



EUROPEAN COURT OF HUMAN RIGHTS  
COUR EUROPÉENNE DES DROITS DE L'HOMME

Guide on Article 14  
of the European Convention  
on Human Rights  
and on  
Article 1 of Protocol No. 12  
to the Convention

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Prohibition of discrimination

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## Note to readers

This Guide is part of the series of Case-Law Guides published by the European Court of Human Rights (hereafter “the Court”, “the European Court” or “the Strasbourg Court”) to inform legal practitioners about the fundamental judgments and decisions delivered by the Strasbourg Court. This particular Guide analyses and sums up the case-law on Article 14 of the Convention and on Article 1 of Protocol No. 12 to the European Convention on Human Rights (hereafter “the Convention” or “the European Convention”). Readers will find herein the key principles in this area and the relevant precedents.

The case-law cited has been selected among the leading, major, and/or recent judgments and decisions.\*

The Court’s judgments and decisions serve not only to decide those cases brought before the Court but, more generally, to elucidate, safeguard and develop the rules instituted by the Convention, thereby contributing to the observance by the States of the engagements undertaken by them as Contracting Parties (*Ireland v. the United Kingdom*, 18 January 1978, § 154, Series A no. 25, and, more recently, *Jeronovičs v. Latvia* [GC], no. 44898/10, § 109, 5 July 2016).

The mission of the system set up by the Convention is thus to determine, in the general interest, issues of public policy, thereby raising the standards of protection of human rights and extending human rights jurisprudence throughout the community of the Convention States (*Konstantin Markin v. Russia* [GC], 30078/06, § 89, ECHR 2012). Indeed, the Court has emphasised the Convention’s role as a “constitutional instrument of European public order” in the field of human rights (*Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland* [GC], no. 45036/98, § 156, ECHR 2005-VI).

This Guide contains references to keywords for each cited Article of the Convention and its Additional Protocols. The legal issues dealt with in each case are summarised in a [List of keywords](#), chosen from a thesaurus of terms taken (in most cases) directly from the text of the Convention and its Protocols.

The [HUDOC database](#) of the Court’s case-law enables searches to be made by keyword. Searching with these keywords enables a group of documents with similar legal content to be found (the Court’s reasoning and conclusions in each case are summarised through the keywords). Keywords for individual cases can be found by clicking on the Case Details tag in HUDOC. For further information about the HUDOC database and the keywords, please see the [HUDOC user manual](#).

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\* The case-law cited may be in either or both of the official languages (English or French) of the Court and the European Commission of Human Rights. Unless otherwise indicated, all references are to a judgment on the merits delivered by a Chamber of the Court. The abbreviation “(dec.)” indicates that the citation is of a decision of the Court and “[GC]” that the case was heard by the Grand Chamber. Chamber judgments that were not final when this update was finalised are marked with an asterisk (\*).

## Introduction

1. Article 14 of the Convention enshrines the protection against discrimination in the enjoyment of the rights set forth in the Convention. According to the Court's case-law, the principle of non-discrimination is of a "fundamental" nature and underlies the Convention together with the rule of law, and the values of tolerance and social peace (*S.A.S. v. France* [GC], 2014, § 149; *Străin and Others v. Romania*, 2005, § 59). Furthermore, this protection is completed by Article 1 of Protocol No. 12 to the Convention which prohibits discrimination more generally, in the enjoyment of any right set forth by law.

## I. Scope of application

### A. Nature and scope of application of Article 14 of the Convention

#### Article 14 of the Convention – Prohibition of discrimination

"The enjoyment of the rights and freedoms set forth in [the] 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."

#### HUDOC keywords

Discrimination (14); Sex (14); Race (14); Colour (14); Language (14); Religion (14); Political or other opinion (14); National origin (14); Social origin (14); National minority (14); Property (14); Birth (14); Other status (14)

Comparable situation (14) – Objective and reasonable justification (14)

#### 1. The ancillary nature of Article 14

2. Article 14 of the Convention enshrines the right not to be discriminated against in "the enjoyment of the rights and freedoms set out in the Convention".

3. The Court has frequently underlined that Article 14 merely complements the other substantive provisions of the Convention and the Protocols (*Molla Sali v. Greece* [GC], 2018, § 123; *Carson and Others v. the United Kingdom* [GC], 2010, § 63; *E.B. v. France* [GC], 2008, § 47; *Marckx v. Belgium*, 1979, § 32). This means that Article 14 does not prohibit discrimination as such, but only discrimination in the enjoyment of the "rights and freedoms set forth in the Convention". In other words, the guarantee provided by Article 14 has no independent existence (*Case "relating to certain aspects of the laws on the use of languages in education in Belgium" v. Belgium* (merits) ("the Belgian linguistic case"), 1968, § 9 of "the Law" part; *Carson and Others v. the United Kingdom* [GC], 2010, § 63; *E.B. v. France* [GC], 2008, § 47) and this Article forms an integral part of each of the Articles laying down rights and freedoms (the *Belgian linguistic case*, 1968, § 9 of "the Law" part; *Marckx v. Belgium*, 1979, § 32; *Inze v. Austria*, 1987, § 36). In practice the Court always examines Article 14 in conjunction with another substantive provision of the Convention.

4. However, the ancillary nature of Article 14 in no way means that the applicability of Article 14 is dependent on the existence of a violation of the substantive provision (see [Section I.A.2](#) below). Furthermore, the material scope of application of Article 14 is not strictly limited to that of the

substantive provision (see [Section I.A.3](#) below). Consequently, the Court has found Article 14 applicable to many areas, such as

- employment (*Sidabras and Džiautas v. Lithuania*, 2004; *Bigaeva v. Greece*, 2009);
- membership of a trade union (*Danilenkov and Others v. Russia*, 2009);
- social security (*Andrejeva v. Latvia* [GC], 2009; *Gaygusuz v. Austria*, 1996; *Koua Poirrez v. France*, 2003; *Stummer v. Austria* [GC], 2011);
- education (*D.H. and Others v. the Czech Republic* [GC], 2007; *Oršuš and Others v. Croatia* [GC], 2010; *Ponomaryovi v. Bulgaria*, 2011);
- right to respect for home (*Buckley v. the United Kingdom*, 1996; *Karner v. Austria*, 2003);
- access to justice (*Paraskeva Todorova v. Bulgaria*, 2010; *Moldovan and Others v. Romania (no. 2)*, 2005; *Anakomba Yula v. Belgium*, 2009);
- inheritance rights (*Fabris v. France* [GC], 2013);
- access to children (*Sommerfeld v. Germany* [GC], 2003);
- paternity (*Rasmussen v. Denmark*, 1984);
- freedom of expression, assembly and association (*Bączkowski and Others v. Poland*, 2007);
- right to an effective investigation (*Nachova and Others v. Bulgaria* [GC], 2005; *Opuz v. Turkey*, 2009; *B.S. v. Spain*, 2012);
- eligibility to life sentences (*Khamtokhu and Aksenchik v. Russia* [GC], 2017);
- eligibility for tax relief (*Guberina v. Croatia*, 2016).

## 2. The application of Article 14 in the absence of a violation of the substantive provision

5. The application of Article 14 – read in conjunction with a substantive provision – does not necessarily presuppose the violation of one of the substantive rights guaranteed by the Convention (*Carson and Others v. the United Kingdom* [GC], 2010, § 63; *E.B. v. France* [GC], 2008, § 47) and to this extent it is autonomous (*Sidabras and Džiautas v. Lithuania*, 2004, § 38).

6. As a consequence, the Court recognised the applicability of Article 14 in cases where there had been no violation of the substantive right itself (*Sommerfeld v. Germany* [GC], 2003; *Marckx v. Belgium*, 1979; the *Belgian linguistic case*, 1968, § 4 of “the Law” part).

7. This relative autonomy of Article 14 as regards its applicability has led to some procedural consequences. In some cases the Court has dealt first with the alleged violation of the substantive Article and then separately with the alleged violation of Article 14 read in conjunction with the substantive Article (*Marckx v. Belgium*, 1979; *Bączkowski and Others v. Poland*, 2007; *Aziz v. Cyprus*, 2004; *Nachova and Others v. Bulgaria* [GC], 2005). In other cases the Court found a violation of a substantive Article read in conjunction with Article 14, and did not deem it necessary to examine the violation of the substantive Article taken alone (*Molla Sali v. Greece* [GC], 2018; *Rangelov v. Germany*, 2012; *Andrejeva v. Latvia* [GC], 2009; *Barrow v. the United Kingdom*, 2006; *Sidabras and Džiautas v. Lithuania*, 2004; *Rasmussen v. Poland*, 2009).

8. In *Emel Boyraz v. Turkey*, 2014, the Court, as the master of the characterisation to be given in law to the facts of any case before it and having regard to the circumstances of the case, went even further and considered that the applicant’s complaint fell to be examined under Article 14 of the Convention, taken in conjunction with Article 8, although the applicant had not substantiated her claim under Article 8 (§ 33).

9. Conversely, the Court may decide not to examine a case under Article 14 when it has already found a separate breach of the substantive Article of the Convention. For example, in *Dudgeon v. the United Kingdom*, 1981, the Court stated that it was not generally necessary for the Court to also

examine the case under Article 14, though the position was otherwise if a clear inequality of treatment in the enjoyment of the right in question was a fundamental aspect of the case (§ 67; see also *Norris v. Ireland*, 1988; *Evans v. the United Kingdom* [GC], 2007; *V.C. v. Slovakia*, 2011).

### 3. The material scope of the prohibition of discrimination set forth in Article 14

10. For Article 14 to be applicable it is necessary, but also sufficient, for the facts of the case to fall within the wider ambit of one or more of the Convention Articles (*Carson and Others v. the United Kingdom* [GC], 2010, § 63; *E.B. v. France* [GC], 2008, § 47; *Konstantin Markin v. Russia* [GC], 2012, § 124; *Sidabras and Džiautas v. Lithuania*, 2004, § 38). As such, the material scope of application of Article 14 – read in conjunction with a substantive provision – cannot be reduced solely to the material scope of application of the substantive provision.

11. As a consequence, the Court has established that the prohibition of discrimination applies to those additional rights, falling within the general scope of any Article of the Convention, for which the State has voluntarily decided to provide (*Fábián v. Hungary* [GC], 2017, § 112; *Biao v. Denmark* [GC], 2016, § 88; *Izzettin Doğan and Others v. Turkey* [GC], 2016, § 158; *Carson and Others v. the United Kingdom* [GC], 2010, § 63; *E.B. v. France* [GC], 2008, § 48; *X and Others v. Austria* [GC], 2013, § 135; *Genovese v. Malta*, 2011, § 32; *Beeckman and Others v. Belgium* (dec.), 2018, § 19).

12. The Court itself has provided a number of examples of this concept of “additional rights”, explaining that, for instance, Article 6 of the Convention does not compel States to institute a system of appeal courts. A State which does set up such courts consequently goes beyond its obligations under Article 6. However, it would violate that Article, read in conjunction with Article 14, were it to debar certain persons from these remedies without a legitimate reason, while making them available to others in respect of the same type of actions (the *Belgian linguistic case*, 1968, § 9 of “the Law” part).

13. To this end, it is necessary that the legal interest to which the non-discrimination requirement applies falls within the ambit of the substantive Article (*Zarb Adami v. Malta*, 2006, § 49), is linked to the exercise of a right guaranteed by the substantive Article (*Konstantin Markin v. Russia* [GC], 2012, § 129), or does not fall completely outside the ambit of the substantive Article (*Van der Mussele v. Belgium*, 1983, § 43).

14. The Court has thus found Article 14, read in conjunction with a substantive right, applicable to a number of circumstances. For example, it recognised that rights such as the right for a single homosexual parent to adopt a child (*E.B. v. France* [GC], 2008, § 43), parental leave and parental allowances (*Konstantin Markin v. Russia* [GC], 2012, § 130) and denial of citizenship (*Genovese v. Malta*, 2011) come within the scope of Article 8 in conjunction with Article 14. By the same token, the Court has found Article 14 in conjunction with Article 1 of Protocol No. 1 applicable to a variety of welfare benefits (*Stummer v. Austria* [GC], 2011, § 82; *Stec and Others v. the United Kingdom* [GC], 2006, § 53; *Carson and Others v. the United Kingdom* [GC], 2010, §§ 64-65; *Andrejeva v. Latvia* [GC], 2009, § 77; *Fábián v. Hungary* [GC], 2017, § 117; see also, *a contrario*, *Dobrowolski and Others v. Poland* (dec.), 2018, where the Court held that a prisoner did not have a legitimate expectation to receive more than a half of the statutory minimum wage for work performed in prison).

15. The Court pointed out the “horizontal effect” of Article 14, meaning that the principle of non-discrimination may also apply in purely private situations. Indeed, the Court has held that it could not 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 – appeared unreasonable, arbitrary or blatantly inconsistent with the prohibition of discrimination enshrined in Article 14 and more broadly with the principles underlying the Convention. In *Pla and Puncernau v. Andorra*, 2004, for example, the national jurisdiction had

interpreted a person's will and considered that the testator had not wished to include adopted children as beneficiaries of the estate. The Court considered that, in conjunction with Article 8, Article 14 did not merely compel State to abstain from any arbitrary interference with an individual's private and family life. It held in this context that, in addition to this negative undertaking, there may be positive obligations inherent in an effective "respect" for private or family life (§ 59).

16. In other cases the Court found that the Contracting States had not taken the necessary measures in order to prevent or punish discrimination between private parties. In *Danilenkov and Others v. Russia*, 2009, for example, the State failed to afford effective judicial protection against discrimination on the ground of trade-union membership to employees on strike who were fired by their employer.

