



LESBIAN AND GAY RIGHTS LITIGATION BEFORE THE EUROPEAN
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WORKSHOP

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Workshop

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I. Case Law on Lesbian and Gay Rights

Private Sexual Conduct

Dudgeon v. United Kingdom (Application no. 7525/76) [decided on 22 October 1981]
Criminalisation of homosexual relations is an infringement of the right to privacy. The holding in Dudgeon was confirmed subsequently in the cases of Norris v. Ireland (Application no. 10581/83, decided on 26 October 1988) and Modinos v. Cyprus (Application no. 15070/89, decided on 22 April 1993).

The facts

The applicant is a homosexual man and his complaints are directed primarily against the existence in Northern Ireland of laws which have the effect of making certain homosexual acts between consenting adult males criminal offences and, if possible, achieving a minimum age of consent lower than 21 years. In 1976, during an unrelated police search, personal papers describing homosexual activities, including correspondence and diaries belonging to the applicant, were found and seized. The authorities considered instituting proceedings for the offence of gross indecency between males, but subsequently decided that it would not be in the public interest for proceedings to be brought. Mr. Dudgeon was so informed in February 1977.

The applicant complained that under the law in force in Northern Ireland he is liable to criminal prosecution on account of his homosexual conduct and that he has experienced fear, suffering and psychological distress directly caused by the very existence of the laws in question - including fear of harassment and blackmail. He alleged that, in breach of Article 8 of the Convention, he has thereby suffered, and continues to suffer, an unjustified interference with his right to respect for his private life.

The law

The Court concluded that the maintenance in force of the impugned legislation constitutes a continuing interference with the applicant's right to respect for his private life (which includes his sexual life) within the meaning of Article 8 para 1. The very existence of this legislation continuously and directly affects his private life (see *Marckx* [1979]: either he respects the law and refrains from engaging – even in private with consenting male partners - in prohibited sexual acts, or he commits such acts and thereby becomes liable to criminal prosecution.

As the present case concerns a most intimate aspect of private life, there must exist particularly serious reasons before interferences on the part of the public authorities can be legitimate for the purposes of paragraph 2 of Article 8.

As compared with the era when that legislation was enacted, there is now a better understanding, and in consequence an increased tolerance, of homosexual behaviour to the extent that in the great majority of the member States of the Council of Europe it is no longer considered to be necessary or appropriate to treat homosexual practices of the kind now in question as in themselves a matter to which the sanctions of the criminal law should be applied; the Court cannot overlook the marked changes which have occurred in this regard in the domestic law of the member States (see *Marckx* judgment, and *Tyrer* judgment [1978]). In Northern Ireland itself, the authorities have refrained in recent years from enforcing the law in respect of private homosexual acts between consenting males over the age of 21 years capable of valid consent. No evidence has been adduced to show that this has been injurious to moral standards in Northern Ireland or that there has been any public demand for stricter enforcement of the law. It cannot be maintained in these circumstances that there is a "pressing social need" to make such acts criminal offences, there being no sufficient justification provided by the risk of harm to vulnerable sections of society requiring protection or by the effects on the public. On the issue of proportionality, the Court considers that such justifications for retaining the law in force unamended are outweighed by the detrimental effects which the very existence of the legislative provisions in question can have on the life of a person of homosexual orientation like the applicant. Although members of the public who regard homosexuality as immoral may be shocked, offended or disturbed by the commission by others of private homosexual acts, this cannot on its own warrant the application of penal sanctions when it is consenting adults alone who are involved.

The Court concluded that Mr. Dudgeon suffered and continues to suffer an unjustified interference with his right to respect for his private life. There is accordingly a breach of Article 8.

Laskey, Jaggard and Brown v. United Kingdom (Applications no. 21627/93, 21826/93 and 21974/93) [19 February 1997]

Sadomasochistic sexual activities carried out in private involving significant degrees of injury and wounding may be restricted under Article 8.2 on protection of health grounds.

The facts

In this case, the applicants were charged with a series of offences, including assault and wounding, relating to sadomasochistic activities. These activities were consensual and were conducted in private for the achievement of sexual gratification. The infliction of pain was subject to certain rules and did not lead to any instances of infection, permanent injury or the need for medical attention. However, the trial judge ruled that they could not rely on the consent of the "victims" as an answer to the prosecution case.

The law

The Court observes that not every sexual activity carried out behind closed doors necessarily falls within the scope of Article 8. There can be no doubt that sexual orientation and activity concern an intimate aspect of private life (*Dudgeon v. the United Kingdom*). However, a considerable number of people were involved in the activities in question which included, inter alia, the recruitment of new "members", the provision of several specially equipped "chambers", and the shooting of many videotapes which were distributed among the "members".

The determination of the level of harm that should be tolerated by the law in situations where the victim consents is in the first instance a matter for the State concerned since what is at stake is related, on the one hand, to public health considerations and to the general deterrent effect of the criminal law, and, on the other, to the personal autonomy of the individual.

The significant degree of injury or wounding involved in the applicants' sadomasochistic activities suffices to distinguish the present case from those previously examined by the Court concerning consensual homosexual behaviour in private between adults where no such feature was present [see *Dudgeon vs. UK* (1981), the *Norris v. Ireland* (1988), and the *Modinos v. Cyprus* (1993)]. In deciding whether or not to prosecute, the State authorities were entitled to have regard not only to the actual seriousness of the harm but also to the potential for harm inherent in the acts in question.

The Court notes that the charges of assault were numerous and referred to illegal activities which had taken place over more than ten years. In these circumstances, bearing in mind the degree of organisation involved in the offences, the measures taken against the applicants cannot be regarded as disproportionate.

Accordingly, the Court considers that the reasons given by the national authorities for the measures taken in respect of the applicants were relevant and necessary in a democratic society for the protection of health within the meaning of Article 8 para 2 of the Convention.

A.D.T. v. United Kingdom (Application no. 35765/97) [decided on 31 July 2000]
Criminalization of group sexual activities carried out in private is an infringement of the right to private life.

The facts

In this case, the applicant is a homosexual man whose home was searched by the police, resulting in the seizing of various items, including photographs and videotapes. After admitting that the tapes would contain footage of himself and other adult men engaging in various acts in his home, the applicant was charged with gross indecency between men contrary to section 13 of the *Sexual Offences Act 1956*. The charge related to the commission of the sexual acts depicted in one of the videotapes and not to the making or distribution of the tapes themselves.

The applicant complained that his conviction for gross indecency constituted a violation of his right to respect for his private life, protected by Article 8 of the Convention.

The cardinal issue in the case is whether the existence of the legislation in question, and its application in the prosecution and conviction of the applicant, were “necessary in a democratic society” for these aims. The Court will therefore consider the compatibility of the legislation in the present case with the Convention in the light of the circumstances of the case, that is, that the applicant wished to be able to engage, in private, in non-violent sexual activities with other men.

The law

The Court found that the facts of the present case do not indicate circumstances in which State interference may be justified, such as for the protection of health or morals. The activities were genuinely “private”, and the approach of the Court must be to adopt the same narrow margin of appreciation as it found applicable in other cases involving intimate aspects of private life. Given that, the Court finds that the reasons submitted for the maintenance in force of legislation criminalising homosexual acts between men in private, and a fortiori the prosecution and conviction in the present case, are not sufficient to justify the legislation and the prosecution.

Sutherland v. United Kingdom (Application no. 25186/94) [decided by the Commission on 27 March 2001]

Prohibition of discrimination requires equalization of ages of consent for consensual homosexual and heterosexual relations. This decision is significant since it reverses previous jurisprudence on the differential age of consent between homosexuals and heterosexuals. The Court then relied on Sutherland in L. v. Austria which formally reversed said negative jurisprudence.

The facts

In this case, the applicant had his first homosexual encounter when he was 16, with another person of his own age. However, both worried about the law.

The law

In the UK, prior to 3 November 1994, the minimum age for consensual male homosexual relations was 21 and, since that date, the minimum age has been 18. The age of consent for consensual heterosexual and lesbian relations has at all material times been 16. There were and are therefore at least two differences which are at issue: the difference in treatment of homosexual and heterosexual relationships, and the difference in treatment between male homosexual and lesbian relationships. The different minimum ages for lawful sexual relations between homosexuals and heterosexuals are a difference based on sexual orientation. In terms of Article 14 of the Convention, it is not clear whether this difference is a difference based on "sex" or on "other status".

