied for considering discrimination: No

Discussion of margin of appreciation? No

Discussion of justification? No

Discussion of the absence of positive measures as a basis to find discrimination? No

Any other issue of note? No

[Wolter and Sarfert v Germany, nos. 59752/13 and 66277/13](#)

PART A

Date and Court: 23 March 2017 Fifth Section

Facts of the case: The applicants, who are children born outside marriage, alleged that they had suffered discrimination on the grounds of their birth by the application of the relevant provisions of domestic inheritance law by the national courts.

Ambit of which article: Article 14 + Article 1 Protocol 1

Protected characteristic argued: Other status- children born outside marriage

Did the Court consider Article 14 as well as substantive argument? Art 14 combined with A1P1 considered collectively

Violation or not? Violation Art 14 with A1P1, no separate issue of Art 8 and 14

Principal reason for finding a violation of Article 14 or not: difference in treatment based on the applicants' status as children born outside marriage which excluded them from any entitlement to the estate. The measures were not proportionate to the aim pursued. [§78]

PART B

Discussion of "suspect grounds"? [§58]: the member States of the Council of Europe attach great importance to the question of equality between children born in and out of wedlock as regards their civil rights. Very weighty reasons would accordingly have to be advanced before a difference of treatment on the grounds of birth outside marriage could be regarded as compatible with the Convention

Discussion of comparators/ like for like? No

Direct or indirect discrimination argued: Direct discrimination

Influence of EU or UN law? No

Influence of gender perspective? No

Test applied for considering discrimination: [§57] Article 14 affords protection against the different treatment of persons in similar situations without an objective and reasonable justification. For the purposes of Article 14, a difference of treatment is discriminatory if it "has no objective and reasonable justification", that is, if it does not pursue a "legitimate aim" or if there is not a "reasonable relationship of proportionality between the means employed and the aim sought to be realised"

Discussion of margin of appreciation? No

Discussion of justification? §§ 68 to 69: Legitimate aim. The law had already changed, so the case turned on the need to preserve a cut-off date as a means of securing legal certainty, which is legitimate.

The measure was not proportionate due the strict application even in the special circumstances of the two applicants' cases. Appropriate considerations were: knowledge of the persons concerned, status of the inheritance rights involved, and the passage of time in bringing complaints. Having regard to the paramount importance of eliminating all differences in treatment between children born within and outside marriage, the domestic courts' arguments based on legal certainty, though being a weighty factor, were not sufficient to override the applicants' claims to a share in their fathers' estate under the specific circumstances. [§§ 72 and 77]

Discussion of the absence of positive measures as a basis to find discrimination? No

Any other issue of note? No

PART A

Date and Court: 13 June 2017 Second section

Facts of the case: The applicants complained that the national authorities' refusal to allow them to bear only their maiden name after their respective marriages, when men did not have to change their names, amounted to a breach of Articles 8 and 14 of the Convention.

Ambit of which article: Articles 14 + 8

Protected characteristic argued: Sex (f)

Did the Court consider Article 14 as well as substantive argument? Only looked at 14 + 8, no need to separately consider 8 (§ 18)

Violation or not? Violation of art 14 +8

Principal reason for finding a violation of Article 14 or not: Previously determined the issue in *Ünal Tekeli v. Turkey* no. [29865/96](#) and the Court considers that the Government have not put forward any fact or argument capable of persuading it to reach a different conclusion in the present cases.

PART B

Discussion of "suspect grounds"? No

Discussion of comparators/ like for like? No

Direct or indirect discrimination argued: Direct

Influence of EU or UN law? No

Influence of gender perspective? No

Test applied for considering discrimination: § 17, this difference in treatment on grounds of sex between persons in an analogous situation was in breach of Article 14 taken in conjunction with Article 8

Discussion of margin of appreciation? No

Discussion of justification? No

Discussion of the absence of positive measures as a basis to find discrimination? No

Any other issue of note? Very short decision due to previous and clear caselaw.

Annex B: European Convention on Human Rights – extract of rights and freedoms mentioned in the paper

- Article 1: Obligation to respect Human Rights
- Article 2: Right to life
- Article 3: Freedom from torture and inhuman or degrading treatment or punishment
- Article 4: Prohibition of slavery and forced labour
- Article 5: Right to liberty and security
- Article 6: Right to a fair trial
- Article 7: No punishment without law
- Article 8: Right to respect for private and family life, home and correspondence
- Article 9: Freedom of thought, conscience and religion
- Article 10: Freedom of expression
- Article 11: Freedom of assembly and association
- Article 12: Right to marry and start a family
- Article 13: Right to an effective remedy
- Article 14: Prohibition of discrimination
- Protocol 1, Article 1: Right to peaceful enjoyment of property
- Protocol 1, Article 2: Right to education
- Protocol 1, Article 3: Right to participate in free elections
- Protocol 12, Article 1: General prohibition of discrimination
- Protocol 13, Article 1: Abolition of the death penalty