17. In cases concerning discriminatory violence emanating either from State agents or private individuals, State authorities have been required to conduct an effective and adequate investigation by ascertaining whether there were discriminatory motives and whether feelings of hatred or prejudice based on an individual's personal characteristic played a role in the events (*Abdu v. Bulgaria*, 2014, § 29; *Milanović v. Serbia*, 2010, § 90; *Opuz v. Turkey*, 2009, § 154). The case of *Members of the Gldani Congregation of Jehovah's Witnesses and Others v. Georgia* (2007) concerned a violent assault on the congregation of Jehovah's Witnesses by a group purporting to support the Orthodox Church and the lack of an effective investigation. In *Identoba and Others v. Georgia*, 2015, the Court considered that the State had violated its obligations under the principle of non-discrimination due to the failure to protect demonstrators from homophobic violence and to launch an effective investigation.

18. Finally, the failure to enforce a judgment acknowledging gender discrimination against a working mother (*García Mateos v. Spain*, 2013), the refusal to award compensation to a serviceman for discrimination with respect to his right to parental leave (*Hulea v. Romania*, 2012) and the failure to enforce a judgment of the Court finding a violation of Article 14 (*Sidabras and Others v. Lithuania*, 2004) have also resulted in breaches of Article 14.

## B. Article 1 of Protocol No. 12

### Article 1 of Protocol No. 12 – General prohibition of discrimination

"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."

#### HUDOC keywords

Prohibition of discrimination (P12-1)

19. As stated above, Article 1 of Protocol No. 12 extends the scope of protection against discrimination to "any right set forth by law". It thus introduces a general prohibition of discrimination (*Savez crkava "Riječ života" and Others v. Croatia*, 2010, § 103; *Sejdić and Finci v. Bosnia and Herzegovina* [GC], 2009, § 53) and a "free-standing right" not to be discriminated against.

20. The Court confirmed that the notions of discrimination prohibited by both Article 14 of the Convention and Article 1 of Protocol No. 12 were to be interpreted in the same manner<sup>1</sup> (*Pilav*

1. For the definition of the notion of discrimination, see Part II hereafter.

*v. Bosnia and Herzegovina*, 2016, § 40; *Zornić v. Bosnia and Herzegovina*, 2014, § 27; *Sejdić and Finci v. Bosnia and Herzegovina* [GC], 2009, §§ 55-56).

21. In the Court's interpretation of this provision, Article 1 of Protocol No. 12 extends the scope of protection not only to "any right set forth by law", but even beyond that (*Savez crkava "Riječ života" and Others v. Croatia*, 2010, § 104). This would follow from paragraph 2 of the said provision, which further provides that no one may be discriminated against by a public authority. According to the [Explanatory Report to Protocol No. 12](#), the scope of protection of that Article concerns four categories of cases, in particular "where a person is discriminated against

1. in the enjoyment of any right specifically granted to an individual under national law;
2. in the enjoyment of a right which may be inferred from a clear obligation of a public authority under national law, that is, where a public authority is under an obligation under national law to behave in a particular manner;
3. by a public authority in the exercise of discretionary power (for example, granting certain subsidies);
4. by any other act or omission by a public authority (for example, the behaviour of law enforcement officers when controlling a riot)." (§ 22 of the Explanatory Report)

22. The Explanatory Report further clarifies that "it was considered unnecessary to specify which of these four elements are covered by the first paragraph of Article 1 and which by the second. The two paragraphs are complementary and their combined effect is that all four elements are covered by Article 1. It should also be borne in mind that the distinctions between the respective categories ... are not clear-cut and that domestic legal systems may have different approaches as to which case comes under which category." (§ 23).

23. Therefore, in order to determine whether Article 1 of Protocol No. 12 to the Convention is applicable, the Court needs to establish whether the complaints fall within one of the four categories mentioned in the Explanatory Report (*Savez crkava "Riječ života" and Others v. Croatia*, 2010, §§ 104-105).

24. The Explanatory Report further states that, while that Protocol principally protects individuals against discrimination by the State, "Article 1 obliges the Parties to take measures to prevent discrimination, even where discrimination occurs in relations between private persons (so-called 'indirect horizontal effects')" (§ 24). These may include, for example, "arbitrary denial of access to work, access to restaurants, or to services which private persons may make available to the public such as medical care or utilities such as water and electricity" (§ 28). However, the Court has not yet had the opportunity to apply Article 1 of Protocol No. 12 in such a context.

25. In its first case concerning Protocol No. 12, *Sejdić and Finci v. Bosnia and Herzegovina* [GC], 2009, the Court examined the ineligibility of the applicants, who identified themselves as being of Roma and Jewish origin respectively, to stand for election to the House of Peoples and the State Presidency because they had not declared affiliation to any of the "constituent peoples" (Bosniacs, Croats and Serbs) as required by a provision of the Constitution. The Court held that the constitutional provisions which rendered the applicants ineligible for election to the State Presidency had been discriminatory under Article 1 of Protocol No. 12 to the Convention.

26. To date, Protocol No. 12 (opened for signature on 4 November 2000 and entered into force on 1 April 2005) has been ratified by twenty out of the forty-seven member States of the Council of Europe.<sup>2</sup> Consequently, the Court has only examined a handful of cases in relation to this provision.

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2. See the [Chart of signatures and ratifications of Treaty 177](#).

## II. Forms of discrimination

### A. Direct and indirect discrimination

27. Article 14 does not provide a definition of what constitutes direct discrimination. The expression “direct discrimination” describes a “difference in treatment of persons in analogous, or relevantly similar situations” and “based on an identifiable characteristic, or ‘status’” (*Biao v. Denmark* [GC], 2016, § 89; *Carson and Others v. the United Kingdom* [GC], 2010, § 61; *D.H. and Others v. the Czech Republic* [GC], 2007, § 175; *Burden v. the United Kingdom* [GC], 2008, § 60) protected by Article 14 of the Convention (*Varnas v. Lithuania*, 2013, § 106; *Hoogendijk v. the Netherlands* (dec.), 2005). That provision thus requires that persons in a similar situation be treated in an equal manner (*ibid.*).

28. For example, in *Alexandru Enache v. Romania*, 2017, sentenced female offenders who had a small child were able to obtain deferral of the starting date for the service of their prison sentence until the child’s first birthday. The applicant complained that, as a man, he was excluded from such a possibility and thus directly discriminated against on the basis of his sex. In *Ēcis v. Latvia*, 2019, a blanket ban on prison leave for male prisoners in closed prisons was found to be in breach of Article 14 in conjunction with Article 8 on grounds of sex.

29. Harassment and instruction to discriminate can be seen as particular manifestations of direct discrimination. The Court has found violations of Article 14 in cases of harassment and instruction to discriminate, for instance, in conjunction with Article 11 concerning the right of peaceful assembly (*Bączkowski and Others v. Poland*, 2007). In that case the mayor of Warsaw had made public announcements of a homophobic nature, stating that he would refuse permission to hold a march to raise awareness about sexual orientation discrimination. When the decision came before the relevant administrative body, permission was refused based on other reasons, such as the need to prevent clashes between demonstrators. The Court found that the mayor’s statements could have influenced the decision of the relevant authorities and that the decision had been based on the ground of sexual orientation and thus constituted a violation of Article 14 of the Convention in conjunction with Article 11.

30. Indirect discrimination may take the form of disproportionately prejudicial effects of a general policy or measure which, though couched in neutral terms, has a particular discriminatory effect on a particular group (*Biao v. Denmark* [GC], 2016, § 103; *D.H. and Others v. the Czech Republic* [GC], 2007, § 184; *Sampanis and Others v. Greece*, 2008, § 67). Although the policy or measure at stake may not be specifically aimed or directed at a particular group, it might nevertheless discriminate against that group in an indirect way (*Hugh Jordan v. the United Kingdom*, 2001, § 154; *Hoogendijk v. the Netherlands* (dec.), 2005). Indirect discrimination does not necessarily require a discriminatory intent (*Biao v. Denmark* [GC], 2016, § 103; *D.H. and Others v. the Czech Republic* [GC], 2007, § 184). Moreover, indirect discrimination may arise both from a neutral rule (*Hoogendijk v. the Netherlands* (dec.), 2005) or from a *de facto* situation (*Zarb Adami v. Malta*, 2006, § 76).

31. In *D.H. and Others v. the Czech Republic* [GC], 2007, the issue was whether the manner in which the legislation was applied in practice resulted in a disproportionate number of Roma children being placed in special schools without justification, and whether such children were thereby placed at a significant disadvantage. The “general policy or measure” that the Court found to be discriminatory was the tests used to evaluate the children’s intellectual capacities in order to decide whether to place them in normal or in “special” schools for children with learning disabilities. The test has been designed having in mind the mainstream Czech population and the results were not analysed in the light of the particularities and special characteristics of the Roma children who sat them. This led to indirect discrimination of Roma children who were more likely to perform poorly and were subsequently placed in “special schools” in a disproportionately high number in comparison to children of Czech ethnic origin (§§ 200-201).

32. In *Biao v. Denmark* [GC], 2016, the applicants, a naturalised Danish citizen of Togolese origin living in Denmark and his Ghanaian wife, complained that their request for family reunification in Denmark had been rejected for non-compliance with statutory requirements. According to Danish law, the permit would be granted if they could demonstrate that their aggregate ties to Denmark were stronger than their attachment to any other country or if they had held Danish citizenship for at least twenty-eight years. The Court held that the relevant rule constituted a difference in treatment between Danish citizens of Danish origin and those of non-Danish origin. Referring to the [European Convention on Nationality](#) and a certain trend towards a European standard, the Court noted that there were no other countries which distinguished between nationals from birth and other nationals, including naturalised persons when it came to the determination of the conditions for granting family reunification. Such a rule thus had a disproportionately prejudicial effect on persons who acquired Danish nationality later in life and who were of ethnic origins other than Danish.

33. Another example of indirect discrimination is the case of *Zarb Adami v. Malta*, 2006. Maltese law in force at the relevant time made no distinction between sexes, both men and women being equally eligible for jury service. The discrimination at issue was based on a well-established practice, characterised by a number of factors, such as the manner in which the lists of jurors were compiled and the criteria for exemption from jury service. As a result, only a negligible percentage of women were called to serve as jurors (§ 75).

34. In *Opuz v. Turkey*, 2009, a case involving violence against women, Turkish law in force at the time of the facts did not make explicit distinction between men and women in the enjoyment of rights and freedoms or in access to justice. Thus, the discrimination in that case was not based on the legislation *per se* but rather resulted from the general attitude of the local authorities, such as the manner in which women were treated at police stations when they reported incidents of domestic violence and judicial passivity in providing effective protection to victims (§ 192).

35. In *S.A.S. v. France* [GC], 2014, the Court acknowledged that, by prohibiting everyone from wearing clothing designed to conceal the face in public places, French law had specific negative effects on the situation of Muslim women who, for religious reasons, wished to wear the full-face veil in public (§ 161).

## B. Discrimination by association

36. The Court has confirmed that Article 14 also covers discrimination by association, that is, situations where the protected ground in question relates to another person somehow connected to the applicant (*Molla Sali v. Greece* [GC], 2018; *Guberina v. Croatia*, 2016, § 78; *Škorjanec v. Croatia*, 2017, § 55; *Weller v. Hungary*, 2009, § 37).

37. In *Guberina v. Croatia*, 2016, the domestic authorities failed to take account of the needs of a child with disabilities when determining his father's eligibility for tax relief on the purchase of suitably adapted property. The Court found that the discriminatory treatment of the father on account of the disability of his child was a form of disability-based discrimination. In *Škorjanec v. Croatia*, 2017, the applicant and her partner of Roma origin were assaulted by two individuals who uttered anti-Roma insults. The Court stressed that the obligation on the authorities to seek a possible link between racist attitudes and a given act of violence, which was part of the responsibility incumbent on States under Article 3 taken in conjunction with Article 14, also concerned acts of violence based on a victim's actual or presumed association or affiliation with another person who actually or presumably possessed a particular status or protected characteristic.

38. In *Molla Sali v. Greece* [GC], 2018, the first application by the Grand Chamber of the principle of discrimination by association, the Court confirmed that Article 14 of the Convention also covers instances in which an individual is treated less favourably on the basis of another person's status or

protected characteristics (§ 134). In that case, in which Sharia law had been applied to an inheritance dispute contrary to the will of the testator, the Court focused on the difference of treatment given the Muslim faith of the testator, and not of the applicant, who was his wife.

### C. Positive action

39. According to the Court's established case-law, Article 14 does not prohibit a member State from treating groups differently in order to correct "factual inequalities" between them; indeed in certain circumstances a failure to attempt to correct such inequality through different treatment may in itself give rise to a breach of Article 14 (*Taddeucci and McCall v. Italy*, 2016, § 81; *Kurić and Others v. Slovenia* [GC], 2012, § 388; *Sejdić and Finci v. Bosnia and Herzegovina* [GC], 2009, § 44; *Muñoz Díaz v. Spain*, 2009, § 48; *D.H. and Others v. the Czech Republic* [GC], 2007, § 175; *Stec and Others v. the United Kingdom* [GC], 2006, § 51; *Thlimmenos v. Greece* [GC], 2000, § 44; the *Belgian linguistic case*, 1968, § 10 of "the Law" part).

40. For example, the Convention organs have found that measures resulting in a difference in treatment between men and women were justified in order to compensate women for existing inequalities. In *Andrle v. the Czech Republic*, 2011, the applicant complained that, unlike for women, there was no lowering of pensionable age for men who had raised children. The Court found that this measure was objectively and reasonably justified so as to compensate women for the inequalities (such as generally lower salaries and pensions) and the hardship generated by the expectation that they would work on a full-time basis and take care of children and the household. It further held that the timing and the extent of the measures taken to rectify the inequality in question had not been manifestly unreasonable and that, consequently, there had been no violation of Article 14 of the Convention in conjunction with Article 1 of Protocol No. 1. In the Commission decision in *Lindsay v. the United Kingdom*, 1986, tax provisions resulting in extra taxation advantages accruing when a wife was the breadwinner of a family were held to fall within the margin of appreciation accorded to the national authorities as such difference in treatment had an objective and reasonable justification in the aim of providing positive discrimination in favour of married women who work.