The Commission is of the opinion that, regardless of whether the difference in treatment of heterosexuals and homosexuals is based on "sex" or "other status", given that it impinges on a most intimate aspect of affected individuals' private lives, the margin of appreciation must be relatively narrow. Since 1981 there have been important developments in professional opinion regarding the age of consent. Furthermore, equality of treatment in respect of the age of consent is now recognised by the great majority of Member States of the Council of Europe.

The Commission, accordingly, considers it opportune to reconsider its earlier case-law in the light of these modern developments and, more especially, in the light of the weight of current medical opinion that to reduce the age of consent to 16 might have positively beneficial effects on the sexual health of young homosexual men without any corresponding harmful consequences. Even if, as claimed in the Parliamentary debate, there may be certain young men for whom homosexual experience after the age of 16 will have influential and potentially disturbing effects and who may require protection, the Commission is unable to accept that it is a proportionate response to the need for protection to expose to criminal sanctions not only the older man who engages in homosexual acts with a person under the age of 18 but the young man himself who is claimed to be in need of such protection.

Consequently, the Commission found no objective and reasonable justification for keeping a higher minimum age of consent for male homosexuals, than for heterosexuals,

acts and that the application discloses discriminatory treatment in the exercise of the applicant's right to respect for private life under Article 8 of the Convention.

L. and V. v. Austria (Applications nos. 39392/98 and 39829/98) [decided on 9 January 2003]

Confirms holding in *Sutherland*. Other similar rulings: *Waite v. United Kingdom* (Application no. 53236/99) [decided on 10 December 2002], *S.L. v. Austria* (Application no. 45330/99) [decided on 9 January 2003], *B.B. v. United Kingdom* (Application no. 53760/00) [decided on 10 February 2004].

The facts

In this case, the applicants complained that criminalising homosexual acts of adult men with consenting adolescents between 14 and 18 years of age, and their convictions under that provision, violated their right to respect for their private life and were discriminatory, as heterosexual or lesbian relations between adults and adolescents in the same age bracket were not punishable.

The law

What is decisive is whether there was an objective and reasonable justification why young men in the 14 to 18 age bracket needed protection against sexual relationships with adult men, while young women in the same age bracket did not need such protection against relations with either adult men or women. In this connection the Court reiterates that the scope of the margin of appreciation left to the Contracting State will vary according to the circumstances, the subject matter and the background; in this respect, one of the relevant factors may be the existence or non-existence of common ground between the laws of the Contracting States (*Petrovic and Fretté*). To the extent that Article 209 of the Criminal Code embodied a predisposed bias on the part of a heterosexual majority against a homosexual minority, these negative attitudes cannot of themselves be considered by the Court to amount to sufficient justification for the differential treatment any more than similar negative attitudes towards those of a different race, origin or colour (*Smith and Grady*). In conclusion, the Court finds that the Government have not offered convincing and weighty reasons justifying the maintenance in force of Article 209 of the Criminal Code and, consequently, the applicants' convictions under this provision. It follows that there has been a violation of Article 8.

In *Woditschka and Wilfling v. Austria* (Applications no. 69756/01 and 6306/02) [decided on 21 October 2004], *Ladner v. Austria* (Application no. 18297/03) [decided on 3 February 2005], *Wolfmeyer v. Austria* (Application no. 5263/03) [decided on 26 May 2005], *H.G. and G.B. v. Austria* (Applications no. 11084/02 and 15306/02) [decided on 2 June 2005] and *R. H. v. Austria* (Application no. 7336/03) [decided on 19 January 2006], the question was the maintenance of Article 209 of the Criminal Code of Austria. The Court reiterated its finding in *L.*

and V. that the fact that Article 209 of the Criminal Code has been repealed does not affect the applicant's victim status. Noting, in particular, that the applicant's conviction still stands despite the repeal of Article 209, it sees no reason to deviate from this position in the present cases.

Smith and Grady v. United Kingdom (Applications nos. 33985/96 and 33986/96) [decided on 27 September 1999]

Overly intrusive investigations conducted into sexual orientation of the applicants, Army employees, and their discharge on the grounds of their homosexuality in pursuance of the Ministry of Defence policy banning homosexuals from the army, were in breach of the right to privacy. Similar rulings were held in **Lustig-Prean and Beckett v. the United Kingdom** (Applications no. 31417/96 and 32377/96) [decided on 27 September 1999], **Beck, Copp and Bazeley v. the United Kingdom** (Applications no. 48535/99, 48536/99 and 48537/99) [decided on 22 October 2002] and in **Perkins and R. v. the United Kingdom** (Applications no. 43208/98 and 44875/98) [decided on 22 October 2002]

The facts

In this case, the two applicants complained that the investigations into their homosexuality and their discharge from the Royal Air Force on the sole ground that they are homosexual constituted violations of Article 8 of the Convention taken alone and in conjunction with Article 14. They also invoked Articles 3 and 10 of the Convention taken alone and in conjunction with Article 14 in relation to the policy of the Ministry of Defence against homosexuals in the armed forces and the consequent investigations and discharges. They further complained under Article 13 that they did not have an effective domestic remedy for these violations.

The law

The Court is of the view that the investigations by the military police into the applicants' homosexuality, which included detailed interviews with each of them and with third parties on matters relating to their sexual orientation and practices, together with the preparation of a final report for the armed forces' authorities on the investigations, constituted a direct interference with the applicants' right to respect for their private lives. Their consequent administrative discharge on the sole ground of their sexual orientation also constituted an interference with that right (see *Dudgeon v. UK*).

The Court notes that the Ministry of Defence policy excluding homosexuals from the armed forces was confirmed by the Court of Appeal in the present case to be lawful, in terms of both domestic and applicable European Community law.

When the core of the national security aim pursued is the operational effectiveness of the armed forces, it is accepted that each State is competent to organise its own system of military discipline and enjoys a certain margin of appreciation in this respect. The Court also considers that it is open to the State to impose restrictions on an individual's right to

respect for his private life where there is a real threat to the armed forces' operational effectiveness, as the proper functioning of an army is hardly imaginable without legal rules designed to prevent service personnel from undermining it. However, the national authorities cannot rely on such rules to frustrate the exercise by individual members of the armed forces of their right to respect for their private lives, which right applies to service personnel as it does to others within the jurisdiction of the State. Moreover, assertions as to a risk to operational effectiveness must be "substantiated by specific examples".

The Court finds that the perceived problems which were identified in the HPAT (Homosexuality Policy Assessment Team) report as a threat to the fighting power and operational effectiveness of the armed forces were founded solely upon the negative attitudes of heterosexual personnel towards those of homosexual orientation. These negative attitudes cannot, of themselves, be considered by the Court to amount to sufficient justification for the interferences with the applicants' rights outlined above any more than similar negative attitudes towards those of a different race, origin or colour. The Court notes the lack of concrete evidence to substantiate the alleged damage to morale and fighting power that any change in the policy would entail. There was no actual or significant evidence of such damage as a result of the presence of homosexuals in the armed forces, and the Court further considers that the subsequent HPAT assessment did not, whatever its value, provide evidence of such damage in the event of the policy changing.

The Court concluded that convincing and weighty reasons have not been offered by the Government to justify the policy against homosexuals in the armed forces or, therefore, the consequent discharge of the applicants from those forces. The Court finds that neither the investigations conducted into the applicants' sexual orientation, nor their discharge on the grounds of their homosexuality in pursuance of the Ministry of Defence policy, were justified under Article 8 § 2 of the Convention. Accordingly, there has been a violation of Article 8 of the Convention.

Right to Family Life

X. and Y. v. United Kingdom (9369/81, inadmissibility decision of 3 May 1983)

The relationship of a homosexual couple falls within the scope of the right to respect for private life, but not that of family life. The deportation of one of a homosexual couple does not constitute an interference with the right to respect for private life, unless it were established that the couple cannot live elsewhere and that the link with the deporting State is a material element of the relationship.