EQUINET MEMBER EQUALITY BODIES

ALBANIA

Commissioner for the Protection from Discrimination
www.kmd.al

AUSTRIA

Austrian Disability Ombudsman
www.behindertenanwalt.gv.at

AUSTRIA

Ombud for Equal Treatment
www.gleichbehandlungsanwaltschaft.gv.at

BELGIUM

Institute for the Equality of Women and Men
www.igvm-iefh.belgium.be

BELGIUM

Unia (Interfederal Centre for Equal Opportunities)
www.unia.be

BOSNIA AND HERZEGOVINA

Institution of Human Rights Ombudsman of Bosnia and Herzegovina
www.ombudsmen.gov.ba

BULGARIA

Commission for Protection against Discrimination
www.kzd-nondiscrimination.com

CROATIA

Office of the Ombudsman
www.ombudsman.hr

CROATIA

Ombudsperson for Gender Equality
www.prs.hr

CROATIA

Ombudswoman for Persons with Disabilities
www.posi.hr

CYPRUS

Commissioner for Administration and Human Rights (Ombudsman)
www.ombudsman.gov.cy

CZECH REPUBLIC

Public Defender of Rights
www.ochrance.cz

DENMARK

Board of Equal Treatment
www.ast.dk

DENMARK

Danish Institute for Human Rights
www.humanrights.dk

ESTONIA

Gender Equality and Equal Treatment Commissioner
www.volinik.ee

FINLAND

Non-Discrimination Ombudsman
www.syrjinta.fi

FINLAND

Ombudsman for Equality
www.tasa-arvo.fi

FRANCE

Defender of Rights
www.defenseurdesdroits.fr

GEORGIA

Public Defender of Georgia (Ombudsman)
www.ombudsman.ge

GERMANY

Federal Anti-Discrimination Agency
www.antidiskriminierungsstelle.de

GREECE

Greek Ombudsman
www.synigoros.gr

HUNGARY

Equal Treatment Authority
www.egyenlobanasmod.hu

HUNGARY

Office of the Commissioner for Fundamental Rights
www.ajbh.hu

IRELAND

Irish Human Rights and Equality Commission
www.ihrec.ie

ITALY

National Office against Racial Discrimination - UNAR
www.unar.it

KOSOVO*

Ombudsperson Institution
www.oik-rks.org

LATVIA

Office of the Ombudsman
www.tiesibsargs.lv

LITHUANIA

Office of the Equal Opportunities Ombudsperson
www.lygybe.lt

LUXEMBURG

Centre for Equal Treatment
www.cet.lu

MALTA

Commission for the Rights of Persons with Disability
www.crp.d.org.mt

MALTA

National Commission for the Promotion of Equality
www.equality.gov.mt

MOLDOVA

Council on Preventing and Eliminating Discrimination and Ensuring Equality
www.egalitate.md

MONTENEGRO

Protector of Human Rights and Freedoms (Ombudsman)
www.ombudsman.co.me

NETHERLANDS

Netherlands Institute for Human Rights
www.mensenrechten.nl

NORTH MACEDONIA

Commission for the Protection against Discrimination
www.kzd.mk

NORWAY

Equality and Anti-Discrimination Ombud
www.ldo.no

POLAND

Commissioner for Human Rights
www.rpo.gov.pl

PORTUGAL

Commission for Citizenship and Gender Equality
www.cig.gov.pt

PORTUGAL

Commission for Equality in Labour and Employment
www.cite.gov.pt

PORTUGAL

High Commission for Migration
www.acm.gov.pt

ROMANIA

National Council for Combating Discrimination
www.cncd.org.ro

SERBIA

Commissioner for Protection of Equality
www.ravnopravnost.gov.rs

SLOVAKIA

National Centre for Human Rights
www.snspl.sk

SLOVENIA

Advocate of the Principle of Equality
www.zagovornik.si

SPAIN

Council for the Elimination of Ethnic or Racial Discrimination
www.igualdadynodiscriminacion.msssi.es

SPAIN

Institute of Women and for Equal Opportunities
www.inmujer.es

SWEDEN

Equality Ombudsman
www.do.se

UNITED KINGDOM - GREAT BRITAIN

Equality and Human Rights Commission
www.equalityhumanrights.com

UNITED KINGDOM - NORTHERN IRELAND

Equality Commission for Northern Ireland
www.equalityni.org

**This designation is without prejudice to positions on status, and is in line with UNSCR 1244/1999 and the ICJ Opinion on the Kosovo declaration of independence.*

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