41. Article 14 may be triggered where States, without an objective and reasonable justification, fail to treat differently persons whose situations are significantly different (*Abdu v. Bulgaria*, 2014; *Eweida and Others v. the United Kingdom*, 2013, § 87; *Pretty v. the United Kingdom*, 2002, § 88; *Thlimmenos v. Greece* [GC], 2000, § 44). Thus, alongside the negative obligation incumbent on member States not to discriminate, the Court has also found that, in certain circumstances, Article 14 may imply "positive obligations" on States to prevent, stop or punish discrimination (*Pla and Puncernau v. Andorra*, 2004, § 59). Such positive obligations incumbent on the member States can include so-called "positive measures" (*Horváth and Kiss v. Hungary*, 2013, § 104), or "reverse discrimination", "positive action" or "affirmative action" that a State could or should adopt to correct "factual inequalities".

42. For example, in *Thlimmenos v. Greece* [GC], 2000, national law barred those with a criminal conviction from joining the profession of chartered accountants. The applicant had thus been denied appointment as a chartered accountant because he had been criminally convicted for refusing to wear military uniform during his national service, as a result of his religious beliefs. The Court found that the State had violated the applicant's right under Article 14 read in conjunction with Article 9, as it should have distinguished between persons convicted of offences committed exclusively because of their religious beliefs and persons convicted of other offences. In *Abdu v. Bulgaria*, 2014, the Court reiterated that, when investigating violent incidents triggered by suspected racist attitudes, 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 (§ 29). In *Horváth and Kiss v. Hungary*, 2013, a case concerning the systemic placement of Roma children in special schools in Hungary, the Court concluded that, in the context of the right to education of members of groups which suffered past discrimination in education with continuing effects, structural deficiencies called for the implementation of positive measures in order, *inter alia*, to assist the applicants with any difficulties they encountered in following the school curriculum. Therefore, some additional steps were needed in order to address these problems, such as active and structured involvement on the part of the relevant social services (§ 104). In *Çam v. Turkey*, 2016, a music academy refused to enrol a student on the grounds of her visual impairment. The Court found a violation of Article 14 taken in conjunction with Article 2 of Protocol No. 1, noting that discrimination based on disability also covered the refusal to provide reasonable accommodation (for example, adaptation of teaching methods in order to make them accessible to blind students).

## D. Other forms of discrimination

43. The Court has also examined situations of discrimination that took place on the basis of several grounds operating separately or interacting with each other at the same time.

44. Both Article 14 of the Convention and Article 1 of Protocol No. 12 prohibit discrimination on a large number of grounds, making a claim on more than one ground theoretically possible. Furthermore, the non-exhaustive list of grounds of discrimination contained in Article 14 allows the Court to extend and include grounds not expressly mentioned therein.

45. For instance, in *N.B. v. Slovakia*, 2012, a case concerning forced sterilisation of a Roma woman at a public hospital, the applicant expressly complained that she was discriminated against on more than one ground (race/ethnic origin and sex). The Court stated that the practice of sterilisation of women without their prior informed consent affected vulnerable individuals from various ethnic groups (§ 96). The Court found violations of Articles 3 and 8 of the Convention but did not find it necessary to examine separately the complaint under Article 14.

46. In *B.S. v. Spain*, 2012, a female sex worker of Nigerian origin and legally resident in Spain alleged that the Spanish police abused her physically and verbally on the basis of her race, gender and profession. The Court considered that the decisions made by the domestic courts failed to take account of the applicant's particular vulnerability inherent in her position as an African woman working as a prostitute (§ 62) and found a violation of Article 14 in conjunction with Article 3.

47. Another example is the case of *S.A.S. v. France* [GC], 2014, concerning a ban on the full covering of the face in public places. Here, the Court acknowledged that the ban had specific negative effects on the situation of Muslim women who, for religious reasons, wished to wear the full-face veil in public, but considered this measure to have an objective and reasonable justification (§ 161). Consequently, it found no violation of Article 14 in conjunction with Article 9.

48. The case of *Carvalho Pinto de Sousa Morais v. Portugal* (2017) concerned a decision to reduce the amount of non-pecuniary damage initially awarded to a female victim of medical negligence, which resulted in her inability to have sexual relations. In order to justify this reduction, the Supreme Administrative Court had relied on the fact that the applicant was already 50 years old and had two children at the time of the surgery. It considered that at this age sexuality was not as important as in younger years and that its significance diminished with age. It also stated that the applicant probably only needed to take care of her husband, considering the age of her children. The Strasbourg Court further found significant that, in two previous sets of medical malpractice proceedings brought by two male patients (respectively 55 and 59 years old), the domestic court considered that the fact that the men could no longer have normal sexual relations had affected their self-esteem and resulted in a "tremendous shock" and "strong mental shock" without considering the age of the

applicants as being relevant. As the Court noted, the question in issue here was not considerations of age or sex as such, but rather the assumption that sexuality was not as important for a fifty-year-old woman and mother of two children as for someone of a younger age. That assumption reflected a traditional idea of female sexuality as being essentially linked to child-bearing purposes and thus ignored its physical and psychological relevance for the self-fulfillment of women as people. Apart from being, in a way, judgmental, it omitted to take into consideration other dimensions of women's sexuality in the specific case of the applicant. In other words, the Supreme Administrative Court made a general assumption without attempting to look at its validity in the specific case of the applicant herself (§ 52). Finding a breach of Article 14 in conjunction with Article 8, the Court concluded that 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.

### III. Discrimination test

49. Not all differences in treatment – or failure to treat differently persons in relevantly different situations – constitute discrimination, but only those devoid of “an objective and reasonable justification” (*Molla Sali v. Greece* [GC], 2018, § 135; *Fabris v. France* [GC], 2013, § 56; *D.H. and Others v. the Czech Republic* [GC], 2007, § 175; *Hoogendijk v. the Netherlands* (dec.), 2005).

50. When deciding cases of discrimination, the Court will apply the following test:

1. Has there been a difference in treatment of persons in analogous or relevantly similar situations – or a failure to treat differently persons in relevantly different situations?
2. If so, is such difference – or absence of difference – objectively justified? In particular,
  - a. Does it pursue a legitimate aim?
  - b. Are the means employed reasonably proportionate to the aim pursued?

#### A. Difference in treatment

51. First of all, when bringing a complaint under Article 14, the applicant has to show that he or she has been treated differently from another person or group of persons placed in a relevantly similar situation, or equally to a group of persons placed in a relevantly different situation. The other person or group of persons to which the applicant is compared to is called the “comparator”.

52. In *Carson and Others v. the United Kingdom* [GC], 2010, the differential treatment consisted in the fact that, under British law governing the entitlement to index-linking of State pensions, pensions were only index-linked if the recipient was ordinarily resident in the United Kingdom or in a country having a reciprocal agreement with the United Kingdom on the uprating of pensions. Pensioners residing elsewhere continued to receive the basic State pension, which was, however, frozen at the rate payable on the date they left the United Kingdom. In *Varnas v. Lithuania*, 2013, a prisoner held in pre-trial detention had been denied conjugal visits from his wife, while convicted prisoners were allowed such visits. In *Cusan and Fazzo v. Italy*, 2014, the differential treatment consisted in the fact that Italian law allowed married couples to give their legitimate child only the husband’s surname but not the wife’s. In *Fabris v. France* [GC], 2013, for succession purposes, children born out of wedlock could claim a share in their deceased parent’s estate equal to only half the share of a legitimate child.

53. The parties to a case may sometimes disagree as to whether there has been a difference in treatment. For example, in *E.B. v. France* [GC], 2008, the Government argued that the reason for not allowing a homosexual woman to adopt had not been her sexual orientation but the fact that her child would lack a father figure. However, the Court found that the domestic law in principle allowed single women to adopt a child and that the domestic authorities had based their refusal on the applicant’s “lifestyle” (§ 88). In *Karlheinz Schmidt v. Germany*, 1994, the applicant complained that the region where he lived had treated men and women differently as only the former had to serve as firemen in the fire brigade and, in case of refusal, they had to pay a levy. However, the Court found that what was decisive in that case was that the obligation to perform such service had been only theoretical, as in practice nobody was actually obliged to serve in a fire brigade. Thus, it was the imposition of a financial burden only to men which constituted the real difference in treatment, and not the obligation to serve as firemen (§ 28). In *Hoffmann v. Austria*, 1993, the Court accepted that the decision of the Austrian courts to award custody of the child to her husband had been taken largely on the basis of the applicant’s religious beliefs.

54. In order for an issue to arise under Article 14, there must be a difference in treatment of “persons in an analogous or relevantly similar situation” (*Molla Sali v. Greece* [GC], 2018, § 133;

*Fábián v. Hungary* [GC], 2017, § 113; *Khamtokhu and Aksenchik v. Russia* [GC], 2017, § 64; *X and Others v. Austria* [GC], 2013, § 98; *Konstantin Markin v. Russia* [GC], 2012, § 125; *Marckx v. Belgium*, 1979, § 32; *Burden v. the United Kingdom* [GC], 2008, § 60; *D.H. and Others v. the Czech Republic* [GC], 2007, § 175; *Zarb Adami v. Malta*, 2006, § 71; *Kafkaris v. Cyprus* [GC], 2008, § 160). In other words, 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 (*Fábián v. Hungary* [GC], 2017, § 113; *Clift v. the United Kingdom*, 2010, § 66). Elements which characterise different situations, and determine their comparability, must be assessed in light of the subject-matter and purpose of the measure which makes the distinction in question (*Fábián v. Hungary* [GC], 2017, § 121). In other words, the analysis of the question of whether or not two persons or groups are in a comparable situation for the purposes of an analysis of differential treatment and discrimination is both specific and contextual.

55. The Court has, for instance, found that remand prisoners were in a comparable position to convicted prisoners as regards conjugal visits (*Varnas v. Lithuania*, 2013) and long-term visits (*Chaldayev v. Russia*, 2019), and that men and women were in a comparable situation as regards parental leave (*Konstantin Markin v. Russia* [GC], 2012), prison sentencing policy (*Khamtokhu and Aksenchik v. Russia* [GC], 2017) and deferral of prison sentences (*Alexandru Enache v. Romania*, 2017).

56. At the same time, the Court has held that

- pensioners living within a country were not in a comparable situation to those living abroad as regards index-linking of pensions (*Carson and Others v. the United Kingdom* [GC], 2010);
- cohabiting sisters were not in a comparable situation to spouses or civil partners as regards inheritance tax (*Burden v. the United Kingdom* [GC], 2008);
- pensioners employed within the civil service were not in a comparable situation to those employed within the private sector as regards their pension entitlement (*Fábián v. Hungary* [GC], 2017) or to those belonging to a different categories of pensioners within the public sector (*Gellértheygi and Others v. Hungary* (dec.), 2018); and
- taxpayers who had not challenged a social contribution before it was declared unconstitutional were not in a comparable situation to those who had taken this bold initiative as regard the retroactive reimbursement of said social contribution (*Frantzeskakis and Others v. Greece* (dec.), 2019).

57. The difference in treatment – or failure to treat differently – can take any of the forms described above such as direct or indirect discrimination, and discrimination by association, for example. It is important to note that, in cases of discrimination by association, the comparator is compared to a person other than the applicant (*Guberina v. Croatia*, 2016, § 78; *Škorjanec v. Croatia*, 2017, § 55; *Weller v. Hungary*, 2009, § 37).

58. For example, in *Molla Sali v. Greece* [GC], 2018, the Court dealt with the situation of a *married Muslim woman* who was the beneficiary of her Muslim husband's will. However, the Court did not compare the applicant's situation to that of a *married non-Muslim female* beneficiary of a non-Muslim husband's will. Instead, it examined the difference in 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* (§ 134).

59. Finally, the source of the difference in treatment can be the domestic legal regime (*Ēcis v. Latvia*, 2019), as well as the vocabulary used by a national court to motivate its decision (*Carvalho Pinto de*

*Sousa Morais v. Portugal*, 2017) or even a purely private action (*Identoba and Others v. Georgia*, 2015).

## B. Lack of objective and reasonable justification

60. The competent national authorities are frequently confronted with different situations which therefore call for different legal solutions. Moreover, certain legal inequalities are solely aimed at correcting factual inequalities (the *Belgian linguistic case*, 1968, § 10 of “the Law” part).

61. Thus, Article 14 does not prohibit differences in treatment which are founded on an objective assessment of essentially different factual circumstances and which, being based on the public interest, strike a fair balance between the protection of the interests of the community and respect for the rights and freedoms safeguarded by the Convention (*G.M.B. and K.M. v. Switzerland* (dec.), 2001; *Zarb Adami v. Malta*, 2006, § 73).

62. In the Court’s words, a difference in treatment will be 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 (*Molla Sali v. Greece* [GC], 2018, § 135; *Fábián v. Hungary* [GC], 2017, § 113; *Abdulaziz, Cabales and Balkandali v. the United Kingdom*, 1985, § 72; the *Belgian linguistic case*, 1968, § 10 of “the Law” part). Therefore, the Court will proceed to a so-called “proportionality test” divided in two steps. Firstly, it will examine the existence of a legitimate aim (Section 1 below) and, secondly, it will check the proportionality *stricto sensu* of the difference in treatment (Section 2 below).

### 1. Legitimate aim

63. In order to justify a difference in treatment, in the first place States have to base the measure at issue on a “legitimate aim” (*Molla Sali v. Greece* [GC], 2018, § 135; *Fabris v. France* [GC], 2013, § 56). Moreover, they have to show that there is a “link” between the legitimate aim pursued and the differential treatment alleged by the applicant. For example, the Court found that there was no link between the aim of preserving family unity and the bearing of a joint family name based on the husband’s name, resulting in a lack of justification of the obligation on married women to bear their husband’s surname (*Ünal Tekeli v. Turkey*, 2004, § 66).