Despite the modern evolution of attitudes towards homosexuality, the Commission finds that the applicants' relationship does not fall within the scope of the right to

respect for family life ensured by Article 8. On the other hand, as the Commission and Court have recognised in the case of Dudgeon (Eur. Court H.R. judgment of 22 October 1981), certain restraints on homosexual relationships could create an interference with an individual's right to respect for his private life ensured by Article 8 (Art. 8). The Commission finds that the applicants' relationship is a matter of their private life and the question arises whether the deportation order, requiring the first applicant to leave the United Kingdom, constituted an interference with the applicants' right under Article 8.

Schalk and Kopf v. Austria (Application no. 30141/04) [decided on 24 June 2010]

The European Convention of Human Rights does not oblige States to ensure the right to marry to homosexual couples. In this regard, in the present case the Court found no violation of Article 12 (Right to marry) and Article 14 (Prohibition of discrimination) in conjunction with Article 8 (Right to respect for private and family life). Nonetheless, in this very important case, the Court has taken a major step forward in its jurisprudence by extending the notion of "family life" to same-sex couples.

The facts

The applicants are a same-sex couple living together in Austria. Relying on Article 12 (right to marry), they complain of the authorities' refusal to allow them to marry. Relying further on Article 14 (prohibition of discrimination) in conjunction with Article 8 (right to respect for private and family life) they complain that they were discriminated against on account of their sexual orientation since they were denied the right to marry and have no other possibility to have their relationship recognised by law.

The law

The Court recognised for the first time that the "right to marry enshrined in Article 12 must [not] in all circumstances be limited to marriage between two persons of the opposite sex" and that "it cannot be said that Article 12 is inapplicable to the applicants' complaint". However, considering the wording of Article 12 which grants the right to marriage to a man and a woman, the lack of consensus on the matter across the Council of Europe area, the Court decided that the question as to whether or not to allow same-sex marriage should better be left to regulation by the national law of the Contracting State. Thus, Article 12 of the Convention does not impose an obligation on the respondent Government to grant a same-sex couple like the applicants access to marriage.

According to the Court, the relationship of a cohabiting same-sex couple living in a stable *de facto* partnership falls within the notion of "family life", just as the relationship of a different-sex couple in the same situation would. Consequently, they are in a relevantly similar situation to a different-sex couple as regards their need for legal recognition and protection of their relationship. Nonetheless, just as Article 12 does not

impose an obligation on Contracting States to grant same-sex couples access to marriage, Article 14 taken in conjunction with Article 8, a provision of more general purpose and scope, cannot be interpreted as imposing such an obligation either.

As for alternative means of recognition of same-sex couples, the Court notes that there is not yet a majority of States providing for this. The area in question must therefore still be regarded as one of evolving rights with no established consensus, where States must also enjoy a margin of appreciation in the timing of the introduction of legislative changes. Thus, the Court finds there has been no violation of Article 14 of the Convention taken in conjunction with Article 8.

Gas and Dubois v. France (Application no. 25951/07) [decided on 31 August 2010]
The court declares admissible an application from a same-sex couple concerning a child's adoption and considers that the refusal of such application by the French government constitutes a violation of Article 14 in conjunction with Article 8.

The facts

The applicants, Valérie Gas and Nathalie Dubois, are French nationals who have been cohabiting since 1989. In September 2000 Nathalie Dubois gave birth to a daughter who had been conceived in Belgium by means of medically-assisted procreation with an anonymous donor. In April 2002 the couple entered into a civil partnership agreement and on 3 March 2006 Ms Gas applied to Nanterre Court of First Instance for a simple adoption order in respect of her partner's daughter.

On 4 July 2006 the court refused the application on the grounds that the adoption would have legal implications which ran counter to the applicants' intentions and the child's best interests by transferring parental authority to the adoptive parent and hence depriving the biological mother of her rights in respect of the child. The Versailles Court of Appeal upheld the refusal but the applicants did not pursue the appeal to its conclusion, believing that it had no prospect of success in view of the recent case-law of the Court of Cassation on the subject.

Therefore, the applicants complained of the refusal of Ms Gas's application for a simple adoption order of Ms Dubois' child and maintained that this decision was discriminatory and had infringed their right to respect for their private and family life, in breach of Article 14 taken in conjunction with Article 8.

The law

The Court was of the view that the applicants could not be criticised for not having pursued the proceedings before the Court of Cassation to their conclusion, since, in view of the clear case-law of that court, their appeal on points of law had no prospect of succeeding (the rule of exhaustion of domestic remedies did not require a remedy to be exhausted in such circumstances). Furthermore, the Court observed, as had the

applicants, that the latter had raised their complaint under Article 8 before the Court of Appeal, although this article did not guarantee either the right to found a family or the right to adopt.

The court went on to point out that the notion of “family” under Article 8 was not confined solely to marriage-based relationships but could encompass other de facto “family” ties, such as the relationship between Ms Gas and Ms Dubois. Furthermore, sexual orientation also fell within the personal sphere protected by that Article. With regard to Article 14, the Court reiterated that it was applicable provided that the facts in question fell “within the ambit” of one of the Articles of the Convention, such as Article 8 in this case. In sum, the Court found that Article 14 in conjunction with Article 8 was applicable.

The Court considered that the complaint brought by Ms Gas and Ms Dubois raised serious issues of fact and law which could not be resolved at this stage in the examination of the application but required examination on the merits. Their complaint was therefore not “manifestly ill-founded”. For the above reasons the Court declared the application admissible and this decision does not prejudge the merits of the case.

Right to home

Karner v. Austria (Application no. 40016/98) [decided on 24 July 2003]
Eviction of the surviving partner in a long-term homosexual relationship from rented accommodation was an infringement of his right to home.

The facts

In this case, the applicant had lived with his long-term homosexual partner in a flat which the latter had rented a year earlier, sharing household expenses. After the applicant’s partner died, designating the applicant as heir, the landlord of the flat brought proceedings against the applicant for terminating the tenancy. The District Court dismissed the proceedings since it considered that the Rent Act, which provided that family members had a right to succeed to a tenancy, was also applicable to a homosexual relationship. On appeal, the Supreme Court granted the landlord's appeal, quashed the lower court's decision and terminated the lease. It found that the notion of “life companion” was to be interpreted as at the time it was enacted, and the legislature's intention was not to include persons of the same sex.

The applicant claimed to have been a victim of discrimination on the ground of his sexual orientation and had been denied the status of “life companion” of his late partner within the meaning of the Rent Act, thereby preventing him from succeeding to the tenancy. He relied on Article 14 of the Convention taken in conjunction with Article 8.

The law

The Court can accept that protection of the family in the traditional sense is, in principle, a weighty and legitimate reason which might justify a difference in treatment [*Mata Estevez v. Spain* (2001)]. The aim of protecting the family in the traditional sense is rather abstract and a broad variety of concrete measures may be used to implement it. In this case, the Court found that the Government have not offered convincing and weighty reasons justifying the narrow interpretation of the Rent Act that prevented a surviving homosexual partner from relying on that provision. Thus, there has been a violation of Article 14 of the Convention taken in conjunction with Article 8.

Kozak v. Poland (Application no. 13102/02) [decided on 2 March 2010]

The denial of succession to tenancy of a flat denied to a homosexual man after his partner's death is in breach of the Convention. In particular, it violates Article 14 (prohibition of discrimination) in conjunction with Article 8 (right to respect for private and family life).

The facts

In this case, the applicant is the surviving partner of a homosexual man, seeking to succeed to the tenancy of the flat where the couple lived together. The applicant complained under Article 14 taken in conjunction with Article 8 of the Convention that the Polish courts, by denying him the right to succeed to a tenancy after the death of his partner, had discriminated against him on the ground of his homosexual orientation.

The law

The Court clearly states that sexual orientation is covered by Article 14. Where a difference of treatment is based on sex or sexual orientation, 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 is in general suited for realising the aim sought but it must also be shown that it was necessary in the circumstances.

Indeed, if the reasons advanced for a difference in treatment were based solely on the applicant's sexual orientation, this would amount to discrimination under the Convention. In developing this reasoning, the Court notes that the domestic courts (in particular the Regional Court) concentrated on only one aspect of the facts as adduced by the applicant in support of his claim, namely on the homosexual nature of his relationship with the deceased. In the Court's opinion, the above conclusions clearly show that the Regional Court considered that the principal issue material for the ruling related to the applicant's sexual orientation. In contrast to what the Government argued, the relevant element was not the question of the applicant's residence in the flat or the emotional, economic or other quality of his relationship, but the homosexual nature of that relationship, which *per se* excluded him from succession.

Having regard to the State's narrow margin of appreciation in adopting measures that result in a difference based on sexual orientation, a blanket exclusion of persons living in

a homosexual relationship from succession to a tenancy cannot be accepted by the Court as necessary for the protection of the family viewed in its traditional sense.

The Court accordingly held that there has been a violation of Article 14 taken in conjunction with Article 8 of the Convention.

Prohibition of discrimination

Salgueiro da Silva Mouta v. Portugal (Application no. 33290/96) [decided on 21 December 1999]

The decision not to award custody of the child to the applicant, a homosexual, based on considerations related to his sexual orientation is discriminatory.

The facts

In this case, the applicant married a woman with whom he had a daughter, before the couple separated and the applicant started living with a man. During the divorce proceedings, the applicant signed an agreement with his former wife concerning the award of parental responsibility for their child, wherein the mother was to have parental responsibility and the applicant a right to contact. However, as his former wife did not comply with the agreement; thus, the applicant sought and was granted an order giving him parental responsibility for the child. However, on appeal by the mother, the Court of Appeal reversed the lower court's judgment and awarded parental responsibility to her, with contact to the applicant.

The applicant complained that the Lisbon Court of Appeal had based its decision to award parental responsibility for their daughter to his ex-wife rather than to himself exclusively on the ground of his sexual orientation. He alleged that this constituted a violation of Article 8 of the Convention taken alone and in conjunction with Article 14.

The law

The Court notes that the judgment of the Court of Appeal, in so far as it set aside the judgment of the lower Court which had awarded parental responsibility to the applicant, constitutes an interference with the applicant's right to respect for his family life and thus attracts the application of Article 8.

The Court observes that in reversing the decision of the lower Court and, consequently, awarding parental responsibility to the mother rather than the father, the Court of Appeal introduced a new factor, namely that the applicant was a homosexual and was living with another man. The Court is accordingly forced to conclude that there was a difference of treatment between the applicant and the mother which was based on the applicant's sexual orientation, a concept which is undoubtedly covered by Article 14 of the Convention.

The Court of Appeal took account of the fact that the applicant was a homosexual and was living with another man in observing that “The child should live in ... a traditional Portuguese family” and that “It is not our task here to determine whether homosexuality is or is not an illness or whether it is a sexual orientation towards persons of the same sex. In both cases it is an abnormality and children should not grow up in the shadow of abnormal situations”.

It is the Court’s view that certain passages from the judgment in question suggest that the applicant’s homosexuality was a decisive factor in the final decision. The Court is therefore forced to find that the Court of Appeal made a distinction based on considerations regarding the applicant’s sexual orientation, a distinction which is not acceptable under the Convention and since no reasonable relationship of proportionality existed between the means employed and the aim pursued; there has accordingly been a violation of Article 8 taken in conjunction with Article 14.

E.B. v. France (Application no. 43546/02) [decided on 22 January 2008]

*The decision to deny the applicant, a lesbian, authorization to adopt a child based on considerations related to her sexual orientation was discriminatory. This judgment reverses earlier negative judgment in the case of **Fretté v. France** (Application no. 36515/97) [decided on 26 February 2002] where the Court, on the same set of facts, held that refusal was justified on the basis of the best interests of the child, and in consideration of the wide margin of appreciation available to States in this area.*

The facts

The applicant, a lesbian, alleged that she had suffered discriminatory treatment that had been based on her sexual orientation and had interfered with her right to respect for her private life under Article 14 of the Convention taken in conjunction with Article 8.

The law

The Court notes that whilst the ground relating to the lack of a referent of the other sex features in both the present case and in *Fretté*, the domestic administrative authorities did not – expressly at least – refer to E.B.’s “choice of lifestyle”. Furthermore, they also mentioned the applicant’s qualities and her child-raising and emotional capacities, unlike in *Fretté* where the applicant was deemed to have had difficulties in envisaging the practical consequences of the upheaval occasioned by the arrival of a child. Moreover, in the instant case the domestic authorities had regard to the attitude of E.B.’s partner, with whom she had stated that she was in a stable and permanent relationship, which was a factor that had not featured in the application lodged by Mr. Fretté.

The Court points out that the domestic authorities reached a decision in the light of the opinion given by the adoption board that recommended that the application be refused. The Court established the influence of the applicant’s avowed homosexuality on the

assessment of her application which became a decisive factor leading to the decision to refuse her authorisation to adopt.

In the Court's opinion, if the reasons advanced for such a difference in treatment were based solely on considerations regarding the applicant's sexual orientation this would amount to discrimination under the Convention (*Salgueiro da Silva Mouta*). The Court points out that French law allows single persons to adopt a child, thereby opening up the possibility of adoption by a single homosexual, which is not disputed. The Court cannot but observe that, in rejecting the applicant's application for authorisation to adopt, the domestic authorities made a distinction based on considerations regarding her sexual orientation, a distinction which is not acceptable under the Convention. There has accordingly been a breach of Article 14 of the Convention taken in conjunction with Article 8.

P.B. and J.S. v. Austria (Application no. 18984/02) [decided on 22 July 2010]. *This case addressed the question as to whether different treatment as regard extension of insurance cover discriminated against homosexual couples. The Court found a violation of Article 14 (Prohibition of discrimination) in conjunction with Article 8 (Right to respect for private and family life) for the period the relevant legislation explicitly called for a difference in treatment between homosexual and heterosexual couples. However, since the relevant legislation was amended to be gender-neutral in 2007, no violation occurred.*

The facts

The applicants are a homosexual couple seeking to extend the insurance cover of one partner, a civil servant, to the other partner, his dependent. The applicants petitioned the relevant authorities to formally recognise this relationship, claiming it discriminatory to exclude persons living in a homosexual relationship from extended insurance cover. However, first the authorities and then the national courts (Administrative Court) dismissed the request on the grounds that a difference in treatment of homosexual couples was justified and complied with the principle of equality. As a result, the applicants submitted to the Court that they had been victims of discrimination on the basis of their sexual orientation.

As to the relevant domestic law (the Civil Servants Sickness and Accident Insurance Act – CSSAIA), prior to 1 August 2006 the definition of household member, thus eligible for the insurance cover, included unrelated persons of the opposite sex who have been living in the same household for at least ten months and since then have been doing the domestic work for the insured without payment. After the amendment to the law as of 1 August 2006, the definition included a “person who is not a relative of the insured and who has been living with him or her in the same household for at least ten month and since then is doing the domestic work for him or her without payment” if the person in question was carrying out childcare or nursing duties. On 1 July 2007 a further amendment excluded all non-related persons from insurance coverage.

The law

The Court, in assessing the case, found a violation of Article 14 in conjunction with Article 8 for the period until 1 August 2006, and for the period between 1 August 2006 and 30 June 2007. In particular, the Court observed that the Government had not given any justification for the difference in treatment experienced by the applicants and that experienced by cohabitantes of the opposite sex.

Even after the 2006 amendment, the Court found the CSSAIA discriminatory, because unmarried male/female couples qualified for preferential treatment, whereas unmarried couples of the same sexual orientation only qualified if they were raising children together. Even though the situation improved as a result of that amendment because homosexual couples were in principle no longer excluded from the scope of application of the CSSAIA, there remained a substantial difference in treatment for which no sufficient justification had been advanced by the Government.

On the contrary, the Court found no violation of Article 14 in conjunction with Article 8 for the period subsequent to 1 July 2007, when the most recent amendment to the CSSAIA was passed. In this regard, the Court observes that the newly amended version of the CSSAIA as in force from 1 July 2007 onwards omitted the explicit reference to partners of the opposite sex and restricted the scope of application to relatives. It is thus formulated in a neutral way concerning the sexual orientation of cohabitantes. The Court therefore considers that from 1 July 2007 the applicants were no longer subject to an unjustified difference in treatment as regards the benefit of extending health and accident insurance cover to the second applicant. Accordingly there was no breach of Article 14, read in conjunction with Article 8, as of 1 July 2007.