64. The Court has identified a number of aims that can be considered acceptable for the application of Article 14, such as

- achieving the effective implementation of policy developing linguistic unity (the *Belgian linguistic case*, 1968);
- legal certainty of completed inheritance arrangements (*Fabris v. France* [GC], 2013);
- restoration of peace (*Sejdić and Finci v. Bosnia and Herzegovina* [GC], 2009, § 45);
- protection of national security (*Konstantin Markin v. Russia* [GC], 2012, § 137);
- providing a public service wholly committed to the promotion of equal opportunities and requiring all its employees to act in a way which does not discriminate against others (*Eweida and Others v. the United Kingdom*, 2013, § 105);
- maintenance of economic stability and restructuration of the debt in the context of a serious political, economic and social crisis (*Mamas and Others v. Greece*, 2016, § 103);
- facilitation of rehabilitation of juvenile delinquents (*Khamtokhu and Aksenchik v. Russia* [GC], 2017, § 80); or
- protection of women against gender-based violence, abuse and sexual harassment in the prison environment (*Khamtokhu and Aksenchik v. Russia* [GC], 2017, § 82).

65. Some aims relied on by Governments have not been considered legitimate by the Court. For instance, no legitimate aim was found in respect of a measure reserving the right to exemption from church tax only to persons formally registered as residents in the respondent State on the ground that the case for reduction could not be argued with the same force in regard of persons who were not resident as it could in regard to those who were, and that the procedure would be more complicated if the reduction was to apply to non-residents (*Darby v. Sweden*, 1990, § 33). Equally, references to traditions, general assumptions or prevailing social attitudes in a particular country were considered to be insufficient justification for a difference in treatment on grounds of sex (*Ünal Tekeli v. Turkey*, 2004, § 63; *Konstantin Markin v. Russia* [GC], 2012, § 127).

66. A special situation arises with the aim of supporting and encouraging traditional family. Indeed, if the Court in its earlier case-law considered this aim in itself legitimate or even praiseworthy (*Marckx v. Belgium*, 1979, § 40) and, in principle, a weighty and legitimate reason which might justify a difference in treatment (*Karner v. Austria*, 2003, § 40), this approach somewhat changed in more recent cases interpreting the Convention in present-day conditions. As a result, the Court considered the aim of protecting the family in the traditional sense as “rather abstract” (*X and Others v. Austria* [GC], 2013, § 139) and legitimate only in some circumstances (*Taddeucci and McCall v. Italy*, 2016, § 93). In *Bayev and Others v. Russia*, 2017, for example, the Court considered that there was no reason to consider the maintenance of family values as the foundation of society to be incompatible with the acknowledgement of the social acceptance of homosexuality, especially in view of the growing general tendency to include relationships between same-sex couples within the concept of “family life” (§ 67).

67. Finally, the aims indicated by the Governments to justify differential treatment may be considered legitimate only if certain safeguards are put in place, and it is the Court’s task to examine whether such safeguards exist at each stage of the implementation of the measures and whether they are effective. For example, the temporary placement of children in a separate class on the ground that they lacked adequate command of the language of instruction in school is not, as such, automatically contrary to Article 14 of the Convention. Indeed, in certain circumstances such placement may pursue the legitimate aim of adapting the education system to the specific needs of the children. However, when such a measure disproportionately or even exclusively affects members of a specific ethnic group, then appropriate safeguards have to be put in place (*Oršuš and Others v. Croatia* [GC], 2010, § 157).

## 2. Proportionality

68. After establishing a legitimate aim, the Court requires that the difference in treatment strike a fair balance between the protection of the interests of the community and respect for the rights and freedoms of the individual (the *Belgian linguistic case*, 1968, § 10 of “the Law” part). Thus, the Court requires a reasonable relationship of proportionality between the means employed and the aim sought to be realised (*Molla Sali v. Greece* [GC], 2018, § 135; *Fabris v. France* [GC], 2013, § 56; *Mazurek v. France*, 2000, §§ 46 and 48; *Larkos v. Cyprus* [GC], 1999, § 29).

69. As the Court’s role is not to substitute the competent national authorities in assessing whether and to what extent differences in otherwise similar situations justified differential treatment, States enjoy a certain margin of appreciation. The scope of that margin will vary according to the circumstances, the subject-matter and the background of the case (*Molla Sali v. Greece* [GC], 2018, § 136; *Stummer v. Austria* [GC], 2011, § 88; *Burden v. the United Kingdom* [GC], 2008, § 60; *Carson and Others v. the United Kingdom* [GC], 2010, § 61).

70. On the one hand, the Court has indicated some areas where the State’s margin of appreciation remains rather wide. For example, the Court has held that, because of their direct knowledge of their society and its needs, 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 (*Belli and Arquier-Martinez v. Switzerland*, 2018, § 94; *Mamatas and Others v. Greece*, 2016, §§ 88-89; *Stummer v. Austria* [GC], 2011, § 89; *Andrejeva v. Latvia* [GC], 2009, § 83; *Burden v. the United Kingdom* [GC], 2008, § 60; *Stec and Others v. the United Kingdom* [GC], 2006, § 52; *Carson and Others v. the United Kingdom* [GC], 2010, § 61). The same is true for matters related to general measures of social strategy (the *Belgian linguistic case*, 1968, § 10 of "the Law" part) and property (*Chabauty v. France* [GC], 2012, § 50).

71. On the other hand, the Court has also identified certain grounds of discrimination where such margin is reduced. Indeed the Court has held time and again that no difference in treatment based exclusively or to a decisive extent on a person's ethnic origin was capable of being objectively justified in a modern democratic society built on the principles of pluralism and respect for different cultures (*D.H. and Others v. the Czech Republic* [GC], 2007, § 176; *Sejdić and Finci v. Bosnia and Herzegovina* [GC], 2009, §§ 43-44). Similarly, differences in treatment on the basis of gender or sexual orientation may only be justified by very weighty reasons (*Abdulaziz, Cabales and Balkandali v. the United Kingdom*, 1985, § 78; *Konstantin Markin v. Russia* [GC], 2012, § 127; *Schalk and Kopf v. Austria*, 2010, § 97).

72. As with the other provisions of the Convention, one of the criteria used by the Court to define the State's margin of appreciation in discrimination cases is the existence and the extent of a consensus among Contracting States on the issue at stake. Since the Convention is first and foremost a system for the protection of human rights, the Court must have regard to the changing conditions in Contracting States and respond to any emerging consensus as to the standards to be achieved (*Weller v. Hungary*, 2009, § 28; *Stec and Others v. the United Kingdom* [GC], 2006, §§ 63-64; *Ünal Tekeli v. Turkey*, 2004, § 54; *Stafford v. the United Kingdom* [GC], 2002, § 68; *Konstantin Markin v. Russia* [GC], 2012, § 126).

## IV. Burden of proof

### A. The principle: *affirmanti incumbit probatio*

73. When examining the cases before it in terms of evidence, the Court usually applies the principle *affirmanti incumbit probatio*, that is to say, that the applicant has to prove his or her allegation.

74. The Court applies the standard of proof “beyond reasonable doubt” as a normal standard for all rights set forth by the Convention. In the proceedings before the Court; there are no procedural barriers to the admissibility of evidence or pre-determined formulae for its assessment. The Court adopts the conclusions that are, in its view, supported by the free evaluation of all evidence, including such inferences as may flow from the facts and the parties’ submissions. According to its established case-law, proof may follow from the coexistence of sufficiently strong, clear and concordant inferences or of similar un rebutted presumptions of fact. 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. The Court is also attentive to the seriousness that attaches to a ruling that a Contracting State has violated fundamental rights (*Nachova and Others v. Bulgaria* [GC], 2005, § 147; *Timishev v. Russia*, 2005, § 39; *D.H. and Others v. the Czech Republic* [GC], 2007, § 178).

75. In *Timishev v. Russia*, 2005, the applicant alleged that he was prevented from passing a checkpoint into a particular region because of his Chechen ethnic origin. The Court found this to be corroborated by official documents, which noted the existence of a policy to restrict the movement of ethnic Chechens. The State’s explanation was found unconvincing because of inconsistencies in its assertion that the victim left voluntarily after being refused priority in the queue. Accordingly, the Court accepted that the applicant had been discriminated against on the basis of his ethnicity.

76. 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 (*Timishev v. Russia*, 2005, § 57).

### B. The exception: reversal of the burden of proof

77. The Court has also recognised that Convention proceedings do not lend themselves in all cases to a rigorous application of the principle *affirmanti incumbit probatio*. For instance, where the events in issue lie wholly, or in large part, within the exclusive knowledge of the authorities, the burden of proof may be regarded as resting on the authorities to provide a satisfactory and convincing explanation (*Salman v. Turkey* [GC], 2000, § 100; *Anguelova v. Bulgaria*, § 111; *Makuchyan and Minasyan v. Azerbaijan and Hungary*<sup>\*</sup>, 2020). The Court has also shifted the burden of proof in other cases where it would be extremely difficult in practice for the applicant to prove discrimination (*Cînta v. Romania*, 2020).

78. In discrimination cases the Court has not excluded that in certain cases of alleged discrimination the respondent Government may be required to disprove an arguable allegation of discrimination and – if they fail to do so – the Court may find a violation of Article 14 of the Convention on that basis. However, where it is alleged 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 (*Nachova and Others v. Bulgaria* [GC], 2005, § 157; *Bekos and Koutropoulos v. Greece*, 2005, § 65). As a result, the alleged failure of the authorities to carry out an effective investigation into the supposedly racist motive for a violent act should not, in itself, shift the burden of proof to the Government with regard to the alleged

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<sup>\*</sup> Not yet final.

violation of Article 14 of the Convention taken in conjunction with the substantive aspect of Article 2 or Article 3 (ibid.).

79. The case of *Nachova and Others v. Bulgaria* [GC] (2005) concerned the shooting of two Roma fugitives by military police during an attempted arrest. Ultimately, the Court concluded that it had not been established that racist attitudes played a role in the fugitives' deaths (see also *Adam v. Slovakia*, 2016). However, on the violation of Article 14 taken together with the procedural aspect of Article 2, the Court concluded that the authorities failed in their duty to take all possible steps to investigate whether or not discrimination may have played a role in the events.

80. In *Makuchyan and Minasyan v. Azerbaijan and Hungary*<sup>\*</sup>, 2020, in view of the special features of the case – the murderer's promotion, the award of several benefits without any legal basis, his glorification as a hero by a number of high-ranking Azerbaijani officials, as well as the creation of a special page on the website of the President – in the Court's view, the applicants had put forward sufficiently strong, clear and concordant inferences as to make a convincing *prima facie* case that the impugned measures had been motivated by the ethnic origin of the victims. Given the difficulty for the applicants to prove such bias beyond a reasonable doubt, the Court, in the particular circumstances of the case, reversed the burden of proof so that it became incumbent on Azerbaijan to disprove the arguable allegation of discrimination, which it had failed to do.

81. In order to rebut the presumption of discrimination, the State may either prove that the applicant is not actually in a similar or comparable situation to their "comparator", that the differential treatment is not based on the protected ground, but on other objective differences, or that the difference in treatment was justified (*Khamtokhu and Aksenchik v. Russia* [GC], 2017, § 65; *Chassagnou and Others v. France* [GC], 1999, §§ 91-92; *Timishev v. Russia*, 2005, § 57; *Biao v. Denmark* [GC], 2016, § 114; *D.H. and Others v. the Czech Republic* [GC], 2007, § 177).

82. In cases of alleged indirect discrimination the applicants may have difficulty in proving discriminatory treatment. In such cases statistical data can play an important role in helping the applicant to give rise to a presumption of discrimination. Where an applicant is able to show, on the basis of undisputed official statistics, the existence of a *prima facie* indication that a specific rule – although formulated in a neutral manner – in fact affects a clearly higher percentage of a group in comparison to another group, it is for the respondent Government to show that this is the result of objective factors unrelated to any discrimination (*Hoogendijk v. the Netherlands* (dec.), 2005; *D.H. and Others v. the Czech Republic*, 2007, § 180; *Di Trizio v. Switzerland*, 2016, § 86). For example, in *Talpis v. Italy*, 2017, the Court considered that the applicant had demonstrated the existence of a *prima facie* discrimination through the conclusions of several bodies that showed the extent of the discrimination of women as regards domestic violence (§ 145).

83. Statistics which appear on critical examination to be reliable and significant will be sufficient to constitute the *prima facie* evidence the applicant is required to produce. This does not, however, mean that indirect discrimination cannot be proved without statistical evidence (*D.H. and Others v. the Czech Republic* [GC], 2007, § 188).

84. In *Opuz v. Turkey*, 2009, for example, there were no statistics presented to the Court showing that victims of domestic violence were predominantly women, and indeed it was noted that Amnesty International stated that there were no reliable data to this effect. Rather, the Court was prepared to accept the assessment of Amnesty International, a reputable international NGO and the UN Committee on the Elimination of Discrimination Against Women that violence against women was a significant problem in Turkey.

85. In other cases the practices or beliefs of others belonging to the same protected category may constitute sufficient proof. In *Oršuš and Others v. Croatia* [GC], 2010, concerning the placement of

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<sup>\*</sup> Not yet final.

Roma children in Roma-only classes owing to their allegedly poor command of the Croatian language, the Court found that, unlike the case of *D.H. and Others v. the Czech Republic* [GC], 2007, the statistics alone did not give rise to a presumption of discrimination. However, the fact that the measure of placing children in separate classes on the basis of their insufficient language skills had only applied to Roma students gave rise to a presumption of differential treatment.

## V. Discrimination by ground

86. Article 14 does not prohibit all differences in treatment but only those based on an identifiable, objective or personal characteristic, or “status”, by which persons or groups of persons are distinguishable from one another (*Molla Sali v. Greece* [GC], 2018, § 134; *Fábián v. Hungary* [GC], 2017, § 113; *Kiyutin v. Russia*, 2011, § 56).

87. Article 14 of the Convention provides an open-ended list of grounds protected against discrimination as is shown by the words “any ground such as” (in French “*notamment*”) and the inclusion in the list of the phrase “any other status” (in French “*toute autre situation*”) (*Clift v. the United Kingdom*, 2010, § 55; *Engel and Others v. the Netherlands*, 1976, § 72; *Carson and Others v. the United Kingdom* [GC], 2010, § 70). Moreover, the Court has developed a rich body of case-law which has expanded the number of protected grounds by interpreting the expression “other status” in an extensive way and in light of present-day conditions.

88. In this respect the Court has stressed that the prohibition of discrimination enshrined in Article 14 was meaningful only if, in each particular case, the applicant’s personal situation in relation to the criteria listed in that provision was taken into account exactly as it stood. 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 certain nationality – would render Article 14 devoid of substance (*Andrejeva v. Latvia* [GC], 2009, § 91).

### A. Sex

89. When it comes to discrimination on grounds of sex, the Court has repeatedly stated that the advancement of gender equality is today a major goal in the member States of the Council of Europe (*Konstantin Markin v. Russia* [GC], 2012, § 127) and that, in principle, “very weighty reasons” had to be put forward before such a difference in treatment could be regarded compatible with the Convention (*Abdulaziz, Cabales and Balkandali v. the United Kingdom*, 1985, § 78; *Burghartz v. Switzerland*, 1994, § 27; *Schuler-Zgraggen v. Switzerland*, 1993, § 67; *Konstantin Markin v. Russia* [GC], 2012, § 127; *J.D. and A. v. the United Kingdom*, 2019, § 89).

90. The Court has held that references to traditions, general assumptions or prevailing social attitudes in a particular country were insufficient justification for a difference in treatment on grounds of sex (*Konstantin Markin v. Russia* [GC], 2012, § 127). For example, States were prevented from imposing traditions that derive from the man’s primordial role and the woman’s secondary role in the family (*Ünal Tekeli v. Turkey*, 2004, § 63; *Konstantin Markin v. Russia* [GC], 2012, § 127). The reference to the traditional distribution of gender roles in society could not justify, for example, the exclusion of men from the entitlement to parental leave. Gender stereotypes, such as the perception of women as primary child-carers and men as primary breadwinners, cannot, by themselves, be considered to amount to sufficient justification for a difference in treatment, any more than similar stereotypes based on race, ethnic origin, colour or sexual orientation (*Konstantin Markin v. Russia* [GC], 2012, § 143).

91. The Court has found that differential treatment on the grounds of sex violated Article 14 in different areas, such as

- equality in marriage (*Ünal Tekeli v. Turkey*, 2004; *Burghartz v. Switzerland*, 1994);
- access to employment (*Emel Boyraz v. Turkey*, 2014);
- parental leave and allowances (*Konstantin Markin v. Russia* [GC], 2012);
- survivor’s pensions (*Willis v. the United Kingdom*, 2002);
- civic obligations (*Zarb Adami v. Malta*, 2006; *Karlheinz Schmidt v. Germany*, 1994);

- family reunification (*Abdulaziz, Cabales and Balkandali v. the United Kingdom*, 1985);
- children’s surnames (*Cusan and Fazzo v. Italy*, 2014); or
- domestic violence (*Opuz v. Turkey*, 2009; *Volodina v. Russia*, 2019).

92. In *Carvalho Pinto de Sousa Morais v. Portugal*, 2017, the Court held that the question at issue was the assumption, made by the domestic courts in medical negligence proceedings, that sexuality was not as important for a fifty-year-old woman and mother of two children as for someone younger. That assumption reflected a traditional idea of female sexuality being essentially linked to child-bearing purposes and thus ignored its physical and psychological relevance for the self-fulfilment of women.

93. Generally speaking, in the context of Article 14 in conjunction with Article 1 of Protocol No. 1, the Court applied the “manifestly without reasonable foundation” test only to circumstances where an alleged difference in treatment resulted from a transitional measure designed to correct a historic inequality (*Stec and Others v. the United Kingdom* [GC], 2006, §§ 61-66; *Runkee and White v. the United Kingdom*, 2007, §§ 40-41; *British Gurkha Welfare Society and Others v. the United Kingdom*, 2016, § 81). The Court has, for instance, recognised that a difference in treatment between men and women in the State pension scheme was acceptable as it was a form of positive measures aimed at correcting factual inequalities between the two genders (*Stec and Others v. the United Kingdom* [GC], 2006, § 61; *Andrle v. the Czech Republic*, 2011, § 60). Along the same lines, in *Khamtokhu and Aksenchik v. Russia* [GC], 2017, concerning the exemption of female offenders from life imprisonment, the Court took note of protecting women against gender-based violence, abuse and sexual harassment in the prison environment, as well as the needs for protection of pregnancy and motherhood (§ 82). The Court also found in *Alexandru Enache v. Romania*, 2017, that the national legislation permitting deferral of a prison sentence for mothers, but not fathers, of young children was justified in order to take account of the particular bond between a mother and her child during the first year of the child’s life (§ 76).

94. Outside the property context concerning transitional measures, and where the alleged discrimination was based on sex, “very weighty reasons” would be required to justify the impugned measure in respect of the applicants. In *J.D. and A. v. the United Kingdom*, 2019, where the applicant had been housed under a “sanctuary scheme” intended to protect victims of serious domestic violence, the Court found that the reduction of her housing benefit had been in conflict with the aim of that scheme (to enable her to remain in her home for her own safety) and that no weighty reasons had been given to justify the prioritisation of one legitimate aim over the other.

95. The Court has also dealt with a number of cases concerning domestic violence under Articles 2 and/or 3 taken in conjunction with Article 14. The Court explicitly considered domestic violence to be a form of gender-based violence, which was in turn a form of discrimination against women (*Opuz v. Turkey*, 2009, §§ 184-191; *Halime Kiliç v. Turkey*, 2016, § 113; *M.G. v. Turkey*, 2016, § 115). In this regard the State’s failure to protect women against domestic violence may breach their right to equal protection of the law and this failure does not need to be intentional (*Talpis v. Italy*, 2017, § 141; *Opuz v. Turkey*, 2009, § 191; *Eremia v. the Republic of Moldova*, 2013, § 85; *T.M. and C.M. v. the Republic of Moldova*, 2014, § 57).

96. In *Eremia v. the Republic of Moldova*, 2013, a case which concerned the failure of domestic authorities to take adequate measures to protect the applicant and her daughters from domestic violence, the Court found that the authorities’ (in)action was not a simple failure or delay in dealing with violence against the first applicant committed by her husband, but amounted to repeatedly condoning such violence and reflected a discriminatory attitude towards the first applicant as a woman (§ 89; see also *Mudric v. the Republic of Moldova*, 2013, § 63).

97. In *Volodina v. Russia*, 2019, the Court found that the Russian legal framework – which did not define domestic violence, whether as a separate offence or an aggravating element of other

offences, and established a minimum threshold of gravity of injuries required for launching public prosecution – fell short of the requirements inherent in the State’s positive obligation to establish and apply effectively a system punishing all forms of domestic violence and providing sufficient safeguards for victims. Such an absence of legislation defining domestic violence and dealing with it at a systemic level indicated the authorities’ reluctance to acknowledge the seriousness and extent of the problem of domestic violence in Russia and its discriminatory effect on women. By tolerating for many years a climate which was conducive to domestic violence, the Russian authorities had 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.

## B. Race and colour

98. Ethnicity and race are related and overlapping concepts (*Sejdić and Finci v. Bosnia and Herzegovina* [GC], 2009, § 43; *Timishev v. Russia*, 2005, § 56). Whereas the notion of race is rooted in the idea of biological classification of human beings into subspecies on the basis of morphological features such as skin colour or facial characteristics, ethnicity has its origin in the idea of societal groups marked in particular by common nationality, tribal affiliation, religion, shared language, or cultural and traditional origins and backgrounds (*Sejdić and Finci v. Bosnia and Herzegovina* [GC], 2009, § 43; *Timishev v. Russia*, 2005, § 55).

99. Discrimination on account of a person’s actual or perceived ethnic origin is a form of racial discrimination (*Sejdić and Finci v. Bosnia and Herzegovina* [GC], 2009, § 43; *Timishev v. Russia*, 2005, § 55). Racial discrimination, as racial violence, is particularly egregious and, in view of its perilous consequences, requires special vigilance and a vigorous reaction from the authorities. It is for this reason that the authorities must use all available means to combat racism, thereby reinforcing democracy’s vision of a society in which diversity is not perceived as a threat but as a source of enrichment (*Sejdić and Finci v. Bosnia and Herzegovina* [GC], 2009, § 43; *Nachova and Others* [GC], 2005, § 145; *Timishev v. Russia*, 2005, § 56; *Soare and Others v. Romania*, 2011, § 201; *Stoica v. Romania*, 2008, § 117).

100. In this context, where a difference in treatment is based on race or ethnicity, the notion of objective and reasonable justification must be interpreted as strictly as possible (*D.H. and Others v. the Czech Republic* [GC], 2007, § 196; *Sejdić and Finci v. Bosnia and Herzegovina* [GC], 2009, § 44). No difference in treatment which is based exclusively or to a decisive extent on a person’s ethnic origin is capable of being objectively justified in a contemporary democratic society built on the principles of pluralism and respect for different cultures (*D.H. and Others v. the Czech Republic* [GC], 2007, § 176; *Sejdić and Finci v. Bosnia and Herzegovina* [GC], 2009, § 44; *Timishev v. Russia*, 2005, § 58).

101. The Court has dealt with a number of cases of racist violence committed by the police (*Nachova and Others v. Bulgaria* [GC], 2005; *B.S. v. Spain*, 2012; *Stoica v. Romania*, 2008; *Bekos and Koutropoulos v. Greece*, 2005; *Turan Cakir v. Belgium*, 2009) or by private individuals (*Abdu v. Bulgaria*, 2014; *Moldovan and Others v. Romania (no. 2)*, 2005; *Šečić v. Croatia*, 2007; *Makhashevy v. Russia*, 2012; *Fedorchenko and Lozenko v. Ukraine*, 2012).<sup>3</sup>

102. In this respect the Convention organs have also accepted that discrimination based on race could, in certain circumstances, of itself amount to “degrading treatment” within the meaning of Article 3 (*East African Asians v. the United Kingdom*, 1973, Commission’s report; *Abdu v. Bulgaria*, 2014, § 23).

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3. See under “Discrimination through violence below.

103. Where there is suspicion that racial attitudes induced a violent act, it is particularly important that the official investigation is pursued with vigour and impartiality. Moreover, when investigating violent incidents triggered by suspected racist attitudes, the State authorities are required to take all reasonable action to ascertain whether there were any racist motives and to establish whether feelings of hatred or prejudice based on a person's ethnic origin played a role in the events. This must be done having regard to the need to continuously reassert society's condemnation of racism and ethnic hatred and to maintain the confidence of minorities in the ability of the authorities to protect them from the threat of racist violence (*Nachova and Others v. Bulgaria* [GC], 2005, § 160; *Abdu v. Bulgaria*, 2014, § 29). The obligation on the authorities to seek out a possible link between racist attitudes and a given act of violence is thus not only an aspect of the procedural obligations flowing from Articles 2 and 3 of the Convention, but also part of the responsibility incumbent on States under Article 14 of the Convention taken in conjunction with Articles 2 and 3 (*Nachova and Others v. Bulgaria* [GC], 2005, § 160; *Abdu v. Bulgaria*, 2014, § 31; *Menson and Others v. the United Kingdom* (dec.), 2003).

104. The Court further specified the scope of the duty to investigate a racially motivated act of violence in *Škorjanec v. Croatia*, 2017, where the applicant was attacked because of her partner's Roma ethnicity. Article 14 in conjunction with Article 3 thus 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.

105. The Court found a violation of Article 14 in conjunction with Article 8 in *Burlya and Others v. Ukraine*, 2018, concerning the failure of the police to protect Roma residents from a pre-planned attack on their homes by an anti-Roma mob. Although some of the applicants had been absent from the village at the time of the events and no physical violence was involved, the Court notably took into account the facts that no investigation had ever been conducted and no person had been held responsible for the attack.

106. The Court has also found violations of Article 14 read in conjunction with Article 2 of Protocol No. 1 in a number of cases concerning the right to education of Roma pupils (*D.H. and Others v. the Czech Republic* [GC], 2007; *Horváth and Kiss v. Hungary*, 2013; *Oršuš and Others v. Croatia* [GC], 2010; *Lavida and Others v. Greece*, 2013; *Sampanis and Others v. Greece*, 2008).<sup>4</sup>

107. Moreover, with regard in particular to discrimination against Roma people, the Court has repeatedly stressed that, as a result of their turbulent history and constant uprooting, the Roma have become a specific type of disadvantaged and vulnerable minority (*D.H. and Others v. the Czech Republic* [GC], 2007, § 182). Therefore, special consideration should be given to their needs and their different lifestyle both in the relevant regulatory framework and in reaching decisions in particular cases (*ibid.*, § 181).

108. Other areas in which the Court found violations of its non-discrimination provisions on the grounds of racial/ethnic discrimination concerned the requirement to affiliate oneself with one of the three "constituent people" of Bosnia and Herzegovina in order to be eligible to stand for elections to the highest political offices in that country (*Sejdić and Finci v. Bosnia and Herzegovina* [GC], 2009), the right to liberty of movement of Chechen people in Russia, which was found to be restricted solely on the ground of the applicant's ethnic origin (*Timishev v. Russia*, 2005), family reunification rules which had a disproportionately prejudicial effect on persons of different ethnic origin (*Biao v. Denmark* [GC], 2016).