J. M. v. the United Kingdom (Application no. 37060/06) [decided on 7 September 2010]
Rules on child maintenance prior to the introduction of the Civil Partnership Act in the UK discriminated against those in same-sex relationships.

The facts

The applicant and her former husband had two children, and after their divorce, J.M. left the family home. The husband became the parent with care of the children for the purposes of the UK's child support legislation, and the applicant, as the non-resident parent, was required to contribute financially to the cost of their upbringing.

Since 1998 the applicant had been living with another woman in an intimate relationship. Her child maintenance obligation was assessed in September 2001 in accordance with the regulations that applied at that time. These provided for a reduced amount where the absent parent had entered into a new relationship, married or unmarried, but took no account of same-sex relationships. In the applicant's case this was a difference between the £47 she was required to pay as opposed to the £14 she would have been liable for if she had formed a new relationship with a man.

Her complaint was upheld by three levels of jurisdiction, but the case was overturned by a majority ruling in the House of Lords in 2006, which rejected the applicant's reliance on Article 8 or Article 1 of Protocol No. 1. J.M. complained before the Court that, when setting the level of child maintenance she was required to pay, the authorities had discriminated against her on the basis of her sexual orientation and thus violated Article 14.

The law

Unlike the English courts, the judges at Strasbourg took the view that the case most naturally fell within the scope of Article 1 of Protocol No. 1. The sums paid by the applicant out of her own financial resources towards the upkeep of her children were to be considered as "contributions" (just like social security benefits or taxation) since payment was required by the relevant legislative provisions and enforced through the Child Support Agency.

The Court considered that her maintenance obligation towards her children had been assessed differently on account of the nature of her new relationship with a person of the same sex, which constituted a violation of article 14. The Court hence concluded that there lacked sufficient justification for such discrimination in 2001-2002. The reforms introduced by the Civil Partnership Act some years later, however laudable, had no bearing on the matter.

The Court did not find it necessary to decide whether the facts of the case fell within the scope of Article 8, but held that there had been certainly a violation of Article 14 in conjunction with Article 1 of Protocol No. 1, and awarded the applicant 3,000 euros in respect of non-pecuniary damage under Article 41.

Freedom of Assembly

Baczowski and Others v. Poland (Application no. 1543/06) [decided on 3 May 2007]
Denial of authorisation to LGBT organisation to hold a meeting was a breach of Articles 11, 13 and 14.

The facts

The applicants are an LGBT group who were refused permission by the Mayor to hold an assembly on discrimination against minorities, women and disabled persons.

The applicants complained that their right to peaceful assembly had been breached by the way in which the domestic authorities had applied relevant domestic law to their case. They alleged that they had not had at their disposal any procedure which would have allowed them to obtain a final decision before the date of the planned assemblies. They also complained that they had been treated in a discriminatory manner in that they

had been refused permission to organise the assemblies whilst other persons had received such permissions. The applicants invoked article 11 of the Convention.

The law

The Court acknowledges that the assemblies were eventually held on the planned dates. However, the applicants took a risk in holding them given the official ban in force at that time. The assemblies were held without a presumption of legality, such a presumption constituting a vital aspect of effective and unhindered exercise of the freedom of assembly and freedom of expression. Hence, the Court is of the view that, when the assemblies were held, the applicants were negatively affected by the refusals to authorise them. The Court observes that legal remedies available to them could not ameliorate their situation as the relevant decisions were given in the appellate proceedings after the date on which the assemblies were held. The Court refers in this respect to its finding concerning Article 13 of the Convention. There has therefore been an interference with the applicants' rights guaranteed by Article 11 of the Convention.

Basing its views on the fact that the local governors found the decision unlawful, the Court concludes that the interference with the applicants' right to freedom of peaceful assembly was therefore not prescribed by law.

In this connection, the Court is of the view that such is the nature of democratic debate that the timing of public meetings held in order to voice certain opinions may be crucial for the political and social weight of such a meeting. Hence, the State authorities may, in certain circumstances, refuse permission to hold a demonstration, if such a refusal is compatible with the requirements of Article 11 of the Convention, but cannot change the date on which the organisers plan to hold it. The freedom of assembly – if prevented from being exercised at a propitious time – can well be rendered meaningless. The Court is therefore of the view that it is important for the effective enjoyment of the freedom of assembly that the applicable laws provide for reasonable time-limits within which the State authorities, when giving relevant decisions, should act. The Court is therefore not persuaded that the remedies available to the applicants in the present case, all of them being of a post-hoc character, could provide adequate redress in respect of the alleged violations of the Convention.

Alekseyev v. Russia (Applications no. 4916/07, 25924/08 and 14599/09) [decided on 30 September 2010]

The prohibitions of the 2006, 2007 and 2008 Moscow Pride are claimed to violate Article 11 and applicant's rights are violated under articles 13 and 14.

The facts

The Applicant along with several others organized a LGBT march in Moscow, due to 27 May 2006. On 18 May, they were informed that the Mayor had refused permission for the march on grounds of public order, for the prevention of riots and the protection of

health, morals and the rights and freedoms of others. The organisers submitted an alternative application involving only a picket in Lubyanka Square and also appealed the original refusal to a judge, however both were unsuccessful.

On 27 May 2006 the Applicant along with several others attended a conference in honour of the International Day Against Homophobia and Transphobia and announced their intention of go to the Alexander Garden along the Western length of the Kremlin Wall, and lay flowers at the Tomb of the Unknown Soldier as an act of remembrance to victims of fascism, including LGBT victims. The Applicant was arrested and the other demonstrators proceeded to the Mayor's office. Around one hundred arrests were made by the OMON police officers of people attacking the LGBT demonstrators.

On 15 May 2007, the Applicant and other individuals submitted another application to the Mayor's office to hold a similar march. This application was refused and an alternative was submitted proposing a picket before the Mayor's residence in Tverskaya Street and another in Novopushkinskiy Park, both of which were denied. On 27 May, the Applicant along with around twenty others attempted to deliver a petition against the prohibition of demonstration to the Mayor's office, but was detained by police along with two other men. He was convicted of the administrative offence of disobeying a lawful order from the police and fined one thousand roubles.

On 18 April 2008, the Applicant along with other organisers submitted notice of ten intended marches to be held on 1 and 2 May 2008. All were refused on public safety grounds, and the organisers submitted another fifteen applications for marches on 3 and 5 May, all of which were refused for the same reasons. The Applicant then submitted a raft of other proposals, including one to the recently-elected President of Russia stating his intention to hold a march in the Alexander Garden on 31 May 2008, to which he received no reply.

The Applicant appealed all of the refusals unsuccessfully, and attempted to organise a picket for 17 May calling for criminal charges to be brought against the Mayor for banning the marches. Permission for this was refused on 13 May on the same grounds as previously, however the organisers managed to hold a picket for around ten minutes on Bolshaya Nikitskaya Street near the Mayor's residence.

Alexeyev claimed that the events surrounding the attempted marches in 2006 - 2008 had violated Article 11. He also claimed that he had not been able to access an effective remedy for the violation of Article 11, a violation of Article 13; and that the refusal to allow the marches to go forward had been discriminatory, in that it was made on the basis of his and other participants' sexual orientation, a violation of Article 14 in conjunction with Article 11.

The law

The Court found it unnecessary to consider the legitimate aim or domestic lawfulness of the ban as it had found the ban did not satisfy the requirement of being necessary in a democratic society. The Court reiterated that Article 11 includes within its protection for assemblies which may be at risk of attack from groups who disagree with or are offended by the assembly's aims or purpose. The Government had referred inter alia to a statement opposing the ban by the head Muslim cleric in Nizhniy Novgorod (Russia's fourth-largest city), that, "as a matter of necessity, homosexuals must be stoned to death", as evidence of the likely public disorder which would result from the march. The Court found that, "[b]y relying on such blatantly unlawful calls as grounds for the ban, the authorities effectively endorsed the intentions of persons and organisations that clearly and deliberately intended to disrupt a peaceful demonstration in breach of the law and public order."

The Court found the ban disproportionate to the Government's stated aim of protecting children and vulnerable adults from homosexual propaganda. It also dismissed the Government's claim that the march should have been banned for conflicting with religious doctrine and the moral values of the majority. It stated that, if a minority group's exercise of rights guaranteed under the Convention were made conditional upon acceptance of that group by the societal majority, it would be "incompatible with the underlying values of the Convention".

The Court responded to the statement by the Government that there was a lack of consensus between member states as to the legitimacy of homosexuality, stating there was a long-standing consensus on such matters as legalisation of homosexual activity (*Dudgeon v United Kingdom*), homosexuals in the military (*Smith and Grady v United Kingdom*), parental rights, succession to tenancies (*Karner v Austria*), and equal ages of consent (*S. L. v. Austria*). While issues such as adoption by same-sex couples and access to same-sex marriage were yet to be brought to consensus, the Court found there was "no ambiguity about the other member States' recognition of the right of individuals to openly identify themselves as gay, lesbian or any other sexual minority, and to promote their rights and freedoms, in particular by exercising their freedom of peaceful assembly."

The Court found that the Government had taken no steps to assess the risk posed should the marches have gone ahead. It stated, "The only factor taken into account by the Moscow authorities was the public opposition to the event, and the officials' own views on morals." The Government had failed to demonstrate any pressing social need to ban such demonstrations for any of the reasons it had given. The Court therefore found the ban not to have been necessary in a democratic society, and to have been a violation of the right to freedom of assembly under Article 11.

The Court stated that, in the circumstances, an appropriate remedy would have been for the Applicant to have been able to obtain a court ruling concerning the authorisation of

the march before it was intended to take place. The Court found that the judicial remedies which had been available to the Applicant in the circumstances were of a post-hoc nature and could not have provided adequate redress to the Applicant, and that there had therefore been a violation of Article 13.

The Court stated that homosexuality was a ground for discrimination under Article 14, and that the margin of appreciation afforded to member states in this regard was narrow. It was necessary to show not just that measures taken were "suitable in general", but that they were "necessary in the circumstances", and that if the sole reason put forward by a member state for restrictions on access to the Convention rights were the victims' homosexuality, it would amount to discrimination under Article 14. The Court found on the facts that the march participants' sexual orientation had been the main reason for banning the events, and that there had therefore been a violation of Article 14 in conjunction with Article 11.

The Applicant had claimed €40,000 in non-pecuniary damages, of which the Government was ordered to pay €12,000, as well as €17,510 in costs.

Freedom of Expression and Obscenity

Scherer v. Switzerland (Application no. 17116/90) [Commission decision, 14th January, 1993)

The conviction of a porn shop owner for showing obscene homosexual films in part of his premises that was not open to the public and as there was no question of the protection of the morals of adults generally as none were confronted unintentionally with the material, was a breach of Article 10.

The facts

In this case, the applicant ran a sex shop for homosexuals in Zürich, at the back of which there was a room used for showing video films. Following a search of the shop, the district attorney's office brought proceedings against the applicant and subsequently fined the applicant for publishing obscene items in violation of the Swiss Criminal Code. The applicant appealed to the District Court which acquitted him, but this decision was overturned on appeal, and he was convicted.

In his application to the Commission the applicant complained under Art 6 of the length and unfairness of the criminal proceedings against him. He also relied on Articles 8 and 10 in respect, firstly, of his conviction for showing the film and the ban on showing the film on his own premises and, secondly, for selling obscene publications.

The law

The Commission notes that it was very unlikely that the projection room adjacent to the shop would be visited by persons who were unaware of the subject matter of the film.

Thus, there was no danger of adults being confronted with the film against or without their intention to see it. Moreover, it is undisputed that minors had no access to the film.

In the Commission's opinion, this case does not concern the protection of morals of adults in Swiss society in general, since no adult was confronted unintentionally or against his will with the film. Where this is so, there must be particularly compelling reasons justifying state interference, which have not been provided by the Government in the present case. Thus the Commission held that there was a violation of Art 10.

Homophobic speech

INTERIGHTS v. Croatia Application to the European Committee of Social Rights (application number 45/2007) [resolution decided on 21 October 2009]
The Commission found that Croatia's curriculum covering sex education discriminates on the basis of sexual orientation and constitutes a violation of article 11 paragraph 2 of the European Social Charter.

The European Committee of Social Rights found that Croatia's curriculum covering sex education discriminates on the basis of sexual orientation. In particular, it observed that the State has an obligation to ensure that educational materials do not reinforce demeaning stereotypes and perpetuate forms of prejudice which contribute to social exclusion, embedded discrimination and denial of human dignity.

The Committee found that certain specific elements of the educational material used in the ordinary curriculum are manifestly biased, discriminatory and demeaning, notably in how persons of non-heterosexual orientation are described and depicted.

For instance, extracts from the mandatory Biology course textbook used at secondary school level state that "*Many individuals are prone to sexual relations with persons of the same sex (homosexuals—men, and lesbians —women). It is believed that parents are to blame because they impede their children's correct sexual development with their irregularities in family relations. Nowadays it has become evident that homosexual relations are the main culprit for increased spreading of sexually transmitted diseases (e.g. AIDS)*", or "*The disease [AIDS] has spread amongst promiscuous groups of people who often change their sexual partners. Such people are homosexuals because of sexual contacts with numerous partners, drug addicts because of shared use of infected drug injection equipment and prostitutes*". These statements stigmatize homosexuals and are based upon negative, distorted, reprehensible and degrading stereotypes about the behaviour of all homosexuals.

The Committee held that such statements serve to attack human dignity and have no place in sexual and reproductive health education: thus, their inclusion in standard educational materials constitutes a violation of Article 11 in the light of the non-

discrimination clause of the Preamble to the Charter. By officially approving or allowing the use of the textbooks that contain these anti-homosexual statements, the Croatian authorities failed in their positive obligation to ensure the effective exercise of the right to protection of health by means of non-discriminatory sexual and reproductive health education which does not perpetuate or reinforce social exclusion and the denial of human dignity.

II. Other relevant Case Law

Freedom of Assembly

Plattform "Ärzte für das Leben" v. Austria Application to the Commission on 13 September 1982 (application no. 10126/82) [decided on 21st June, 1988]

States have a positive obligation to take reasonable and appropriate measures to enable lawful demonstrations to proceed peacefully.

The applicant is an anti-abortion association lamenting a lack of sufficient police protection during certain public demonstrations. Consequently, the applicant submitted that there had been a violation of Articles 9, 10 and 11 of the Convention.

The Court interpreted Article 11 by saying that a demonstration may annoy or give offence to persons opposed to the ideas or claims that it is seeking to promote. The participants must, however, be able to hold the demonstration without having to fear that they will be subjected to physical violence by their opponents; such a fear would be liable to deter associations or other groups supporting common ideas or interests from openly expressing their opinions on highly controversial issues affecting the community.

While it is the duty of Contracting States to take reasonable and appropriate measures to enable lawful demonstrations to proceed peacefully, they cannot guarantee this absolutely and they have a wide discretion in the choice of the means to be used (see *Abdulaziz, Cabales and Balkandali* [1985] and *Rees* [1986]). In this area the obligation they enter into under Article 11 of the Convention is an obligation as to measures to be taken and not as to results to be achieved.

In the present case, the Court held that the Austrian authorities did not fail to take reasonable and appropriate measures. Thus, there has been no violation of Article 11.

Stankov and the United Macedonian Organisation Ilinden v. Bulgaria (Applications nos. 29221/95 and 29225/95) [final judgment on 02/01/2002]

Lack of registration of the association holding the assembly is not a valid reason for denying freedom of assembly. Freedom of assembly is closely related to freedom of speech. Members of

ethnic minorities should be able to form an association and hold assemblies, unless they seek to achieve their ends through violent means or other undemocratic activities.

In this case, the applicant is an organisation for ethnic Macedonians in Bulgaria. In addition to being refused registration further to the authorities finding its aims were directed against the unity of the nation, the organisation was refused permission to hold demonstrations or meeting on several occasions.

The applicants submitted that the ban on certain meetings and the attitude of the authorities at the relevant time were aimed at suppressing the free expression of ideas at peaceful gatherings. As such they amounted to an interference with their rights under Article 11 of the Convention, seen against this background as *lex specialis* in relation to Article 10 of the Convention.