109. However, the Court may decide not to examine a case under Article 14 when it has already found a separate breach of the substantive Article of the Convention. For example, in *V.C. v. Slovakia*, 2011, which concerned the sterilisation of a Roma woman without her informed

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4. See under "Right to education" below.

consent, the Court found a violation of Article 3 (prohibition of torture) and Article 8 (right to respect for private and family life) and did not find it necessary to examine separately the applicant's complaint under Article 14.

## C. Language

110. The leading case in which the Court addressed discrimination on grounds of language is the *Belgian linguistic case*, 1968, concerning the teaching of languages in the Belgian educational system. The State refused to establish or subsidise, in the Dutch unilingual region, primary school education in which French was employed as the language of instruction. For the Court, the difference in treatment was justified as, the two regions being predominantly unilingual, it would not have been feasible to make teaching available in both languages. Furthermore, families were not prevented from making use of private education in French in Dutch-speaking regions.

111. In its subsequent case-law the Convention organs found that the Convention did not guarantee linguistic freedom as such, and particularly the right to use the language of one's choice in an individual's relations with public institutions and to receive a reply in this language (*Igors Dmitrijevs v. Latvia*, 2006, § 85; *Pahor v. Italy*, 1994, Commission decision; *Association "Andecha Astur" v. Spain*, 1997, Commission decision; *Fryske Nasjonale Partij and Others v. the Netherlands*, 1985, Commission decision; *Isop v. Austria*, 1962, Commission decision).

112. The case of *Macalin Moxamed Sed Dahir v. Switzerland* (dec.) (2015) concerned a Somali national, living and married in Switzerland, whose request for permission to change her name was refused. Her request stemmed from the fact that, when the applicant's maiden name was pronounced according to the rules of "Western" pronunciation, it took on a humiliating meaning in Somali. The applicant claimed to have been a victim of discrimination on grounds of language amounting to a violation of Article 14 taken together with Article 8. The Court considered the complaint manifestly ill-founded because the language in which the offensive meaning was heard was Somali and the applicant's situation was not therefore comparable to that of persons whose names took on humiliating meaning in the widely spoken national languages.

## D. Religion

113. Along with the protection against discrimination on the grounds of religion provided by Article 14, the Convention contains a substantive provision expressly providing for the right to freedom of thought, conscience and religion enshrined in Article 9 of the Convention.<sup>5</sup> These notions protect "atheists, agnostics, sceptics and the unconcerned", thus protecting those who choose to hold or not to hold religious beliefs and to practise or not to practise a particular religion (*S.A.S. v. France* [GC], 2014, § 124; *Izzettin Doğan and Others v. Turkey* [GC], 2016, § 103). Religion and belief are essentially personal and subjective, and need not necessarily relate to a faith arranged around institutions (*Moscow Branch of the Salvation Army v. Russia*, 2006, §§ 57-58; *Metropolitan Church of Bessarabia and Others v. Moldova*, 2001, § 114; *Hasan and Chaush v. Bulgaria* [GC], 2000, §§ 62 and 78). Newer religions, such as Scientology, have also been found to qualify for protection (*Church of Scientology Moscow v. Russia*, 2007).

114. On several occasions the Court has held that, in exercising its regulatory power in this sphere and in its relations with the various religions, denominations and beliefs, the State had a duty to remain neutral and impartial (*Members of the Gldani Congregation of Jehovah's Witnesses and Others v. Georgia*, 2007, § 131; *Manoussakis and Others v. Greece*, 1996, § 47; *Metropolitan Church of Bessarabia and Others v. Moldova*, 2001, § 123). That duty was incompatible with any power on the State's part to assess the legitimacy of religious beliefs or the ways in which those beliefs were

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5. In this connection, see also the [Guide on Article 9 of the Convention](#) (freedom of thought, conscience and religion).

expressed (*İzzettin Doğan and Others v. Turkey* [GC], 2016, § 68; *S.A.S. v. France* [GC], 2014, § 55; *Eweida and Others v. the United Kingdom*, 2013, § 81).

115. Religious communities were autonomous in the sense that States were not required to create a particular legal framework in order to grant them a special status entailing specific privileges, but a State which has created such a status had to ensure that religious groups had a fair opportunity to apply for this status and that the criteria established were applied in a non-discriminatory manner (*İzzettin Doğan and Others v. Turkey* [GC], 2016, § 164). With regard to discrimination on grounds of religion, the Court has held that differential treatment based essentially on religion alone was not acceptable (*Hoffmann v. Austria*, 1993, § 36).

116. The Court has found that the difference in treatment on grounds of religion had not been sufficiently justified, thus giving rise to a breach of Article 14, in cases concerning, for example,

- discriminatory violence based on the victims' faith (*Members of the Gldani Congregation of Jehovah's Witnesses and Others v. Georgia*, 2007; *Milanović v. Serbia*, 2010);
- the inability of certain churches to provide religious education in schools and to conclude officially recognised religious marriages (*Savez crkava "Riječ života" and Others v. Croatia*, 2010);
- the refusal to grant parental rights in view of a parent's religious convictions (*Hoffmann v. Austria*, 1993; *Vojnity v. Hungary*, 2013);
- the prohibition for employees of a private company to wear religious symbols although they did not cause any health or safety concerns (*Eweida and Others v. the United Kingdom*, 2013; see, *a contrario*, *Ebrahimian v. France*, 2015, which was examined only from the standpoint of Article 9);
- the requirement of obtaining a certificate of approval for immigrants wishing to marry other than in the Church of England (*O'Donoghue and Others v. the United Kingdom*, 2010);
- the inconsistent application of qualifying periods for eligibility to register as a religious society (*Religionsgemeinschaft der Zeugen Jehovas and Others v. Austria*, 2008);
- the failure to provide a pupil excused from religious instruction with ethics classes and associated marks (*Grzelak v. Poland*, 2010);
- the failure to recognise services connected with the Alevi faith as a religious public service (*İzzettin Doğan and Others v. Turkey* [GC], 2016).

117. The Court found discrimination by association on grounds of religion in the case of *Molla Sali v. Greece* [GC], 2018, concerning the difference in 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 non-Muslim testator. The Court also established a positive obligation for States to treat differently persons convicted of offences committed due to their religious beliefs (*Thlimmenos v. Greece* [GC], 2000).

118. In some cases other competing rights or freedoms had in the Court's view prevailed over freedom of religion, leading it to conclude that the difference in treatment on grounds of religion had been justified. In *S.A.S. v. France* [GC], 2014, concerning the ban on the full covering of the face in public places, the Court found that, while it might be considered that the ban at issue had specific negative effects on the situation of Muslim women who, for religious reasons, wished to wear the full-face veil in public, this measure had an objective and reasonable justification, namely, pursuing the aims of public safety and of respect for the minimum set of values of an open and democratic society (§§ 160-162; see also *Köse and Others v. Turkey* (dec.), 2006). In *Eweida and Others v. the United Kingdom*, 2013, concerning, among other things, the right for a registrar of marriages and a counsellor to refuse to officiate same-sex marriages and to provide counselling to same-sex couples respectively, the Court found that their dismissal on the ground that they refused to provide the service they had been hired for did not violate their Convention rights. In this respect the Court

stressed that an individual's decision to enter into a contract of employment and to undertake responsibilities which he knew would have an impact on his freedom to manifest his religious belief, although determinative of the question whether or not there had been an interference with Article 9 rights, nevertheless needed to be weighed in the balance when assessing whether a fair balance had been struck (§ 109).

119. The case of *Cha'are Shalom Ve Tsedek v. France* [GC] (2000) concerned the refusal by the State to permit an Orthodox Jewish association to carry out ritual slaughters in accordance with its strict requirements. The applicant association claimed that the State's refusal had been discriminatory given that it had granted such an approval to another association. The Court found that such a refusal had pursued a legitimate aim, and there had been a reasonable relationship of proportionality between the means employed and the aim sought to be realised. It did therefore not violate the applicant association's rights under Article 14. In *Alujer Fernández and Caballero García v. Spain* (dec.), 2001, the applicants were members of the Baptist Evangelical Church in Valencia and complained about their inability to allocate a proportion of their income tax directly to their Church, without a prior agreement with the Spanish State. The Court declared their complaint inadmissible as the obligation imposed on Churches to reach an agreement with the State in order to be eligible to receive part of the revenue from income tax did not appear to be unfounded or disproportionate in light of the wide margin of appreciation enjoyed by States in this field.

## E. Political or other opinion

120. As early as 1976 the Court established that the right to freedom of expression protects not only "information" or "ideas" that were favourably received or regarded as inoffensive or as a matter of indifference, but also those that offend, shock or disturb the State or any sector of the population (*Handyside v. the United Kingdom*, 1976, § 49).<sup>6</sup> Political opinion has been given privileged status. The Court has repeatedly emphasised that free elections and freedom of expression, in particular freedom of political debate, constitute the foundation of any democratic system (*Oran v. Turkey*, 2014, § 51). Accordingly, the powers of States to put restrictions on political expression or debate on questions of public interest are very limited (*Kurski v. Poland*, 2016, § 47).

121. The Court has rarely dealt with cases of discrimination on the grounds of a person's political or other opinion. The case of *Georgian Labour Party v. Georgia* (2008) concerned the introduction of a new system of voter registration shortly before the election in a post-revolutionary context. The Court found that the applicant political party failed to show that either the challenged electoral mechanisms or the disenfranchisement of voters from a certain territory had been exclusively aimed at the applicant party and had not affected the other candidates standing for that election. The case of *Adalı v. Turkey* (2005) concerned the murder of a journalist, known for strong criticism of the policies and practices of the Turkish Government and the authorities of the "Turkish Republic of Northern Cyprus", and alleged repeated acts of intimidation against his wife which she claimed had been discriminatory. The Court did not find sufficient evidence to find the existence of discrimination on grounds of political or other opinion.

122. In *Virabyan v. Armenia*, 2012, concerning the applicant's ill-treatment by State agents allegedly motivated by his political convictions, the Court considered that the authorities' obligation to use all available means to combat racism and racist violence also applied in cases where the treatment contrary to Article 3 of the Convention was alleged to have been inflicted for political motives. It reiterated that political pluralism, which implied a peaceful co-existence of a diversity of political opinions and movements, was of particular importance for the survival of a democratic society based on the rule of law. Acts of violence committed by agents of the State intended to suppress,

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6. In this connection, see also the [Guide on Article 10 of the Convention](#) (freedom of expression).

eliminate or discourage political dissent or to punish those who hold or voice a dissenting political opinion posed a special threat to the ideals and values of such society (§§ 199-200).

## F. National or social origin

123. According to a recurring formula used by the Court, very weighty reasons have to be put forward before the Court could regard a difference in treatment based exclusively on the ground of nationality as compatible with the Convention (*Gaygusuz v. Austria*, 1996, § 42; *Koua Poirrez v. France*, 2003, § 46; *Andrejeva v. Latvia* [GC], 2009, § 87).

124. In *Andrejeva v. Latvia* [GC], 2009, for example, the Court found a violation of Article 14 read in conjunction with Article 1 of Protocol No. 1 due to the refusal to take the applicant's years of employment in the former Soviet Union into account when calculating her entitlement to a retirement pension because she did not have Latvian citizenship. The Court noted that the national authorities' refusal to take into account her years of employment performed during Soviet times outside Latvia was based exclusively on the consideration that she did not have Latvian citizenship (§ 87).

125. Other cases regarding alleged discrimination on grounds of nationality concerned, for example,

- the authorities' refusal to grant emergency assistance to an unemployed man because he did not have Austrian nationality (*Gaygusuz v. Austria*, 1996);
- the consequences of family's loss of nationality on the applicant's status as a mother of a large family and her related pension entitlement (*Zeibek v. Greece*, 2009);
- an unlawfully resident alien who was refused legal aid for contesting paternity of her child (*Anakomba Yula v. Belgium*, 2009);
- the refusal to award the applicant a disability allowance on the ground that he was not a French national and that there was no reciprocal agreement between France and his country of nationality in respect of this benefit (*Koua Poirrez v. France*, 2003);
- the refusal of social therapy or relaxations in the conditions of preventive detention due to the applicant's foreign nationality (*Rangelov v. Germany*, 2012);
- the prolonged failure of the Slovenian authorities to regularise the applicants' residence status as citizens of other former Yugoslav republics following their unlawful "erasure" from the register of permanent residents (*Kurić and Others v. Slovenia* [GC], 2012);
- the requirement on aliens without permanent residence to pay secondary-school fees (*Ponomaryovi v. Bulgaria*, 2011);
- the refusal to grant family reunion to naturalised nationals as opposed to nationals born in the country (*Biao v. Denmark* [GC], 2016);
- the blanket ban applied retroactively and indiscriminately to all prospective adoptive parents from a specific foreign State (*A.H. and Others v. Russia*, 2017).

126. In *Biao v. Denmark* [GC], 2016, the Court found that national law contributed to the creation of a pattern that was hampering the integration of aliens newly arrived in the country and that general biased assumptions or prevailing social prejudice in a particular country did not provide sufficient justification for a difference in treatment in cases of discrimination against naturalised nationals (§ 126).

## G. Association with a (national) minority

127. In its case-law the Court has not defined “national minority” or found discrimination on the sole ground of “association with a national minority”. However, it has touched upon the exercise of rights of different minorities in a number of cases.

128. The question of “minority groups” has been raised in some cases dealing with discrimination based on ethnicity. In *Paraskeva Todorova v. Bulgaria*, 2010, for example, the applicant of Roma origin was refused a suspended sentence by the domestic court which referred to the existence of a widespread sentiment of impunity in society, highlighting in particular the extent of this phenomenon in the case of minority groups, for whom a suspended sentence is not a conviction. The Court considered that such a decision taken together with the applicant’s ethnic affiliation was likely to reveal an exemplary sentence for the Roma community by condemning a person belonging to the same minority group (§§ 38-40) and found a violation of Article 14.