The Court reiterates that Article 11 of the Convention only protects the right to “peaceful assembly”. That notion – according to the Commission’s case-law – does not cover a demonstration where the organisers and participants have violent intentions (see *G. v. Germany* [1989] and *Christians against Racism and Fascism* [1980]). In the present case, the Court does not find that those involved in the organisation of the prohibited meetings had violent intentions. Article 11 is thus applicable and there has undoubtedly been an interference with the applicants’ freedom of assembly, within the meaning of Article 11 of the Convention.

However, the Court reiterates that where there has been incitement to violence against an individual or a public official or a sector of the population, the State authorities enjoy a wider margin of appreciation when examining the need for an interference with freedom of expression (see *Incal v. Turkey* [1998] and *Sürek v. Turkey* [1999]).

In the present case, in circumstances where there was no real foreseeable risk of violent action or of incitement to violence or any other form of rejection of democratic principles, the Court found that that the authorities overstepped their margin of appreciation. Thus, banning the applicants from holding meetings constituted a violation of Article 11 of the Convention.

Cisse v. France (Application no. 51346/99) [decided on 9 April 2002]

In the circumstances of the case, restriction of the applicant’s freedom of assembly was necessary and justified on public health grounds.

The applicant was a member of a group of aliens without valid residence permits who occupied a church to denounce French immigration policies. The priest and the parish council did not object to the initiative. After about two months the Paris Police ordered the total evacuation of the premises, due to serious sanitary, health, peace, security and public-order risks.

The applicant alleged a breach of her right to freedom of peaceful assembly with other aliens and a violation of Article 11 of the Convention.

The Court notes that even though it was peaceful and did not in itself entail any disturbance of public order, after two months the continued occupation of the church by illegal immigrants had developed into a situation in which the hunger-strikers' health had deteriorated and sanitary conditions become wholly inadequate.

In these circumstances, the Court accepts that restrictions on the exercise of the applicant's right to assembly may have become necessary. The Court notes that the symbolic and testimonial value of the protest had been tolerated for a sufficiently long period, and with regard to the wide margin of appreciation left to the States in this sphere, holds that the interference with the right to freedom of assembly was not disproportionate. Consequently, there has been no violation of Article 11.

Djavit An v. Turkey (Application no. 20652/92) [final decision on 09/07/2003]
States must refrain from applying unreasonable indirect restrictions upon the right to freedom of assembly.

In this case, the applicant is a member of an association to develop relations between Turkish and Greek Cypriots. The applicant complained that the refusals by the Turkish and Turkish-Cypriot authorities to allow him to cross the "green line" in order to participate in meetings had prevented him from exercising his right to freedom of assembly and association in breach of Article 11.

The Court first observes that the applicant's complaint is that the authorities, by constantly refusing to grant him permits to cross the "green line", have effectively prevented him from meeting Greek Cypriots and from participating in bi-communal meetings, thus affecting his right to freedom of assembly and association, contrary to Article 11. Thus, it should not be interpreted restrictively (see *G. v. Germany* [1989]; *Rassemblement jurassien and Unité jurassienne*; and *Rai and Others v. the United Kingdom* [1995]). The Court notes in addition that States must not only safeguard the right to assemble peacefully but also refrain from applying unreasonable indirect restrictions upon that right. Lastly, the Court considers that, although the essential object of Article 11 is to protect the individual against arbitrary interference by public authorities with the exercise of the rights protected, there may in addition be positive obligations to secure the effective enjoyment of these rights (see *Christians against Racism and Fascism*).

The Court considers that the refusals to grant permits to the applicant in order to cross into southern Cyprus in effect barred his participation in meetings there, preventing him consequently from engaging in peaceful assembly with people from both communities. In this connection the Court observes that hindrance can amount to a violation of the

Convention just like a legal impediment. Accordingly, the Court concludes that there has been an interference with the applicant's right to the freedom of peaceful assembly guaranteed by Article 11.

The manner in which restrictions were imposed on the applicant's exercise of his freedom of assembly was not "prescribed by law" within the meaning of Article 11(2). Accordingly, the Court concludes that there has been a violation of Article 11.

Öllinger v. Austria (Application no. 76900/01) [final judgment on 29/09/2006]
In a democracy the right to counter demonstrate cannot extend to inhibiting the exercise of the right to demonstrate. At the same time the unconditional banning of a counter demonstration requires particular justification, particularly if intended to express an opinion on an issue of public interest.

The applicant intended to hold a commemorative meeting for the Salzburg Jews murdered by the SS at the same time and place as another meeting in commemoration of SS soldiers killed in the Second World War. The applicant expected about six participants, who would carry commemorative messages in their hands and attached to their clothes. The applicant stated that no other means of expression (such as chanting or banners) which might offend piety or undermine public order would be used. The authorities denied the applicant permission to hold the meeting and he complained to the Court of a breach of his freedom of assembly (Article 11).

The Court notes that the applicant's right to freedom of peaceful assembly and his right to freedom of expression have to be balanced against the other association's right to protection against disturbance of its assembly and the cemetery-goers' right to protection of their freedom to manifest their religion.

In the Court's view, the unconditional prohibition of a counter-demonstration is a very far-reaching measure which would require particular justification. In the present case, the Court notes that factors such as the modality and size of the assembly render the unconditional prohibition disproportionate to the aim pursued.

The Court therefore found that the domestic authorities gave prominence to the interest of cemetery-goers in being protected against some rather limited disturbances vis-à-vis the applicant's interest in holding the intended assembly and expressing his protest against the other meeting. Thus, the Court considers that the authorities failed to strike a fair balance between the competing interests, resulting in a violation of Article 11.

Racist Crimes

Assenov and Others v. Bulgaria (Applications No. 90/1997/874/1086) [decided on 28 October 1998]

Based on Articles 2 or 3 State Parties have a positive obligation to investigate suspicious killings and/or ill-treatment.

In this case, the applicants complained, relying on Articles 3, 6 (1) and 13, about Mr. Assenov's alleged ill-treatment by the police and the lack of any effective domestic remedy in this respect; relying on Articles 3 and 5 (1), (3) and (4), about his detention on remand; and, relying on Article 25, about the measures taken by the prosecuting authorities in connection with their application to the Commission.

The Court considers that where an individual raises an arguable claim that he has been seriously ill-treated by the police or other such agents of the State unlawfully and in breach of Article 3, that provision, read in conjunction with the State's general duty under Article 1 to "secure to everyone within their jurisdiction the rights and freedoms defined in ... [the] Convention", requires by implication that there should be an effective official investigation. This investigation, as with that under Article 2, should be capable of leading to the identification and punishment of those responsible. If this were not the case, the general legal prohibition of torture and inhuman and degrading treatment and punishment, despite its fundamental importance would be ineffective in practice and it would be possible in some cases for agents of the State to abuse the rights of those within their control with virtual impunity. Against this background, in view of the lack of a thorough and effective investigation into the applicant's arguable claim that he had been beaten by police officers, the Court finds that there has been a violation of Article 3.

Nachova and Others v. Bulgaria Applications nos. 43577/98 and 43579/98) [decided by the Grand Chamber on 6 July 2005]

States have a positive duty stemming from Article 14 to investigate whether an act of violence was motivated by racial hatred. Burden of proof is applicable to claims under Article 14 (prohibition of discrimination). The judgment delivered by the Grand Chamber partially reversed and partially upheld the judgment delivered by the Section.

This case concerns the killing of two Bulgarian nationals of Roma origin by a member of the military police attempting to arrest them. The applicants complained that the killing had been in violation of Article 2. It was alleged that they had died as a result of the failure of domestic law and practice to regulate in a Convention-compatible manner the use of firearms by State agents. In effect, State agents had been authorised in the instant case to use lethal force in circumstances where this was not absolutely necessary. This fact alone violated Article 2. The applicants also complained that the authorities had failed to conduct an effective investigation into the deaths.

The Court found that the respondent State failed to comply with its obligations under Article 2 in that the relevant legal framework on the use of force was fundamentally flawed and the two had been killed in circumstances in which the use of firearms to

effect their arrest was incompatible with Article 2. Furthermore, grossly excessive force was used. There has therefore been a violation of Article 2.

The applicants alleged a violation of Article 14 in that prejudice and hostile attitudes towards persons of Roma origin had played a role in the events leading up to the deaths. They also argued that the authorities had failed in their duty to investigate possible racist motives in their killing.

The Grand Chamber stated 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 2, but may also be seen as implicit in their responsibilities under Article 14 taken in conjunction with Article 2 to secure the enjoyment of the right to life without discrimination. The Court thus finds that the authorities failed in their duty under Article 14 taken in conjunction with Article 2 to take all possible steps to investigate whether or not discrimination may have played a role in the events. It follows that there has been a violation of Article 14 taken in conjunction with Article 2 in its procedural aspect.

<p><i>Moldovan and Others v. Romania</i> (Applications nos. 41138/98 and 64320/01) [final judgment on 30/11/2005] <i>Racial discrimination may amount to degrading treatment and constitute a breach of Article 3.</i></p>
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The applicants complained that, after the destruction of their houses, they could no longer enjoy the use of their homes and had to live in very poor, cramped conditions, in violation of Articles 3 and 8. The applicants claimed that State officials had been involved in the destruction of their homes. The applicants alleged that the State also had positive obligations under Article 3, and claimed that it was incumbent on the Romanian Government to provide sufficient compensation to restore the applicants to their previous living conditions.

The Court found that the applicants' living conditions and the racial discrimination to which they had been publicly subjected by the way in which their grievances were dealt with by the various authorities, constitute an interference with their human dignity which, in the special circumstances of this case, amounted to "degrading treatment" within the meaning of Article 3. Accordingly, there has also been a violation of Article 3.

The Court found that the facts of the case fall within the scope of Articles 6 and 8 and that, accordingly, Article 14 is applicable. It notes that the attacks were directed against the applicants because of their Roma origin. The Court observes that the Government advanced no justification for the difference in treatment of the applicants. It concludes accordingly that there has been a violation of Article 14 taken in conjunction with Articles 6 and 8.

Secic v. Croatia (Application no. 40116/02) [decided on 31/08/2007]

Duties to investigate violent incidents and possible racist motives are applicable even when the perpetrators are private individuals

In this case, the applicant complained that the investigation carried out by the Croatian authorities following an attack on him had been unreasonably delayed and ineffective, in breach of Articles 3, 8 and 13.

In the present case, the Court considers that the injury suffered by the applicant was sufficiently serious to amount to ill-treatment within the meaning of Article 3, that may also give rise to a positive obligation to conduct an official investigation (see *Assenov and Others v. Bulgaria* [1998]). Such a positive obligation cannot be considered in principle to be limited solely to cases of ill-treatment by State agents (see *M.C. v. Bulgaria* [2003]). Lastly, the Court reiterates that the scope of the above obligation by the State is one of means, not of result; the authorities must have taken all reasonable steps available to them to secure the evidence concerning the incident (see *Menson v. the United Kingdom* [2003]).

The Court notes that the police have not resorted to any other measures of investigation allowed for by the domestic law, other than interviewing witnesses proposed by the applicants' lawyer. Having considered all the material in its possession and the arguments put forward by the parties, the Court considers that the failure of the State authorities to further the case or obtain any tangible evidence with a view to identifying and arresting the attackers over a prolonged period of time indicates that the investigation did not meet the requirements of Article 3. In consequence, the Court finds that there has been a breach of Article 3.

On the issue of alleged violation of Art 14, the applicant also complained that both his ill-treatment and the subsequent proceedings conducted by the authorities showed that he had been discriminated against on account of his ethnic origin. He relied on Article 14, taken in conjunction with Article 3. The Court reiterates 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. The respondent State's obligation to investigate possible racist overtones to a violent act is an obligation to use best endeavours and is not absolute; the authorities must do what is reasonable in the circumstances of the case (see *Nachova and Others*). The Court considers the foregoing necessarily true also in cases where the treatment contrary to Article 3 is inflicted by private individuals. Treating racially induced violence and brutality on an equal footing with cases that have no racist 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 in which situations that are essentially different are handled may constitute unjustified treatment irreconcilable with Article 14 (see *Nachova*).

The Court considers it unacceptable that, being aware that the event at issue was most probably induced by ethnic hatred, the police allowed the investigation to last for more than seven years without taking any serious action with a view to identifying or prosecuting the perpetrators. Consequently, the Court considers that there has been a violation of Article 14 taken in conjunction with the procedural aspect of Article 3.

Freedom of Speech

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

The principle of freedom of expression contained in Article 10 is counter-weighed by Article 16. The general purpose of Article 17 is to prevent individuals or groups with totalitarian aims from exploiting in their own interests the principles enunciated by the Convention.

The applicant, a member of an extreme right wing political party, was convicted and fined for displaying posters with offensive slogans, amounting to an aggravated offence of displaying, with hostility towards a racial or religious group, any writing, sign or other visible representation which is threatening, abusive or insulting, within the sight of a person likely to be caused harassment, alarm or distress by it. The applicant complained under Article 10 that the criminal proceedings against him violated his right to freedom of expression.

The Court held that the complaint was inadmissible, and that the applicant's actions came within the meaning of Article 17, preventing individuals or groups with totalitarian aims from exploiting in their own interests the principles enunciated by the Convention. The Court found in particular that the freedom of expression guaranteed under Article 10 may not be invoked in a sense contrary to Article 17 (see, *inter alia*, *W.P. and Others v. Poland*, (dec.), no. 42264/98, 2 September 2004; *Garaudy v. France*, (dec.), no. 65831/01, 24 June 2003; *Schimanek v. Austria*, (dec.) no. 32307/96, 1 February 2000; and also *Glimmerveen and Hagenbeek v. the Netherlands*, nos. 8348/78 and 8406/78, Commission decision of 11 October 1979, Decisions and Reports 18, p. 187). Thus, the applicant's display of the poster constituted an act within the meaning of Article 17, which did not, therefore, enjoy the protection of Articles 10 or 14 (see the cases cited above, and also *Jersild v. Denmark*, judgment of 23 September 1994, Series A no. 298, § 35).

The application was thus rejected as being incompatible *ratione materiae* with the provisions of the Convention, pursuant to Article 35 §§ 3 and 4.

K.U. v. Finland (Application no. 2872/02, Judgment of 2 December 2008)

States have positive obligations to regulate the responsibility of Internet providers.

The applicant was 13-years old when an unknown person or persons placed an advertisement on an online dating site in his name without his knowledge. The advertisement mentioned personal details and claimed that he was looking for an intimate relationship with a boy of his age or older.

The applicant's father requested the police to identify the person who had placed the advertisement in order to press charges. The service provider, however, refused to divulge the identity of the holder of the so-called dynamic IP address in question, regarding itself bound by the confidentiality of telecommunications as defined by law. The police then asked the District Court to oblige the service provider to divulge the said information pursuant to the Criminal Investigations Act. However, the District Court refused since there was no explicit legal provision authorising it to order the service provider to disclose telecommunications identification data in breach of professional secrecy.

The applicant complained under Article 8 that an invasion of his private life had taken place and that no effective remedy existed to reveal the identity of the person who had put a defamatory text on the Internet in his name, contrary to Article 13.

The Court considers that practical and effective protection of the applicant required that effective steps be taken to identify and prosecute the perpetrator, that is, the person who placed the advertisement. In the instant case such protection was not afforded. An effective investigation could never be launched because of an overriding requirement of confidentiality. Although freedom of expression and confidentiality of communications are primary considerations and users of telecommunications and Internet services must have a guarantee that their own privacy and freedom of expression will be respected, such guarantee cannot be absolute and must yield on occasion to other legitimate imperatives, such as the prevention of disorder or crime or the protection of the rights and freedoms of others. Without prejudice to the question whether the conduct of the person who placed the offending advertisement on the Internet can attract the protection of Articles 8 and 10, having regard to its reprehensible nature, it is nonetheless the task of the legislator to provide the framework for reconciling the various claims which compete for protection in this context. Such framework was not however in place at the material time, with the result that Finland's positive obligation with respect to the applicant could not be discharged. However, the mechanisms introduced by the Exercise of Freedom of Expression in Mass Media Act (see paragraph 21 above) came too late for the applicant. The Court found a violation of Article 8 in the present case.