129. The Court has also stressed the necessity to protect a “sexual minority” under Article 14. The case of *Bayev and Others v. Russia*, 2017, concerned a legal ban on public statements concerning the identity, rights and social status of sexual minorities. The Government claimed that the legislation in question had to be understood in a context in which the majority of Russians disapprove of homosexuality and resent any display of same-sex relations. The Court considered that, while it was true that popular sentiment might play an important role in the Court’s assessment when it comes to the justification on the grounds of morals, the legislation in question represented a pre-disposed bias against a homosexual minority and it would be incompatible with the underlying values of the Convention if the exercise of Convention rights by a minority group were made conditional on its being accepted by the majority (§ 70).

130. In *Molla Sali v. Greece* [GC], 2018, the Court also recognised the “right to free self-identification” as an important right in the field of protection of minorities (§ 157). In that case the applicant complained about the application of Islamic law in proceedings concerning her husband’s succession despite the fact that her husband had drawn up a will in accordance with the Greek Civil Code. The Government submitted that the settled case-law of the Court of Cassation pursued the aim of protecting the Thrace Muslim minority. The Court doubted whether the impugned measure regarding the applicant’s inheritance rights had been suited to achieve that aim. It held that refusing members of a religious minority the right to voluntarily opt for and benefit from ordinary law amounted not only to discriminatory treatment but also to a breach of their right to free self-identification, which was of cardinal importance in the field of protection of minorities. This right applied in its positive aspect to people who wished to be treated as members of a minority but also concerned in its negative aspect, the right to choose not to be treated as a member of a particular minority. In this second aspect, the choice was completely free, provided it is informed, and must be respected both by the other members of the minority in question and by the State itself. No bilateral or multilateral treaty or other instrument required anyone to submit against his or her wishes to a special regime in terms of protection of minorities. Consequently, the Court concluded that the measure in question was not proportionate to the aim pursued.

## H. Property

131. The Court examined discrimination on the grounds of property in two leading cases: *Chassagnou and Others v. France* [GC], 1999, and *Chabauty v. France* [GC], 2012.

132. The case of *Chassagnou and Others v. France* [GC], 1999, concerned the compulsory inclusion of the applicants’ lands in the hunting grounds of the local hunters’ associations and the obligation to join this association although they disapproved of its objectives. The Court found a violation of Article 14 in conjunction with Article 1 of Protocol No. 1 and with Article 11 of the Convention

because the distinction drawn between small and large landowners as regards their freedom to use their property for a purpose other than hunting had had no pertinent justification.

133. On the other hand, in *Chabauty v. France* [GC], 2012, the Court considered that the inability of small landholders, in contrast to large landholders, to have land removed from the control of approved hunters' association other than on ethical grounds did not constitute a violation of Article 14.

## I. Birth

134. When it comes to the personal characteristic of "birth status", the Court considers that very weighty reasons have to be advanced before a distinction on grounds of birth outside marriage can be regarded as compatible with the Convention (*Fabris v. France* [GC], 2013, § 59; *Wolter and Sarfert v. Germany*, 2017, § 58; *Inze v. Austria*, 1987, § 41), including when the difference in treatment affects the parents of children born within or out of wedlock (*Sahin v. Germany* [GC], 2003; *Sommerfeld v. Germany* [GC], 2003).

135. As early as 1979 the Court held that restrictions on children's inheritance rights on grounds of birth were incompatible with the Convention (*Marckx v. Belgium*, 1979, § 59). It has constantly reiterated this fundamental principle ever since, establishing the prohibition of discrimination on grounds of a child's birth "outside marriage" as a standard of protection of European public order (*Fabris v. France* [GC], 2013, § 57).

136. Nowadays, it is common ground among member States of the Council of Europe that children born within and children born outside marriage have to be treated equally. This has led to a uniform approach by the national legislatures on the subject and to social and legal developments definitively endorsing the objective of achieving equality between children (*Fabris v. France* [GC], 2013, § 58).

137. The distinction that had existed in many member States between children "born out of wedlock" ("illegitimate") and children "born within marriage" ("legitimate") for inheritance purposes raised several issues under Article 8 of the Convention taken alone (*Johnston and Others v. Ireland*, 1986) and under Article 14 taken in conjunction with Article 8 of the Convention (*Brauer v. Germany*, 2009; *Vermeire v. Belgium*, 1991) or Article 1 of Protocol No. 1 (*Inze v. Austria*, 1987; *Mazurek v. France*, 2000; *Merger and Cros v. France*, 2004; *Fabris v. France* [GC], 2013). The Court extended its case-law to include voluntary dispositions by upholding the prohibition of discrimination where testamentary dispositions were concerned (*Pla and Puncernau v. Andorra*, 2004).

138. In a case concerning the refusal to grant Maltese citizenship to a child born out of wedlock whose mother had not been Maltese, the Court explained that, although the right to citizenship was not as such a Convention right and its denial in the applicant's case did not give rise to a violation of Article 8, its impact on the applicant's social identity had been such as to bring it within the general scope and ambit of Article 14 of the Convention (*Genovese v. Malta*, 2011). It went on to find a breach of that Article.

139. However, in cases where the liquidation of the deceased's estate occurred long before filiation of a child born out of wedlock had been established, the Court found that the applicants in such cases did not have a sufficient proprietary interest in respect of their deceased parent's estate to constitute a "possession" within the meaning of Article 1 of Protocol No. 1 and that, *a fortiori*, Article 14 was not applicable either (*Alboize-Barthes and Alboize-Montezume v. France* (dec.), 2008; *Wysowska v. Poland* (dec.), 2018, § 51).

## J. “Other status”

140. The words “other status” have generally been given a wide meaning (*Carson and Others v. the United Kingdom* [GC], 2010, § 70) and their interpretation has not been limited to characteristics which are personal in the sense that they are innate or inherent (*Kiyutin v. Russia*, 2011, § 56; *Clift v. the United Kingdom*, 2010, § 56).

### 1. Age

141. The Court has recognised that age constituted “other status” for the purposes of Article 14 of the Convention (*Schwizgebel v. Switzerland*, 2010, § 85; *Carvalho Pinto de Sousa Morais v. Portugal*, 2017, § 45). However, it has not, to date, suggested that discrimination on grounds of age should be equated with other grounds of discrimination (*ibid.*; *British Gurkha Welfare Society and Others v. the United Kingdom*, 2016, § 88).

142. The case of *Schwizgebel v. Switzerland*, 2010, concerned an unmarried woman debarred from adopting a second child as national legislation only authorised adoption by a single person up to a certain age. The Court found no violation of Article 14 in conjunction with Article 8 as the measure sought to pursue the legitimate aim of protecting the well-being and rights of that child.

143. The Court also examined complaints of alleged discrimination on grounds of age in cases dealing with a difference in treatment between minors and adults as regards detention (*D.G. v. Ireland*, 2002; *Bouamar v. Belgium*, 1988) and held that there had been no violation of Article 14 in conjunction with Article 5 as the difference in treatment stemmed from the protective nature of the regime applied to minors in each case. In the same vein the Court found the exemption of juvenile offenders from life imprisonment consonant with the international legal framework on the matter as well as proportionate to the aim of facilitating the rehabilitation of juvenile delinquents (*Khamtokhu and Aksenchik v. Russia* [GC], 2017, § 80).

144. In *Carvalho Pinto de Sousa Morais v. Portugal*, 2017, the applicant, who had undergone a gynaecological surgery and subsequently brought a civil action against a hospital for medical negligence, complained about the reduction in damages awarded on appeal. The Court held that both the applicant’s age and sex appeared to have been decisive factors in the appeal court’s decision, introducing a difference in treatment based on those grounds. In *Deaconu v. Romania* [Committee], 2019, the Court found a breach of Article 14 in conjunction with Article 1 of Protocol No. 1 for lack of reasonable justification for dismissing a claim for damages of younger siblings, whilst making an award to older ones, on the ground that due to their age they suffered less at the death of their younger sister in a car accident.

145. The question of discrimination on grounds of age was also put forward in two cases concerning the trial of minors for murder (*T. v. the United Kingdom* [GC], 1999; *V. v. the United Kingdom* [GC], 1999), but the Court did not deem necessary to examine these complaints under Article 14 as it had already found a violation of Article 6 § 1 in their cases.

### 2. Gender identity

146. The prohibition of discrimination under Article 14 of the Convention duly covers questions related to sexual orientation and gender identity (*Identoba and Others v. Georgia*, 2015, § 96). The Court has also recognised that gender identity and sexual orientation were two distinctive and intimate characteristics. Any confusion between the two would therefore constitute an attack on one’s reputation capable of attaining a sufficient level of seriousness for touching upon such an intimate characteristic of a person (*Sousa Goucha v. Portugal*, 2016, § 27).

147. The Court has dealt with a number of cases concerning gender identity issues, notably

- the right to undergo gender reassignment surgery (*L. v. Lithuania*, 2007);

- the right to have the preferred gender legally recognised (*Christine Goodwin v. the United Kingdom* [GC], 2002; *I. v. the United Kingdom* [GC], 2002; *L. v. Lithuania*, 2007) and the legal requirements that must be satisfied to this end (*Hämäläinen v. Finland* [GC], 2014);
- the right to marry (*Christine Goodwin v. the United Kingdom* [GC], 2002; *I. v. the United Kingdom* [GC], 2002);
- fairness of court proceedings concerning claims for reimbursement of gender reassignment measures against a private health insurance company (*Van Kück v. Germany*, 2003);
- the right to have one's gender legally recognised without changing civil status (*Hämäläinen v. Finland* [GC], 2014);
- liability for medical costs incurred in connection with a gender reassignment operation (*Schlumpf v. Switzerland*, 2009).

148. In *Hämäläinen v. Finland* [GC], 2014, the applicant, a transgender woman married to a cisgender woman, complained that, in order for her to have her female gender legally recognised, her marriage had to be transformed to a civil partnership since in Finland same-sex marriage had not been allowed at the material time. The Court found that the applicant could not claim to be in the same situation as cisgender persons who had obtained legal gender recognition automatically at birth and whose marriages, according to the applicant, did not run the risk of "forced" divorce in the way that hers did (§ 112).

149. Some gender identity cases were dealt with solely under the substantive Convention provision, without a separate examination under Article 14. In *Y.Y. v. Turkey*, 2015, the applicant applied for authorisation to undergo gender reassignment surgery, which was denied by the domestic court on the ground that the applicant was not permanently unable to procreate. The Court found that, in denying the applicant, for many years, the possibility of undergoing such an operation, the State had thus breached the applicant's right to respect for his private life under Article 8 of the Convention.

### 3. Sexual orientation

150. The Court has repeatedly included sexual orientation among the "other grounds" protected under Article 14 (*Salgueiro da Silva Mouta v. Portugal*, 1999, § 28; *Fretté v. France*, 2002, § 32).

151. In 1999 the Court found for the first time a violation of Article 14 on grounds of sexual orientation in a case concerning parental rights (*Salgueiro Da Silva Mouta v. Portugal*, 1999). Ever since, it has examined the issue of sexual orientation in a number of other contexts involving

- different age of consent under criminal law for homosexual relations (*L. and v. v. Austria*, 2003; *S.L. v. Austria*, 2003; *B.B. v. the United Kingdom*, 2004; *Santos Couto v. Portugal*, 2010);
- permission to adopt a child (*X and Others v. Austria* [GC], 2013; *E.B. v. France* [GC], 2008; *Gas and Dubois v. France*, 2012);
- the right to succeed to the deceased partner's tenancy (*Karner v. Austria*, 2003; *Kozak v. Poland*, 2010);
- social protection (*P.B. and J.S. v. Austria*, 2010; *Mata Estevez v. Spain* (dec.), 2001);
- conditions of detention (*X v. Turkey*, 2012);
- regulations on child maintenance (*J.M. v. the United Kingdom*, 2010);
- civil unions (*Vallianatos and Others v. Greece* [GC], 2013);
- marriage (*Schalk and Kopf v. Austria*, 2010; *Chapin and Charpentier v. France*, 2016);
- family reunification (*Pajić v. Croatia*, 2016; *Taddeucci and McCall v. Italy*, 2016);
- freedom of thought, conscience and religion (*Eweida and Others v. the United Kingdom*, 2013);

- freedom of assembly and association (*Bączkowski and Others v. Poland*, 2007; *Alekseyev and Others v. Russia*, 2018; *Genderdoc-M v. Moldova*, 2012; *Zhdanov and Others v. Russia*, 2019);
- protection from homophobic speech or acts of violence and effectiveness of investigation (*Identoba and Others v. Georgia*, 2015; *M.C. and A.C. v. Romania*, 2016; *Beizaras and Levickas v. Lithuania*, 2020).

152. The Court has stressed that discrimination based on sexual orientation was as serious as discrimination based on “race, origin or colour” (*Vejdeland and Others v. Sweden*, 2012, § 55). Where a difference in treatment was based on sexual orientation, the State’s margin of appreciation is narrow (*Kozak v. Poland*, 2010, § 92; *Karner v. Austria*, 2003, § 41). Moreover, differential treatment based solely on considerations of sexual orientation was unacceptable under the Convention (*E.B. v. France* [GC], 2008, §§ 93 and 96; *Salgueiro da Silva Mouta v. Portugal*, 1999, § 36; *X and Others v. Austria* [GC], 2013, § 99).

153. The most important number of cases examined by the Court in relation to discrimination on grounds of sexual orientation relates to the right to respect for private and family life. In that connection, the Court has interpreted Article 8 in light of the present-day conditions and recognised that the relationship of a cohabiting same-sex couple living in a stable *de facto* relationship fell within the notion of “family life” just as the relationship of a different-sex couple in the same situation would (*Schalk and Kopf v. Austria*, 2010, § 94). Furthermore, the Court has also found that the relationship between two women living together, and a child conceived by one of them but being brought up by both of them, constituted “family life” within the meaning of Article 8 of the Convention (*X and Others v. Austria* [GC], 2013, § 95; *Gas and Dubois v. France*, 2012, § 37).

154. As regards the right to marry, the impossibility of a same-sex marriage has been held not to violate Article 14 in conjunction with either Article 8 or Article 12 (*Schalk and Kopf v. Austria*, 2010; *Chapin and Charpentier v. France*, 2016), whereas the exclusion of same-sex couples from a civil union was found to be in breach of Article 14 in conjunction with Article 8 (*Vallianatos and Others v. Greece* [GC], 2013). As regards adoptions, in *E.B. v. France* [GC], 2008, the Court found a breach of Article 14 due to the authorities’ refusal to grant approval for adoption based on the applicant’s lifestyle as a lesbian living with another woman. In *X and Others v. Austria* [GC], 2013, the impossibility of second-parent adoption for an unmarried same-sex couple was found to be discriminatory in comparison with unmarried different-sex couples, who were able to adopt in similar circumstances. On the other hand, in *Gas and Dubois v. France*, 2012, the refusal of simple adoption order in favour of the homosexual partner of the biological mother was found not to be discriminatory since different-sex couples in a civil partnership were also prohibited from obtaining a single adoption order. Finally, the refusal to grant residence permits to a foreign same-sex partner has been found to be in breach of Article 14 in conjunction with Article 8 (*Pajić v. Croatia*, 2016; *Taddeucci and McCall v. Italy*, 2016).

155. Outside the context of family life, the Court found a violation of Article 14 in conjunction with Article 10 in *Bayev and Others v. Russia*, 2017, concerning a legislative prohibition on the promotion of homosexuality among minors which embodied a predisposed bias on the part of the heterosexual majority against the homosexual minority (§ 91). On the other hand, it did not find a violation of Article 14 read in conjunction with Article 8 of the Convention and Article 1 of Protocol No. 1 in *Aldeguer Tomás v. Spain*, 2016, in which the applicant was the surviving partner of a stable same-sex union but was not entitled to a survivor’s pension, his partner having died before the recognition of same-sex marriage.

156. In *Beizaras and Levickas v. Lithuania*, 2020, the applicants were a homosexual couple who received a number of serious threats and offensive comments after they published on Facebook a photograph of them kissing. The competent authorities refused to prosecute finding that the applicants’ behaviour had been “eccentric” and did not correspond to “traditional family values” in

the country. The Court concluded that the applicants had suffered discrimination on the grounds of their sexual orientation, without good cause, given that the hateful comments by private individuals directed against them and the homosexual community in general had been instigated by a bigoted attitude towards that community. The same discriminatory state of mind was subsequently at the core of the authorities' failure to discharge their positive obligation to investigate in an effective manner.

157. In some cases the Court has examined sexual orientation issues under the substantive provision alone, for example

- prohibition under criminal law of homosexual relations between adults (*Dudgeon v. the United Kingdom*, 1981; *Norris v. Ireland*, 1988; *Modinos v. Cyprus*, 1993; *A.D.T. v. the United Kingdom*, 2000);
- discharge of homosexuals from the armed forces (*Lustig-Prean and Beckett v. the United Kingdom*, 1999; *Smith and Grady v. the United Kingdom*, 1999; *Perkins and R. v. the United Kingdom*, 2002; *Beck and Others v. the United Kingdom*, 2002);
- refusal to register same-sex marriages contracted abroad (*Orlandi and Others v. Italy*, 2017);
- positive obligation to enact a legal framework providing for the recognition and protection of same-sex partnerships (*Oliari and Others v. Italy*, 2015);
- conditions of detention (*Stasi v. France*, 2011).

#### 4. Health and disability

158. The Court has confirmed that the scope of Article 14 of the Convention and Article 1 of Protocol No. 12 included discrimination based on disability, medical conditions or genetic features (*Glor v. Switzerland*, 2009, § 80; *G.N. and Others v. Italy*, 2009, § 126; *Kiyutin v. Russia*, 2011, § 57).

159. Referring in particular to [Recommendation 1592 \(2003\)](#) towards full social inclusion of people with disabilities, adopted by the Parliamentary Assembly of the Council of Europe on 29 January 2003, and to the [United Nations Convention on the Rights of Persons with Disabilities](#), adopted on 13 December 2006, the Court has considered that there was a European and worldwide consensus on the need to protect people with disabilities from discriminatory treatment (*Glor v. Switzerland*, 2009, § 54). This included an obligation for the States to ensure "reasonable accommodation" to allow persons with disabilities the opportunity to fully realise their rights, and a failure to do so amounted to discrimination (*Enver Şahin v. Turkey*, 2018, §§ 67-69; *Çam v. Turkey*, 2016, §§ 65-67).

160. In cases concerning disability, the States' margin of appreciation in establishing different legal treatment for people with disabilities is considerably reduced (*Glor v. Switzerland*, 2009, § 84).

161. In *Guberina v. Croatia*, 2016, the applicant requested tax exemption on the purchase of a new property adapted to the needs of his severely disabled child. The authorities did not take into consideration his son's particular needs and found that he did not satisfy the conditions for tax exemption on account of already being in possession of a suitable place to live. The Court stressed that, by ratifying the United Nations Disability Convention, Croatia was obliged to respect such principles as reasonable accommodation, accessibility and non-discrimination against persons with disabilities and that, by ignoring the specific needs of the applicant's family related to his child's disability, there had been a violation of Article 1 of Protocol No. 1 in conjunction with Article 14 of the Convention. The Court recognised for the first time that discriminatory treatment of the applicant on account of the disability of his child was disability-based discrimination covered by Article 14. In *Enver Şahin v. Turkey*, 2018, concerning a failure to conduct a concrete individual assessment of a disabled student's needs regarding access to university premises, the Court found a violation of Article 14 in conjunction with Article 2 of Protocol No. 1 on the right to education.

162. In *Cînța v. Romania*, 2020, the domestic authorities failed to properly assess the impact that the applicant's mental illness might have had on his parenting skills or the child's safety. The Court stressed that mental illness might be a relevant factor to be taken into account when assessing the capacity of parents to care for their child. However, relying on mental illness as the decisive element, or even as one element among others, might amount to discrimination when, in the specific circumstances of the case, the mental illness did not have a bearing on the parents' ability to take care of the child.

163. In *R.P. and Others v. the United Kingdom*, 2012, § 89, concerning the appointment of an Official Solicitor to represent a mother with learning disabilities in child-care proceedings, the Court found that the measure the applicant had been subject to did not constitute unjustified discrimination. In fact, the Court accepted that it was necessary for the Contracting State to take measures to protect litigants in the applicant's situation and that the Official Solicitor scheme was within the State's margin of appreciation. Consequently, although the applicant was treated differently from someone with legal capacity, her situation was significantly different from such a person and the difference in treatment was objectively and reasonably justified (§ 89). In *J.D. and A. v. the United Kingdom*, 2019, the applicant's housing benefit had been reduced and she was forced to move out of property especially adapted to the needs of her disabled daughter. The Court found that, while it would be disruptive and undesirable for her to move, the effect of the measure was proportionate in her case as she could move to smaller, appropriately adapted accommodation and given the availability of a discretionary housing benefit (§ 101).

164. As regards discrimination against people with infectious diseases, the Court has considered that a distinction made on account of an individual's health status, including such conditions as HIV infection, should also be covered – either as a disability or a form thereof – by the term “other status” in the text of Article 14 of the Convention (*Kiyutin v. Russia*, 2011, § 57). The Court has held that people living with HIV were a vulnerable group, due to the prejudice and stigmatisation by the society. Consequently, the States should be afforded only a narrow margin of appreciation in choosing measures that singled out this group for differential treatment on the basis of their HIV status (*Kiyutin v. Russia*, 2011, § 64; *I.B. v. Greece*, 2013, § 81).

165. As with other protected grounds under the Convention, it is not uncommon for cases to be dealt with solely under the substantive right, rather than under Article 14. For example, in *Pretty v. the United Kingdom*, 2002, the applicant suffered from a degenerative disease and the Court examined a refusal of her wish to obtain an assurance from the government that her husband would not be prosecuted for assisting her to die. The Court found that the refusal to distinguish between those who are and those who are not physically capable of committing suicide was justified because introducing exceptions to the law would in practice allow for abuse and undermine the protection of the right to life protected by Article 2 (§ 89).

## 5. Parental and marital status

166. In *Weller v. Hungary*, 2009, the Court found discrimination on grounds of parental status amounting to a violation of Article 14. In that case the first applicant was a father who was denied the award of a benefit to which only mothers, adoptive parents and guardians were entitled.

167. Equally, the Court has considered marital status to be a personal characteristic included in the term “other status”. In *Şerife Yiğit v. Turkey* [GC], 2010, for example, the Court stated that the absence of a marriage tie between two parents is one of the aspects of personal “status” which may be a source of discrimination prohibited by Article 14 (§ 79).

168. In *Petrov v. Bulgaria*, 2008, the Court found a violation of Article 14 in conjunction with Article 8 as the applicant prisoner had been barred from making telephone calls to his partner because they were not married.

169. The case of *Burden v. the United Kingdom* [GC], 2008, concerned two cohabiting sisters who complained that they were ineligible for exemption from inheritance tax that surviving spouses or civil partners enjoyed. The Court held that the absence of such a legally binding agreement between the applicants rendered their relationship of cohabitation, despite its long duration, fundamentally different to that of a married or civil partnership couple (§ 65). In *Korosidou v. Greece*, 2011, the Court examined the case of an applicant who was refused a survivor's pension as a widow on the ground that she had not been married to her deceased partner and did not find discrimination.

170. The case of *Muñoz Díaz v. Spain*, 2009, concerned an applicant whose marriage concluded according to Roma rites was not considered valid for purposes of establishing entitlement to a survivor's pension by the State. The Court observed that the Spanish authorities had recognised the applicant as her partner's "spouse". The woman in question and her family had been issued with a family record book, had been granted large-family status and had been in receipt of health-care assistance. The Court therefore took the view that the applicant's good faith as to the validity of her marriage had given her a legitimate expectation of being entitled to a survivor's pension and acknowledged a violation of Article 14 of the Convention in conjunction with Article 1 of Protocol No. 1. On the other hand, in *Şerife Yiğit v. Turkey* [GC], 2010, the applicant had married in a purely religious ceremony and was refused to be recognised as the heir of her deceased partner. However, the Court noted that the applicant was aware of her situation and knew that she needed to regularise her relationship in accordance with the Civil Code in order to be entitled to benefits on her partner's death. Therefore, the Court considered that there was an objective and reasonable justification for the difference in question and did not find a violation of Article 14.

## 6. Immigration status

171. The Court established that although immigration status was a status conferred by law, rather than one inherent to the individual, this fact did not preclude it from amounting to "other status" for the purposes of Article 14 (*Hode and Abdi v. the United Kingdom*, 2012, § 47; *Bah v. the United Kingdom*, 2011, § 46). Indeed, a wide range of legal and other effects flowed from a person's immigration status (*ibid.*).

172. The case of *Hode and Abdi v. the United Kingdom*, 2012, concerned a person recognised as a refugee and granted a limited leave who could not be joined by his post-flight spouse. The Court reiterated that the argument in favour of refugee status amounting to "other status" was even stronger, as, unlike immigration status, refugee status did not entail an element of choice (§ 47). Consequently, the Court found a violation of Article 14 taken together with Article 8.

173. In *Bah v. the United Kingdom*, 2011, the Court examined the case of a person unintentionally homeless with a minor child, who was not granted priority assistance by the social services because her son was subject to immigration control. The applicant had entered the United Kingdom as an asylum-seeker but had not been granted refugee status. The Court noted that the nature of the status upon which differential treatment is based weighs heavily in determining the scope of the margin of appreciation to be accorded to Contracting States (§ 47). Given the element of choice involved in immigration status, while differential treatment based on this ground must still be objectively and reasonably justifiable, the justification required will not be as weighty as in the case of a distinction based, for example, on nationality (§ 47). The Court concluded that the differential treatment to which the applicant was subjected was reasonably and objectively justified (§ 52).

174. The Court also found discrimination on ground of immigration status in several other cases. In *Ponomaryovi v. Bulgaria*, 2011, the Court found the requirement on aliens without permanent residence to pay secondary-school fees discriminatory by reason of their nationality and immigration status (§ 49). It amounted to a violation of Article 14 of the Convention taken together with Article 2 of Protocol No. 1 on the right to education. In *Anakomba Yula v. Belgium*, 2009, where an unlawfully

resident alien had been refused legal aid for contesting the paternity of her child, the Court found a violation of Article 14 in conjunction with Article 6 (access to court).

## 7. Status related to employment

175. In the field of employment, the Court found, for example, that holding of *high office* can be regarded as “other status” for the purposes of Article 14 (*Valkov and Others v. Bulgaria*, 2011, § 115). In that case the Court refused the applicants’ contention that capping of their pensions amounted to discrimination in comparison to certain high-ranking officials whose pensions were exempted from the cap.

176. The Court also found that the notion of “other status” had been given a sufficiently wide meaning so as to include, in certain circumstances, *military rank*. The case of *Engel and Others v. the Netherlands*, 1976, concerned conscript soldiers on whom various penalties had been imposed by their respective commanding officers for offences against military discipline. The Court established that a distinction based on rank might run counter to Article 14 (§ 72). However, it recognised that the competent national authorities enjoyed a considerable margin of appreciation in this domain, and did not find a violation of Article 14. In *Beeckman and Others v. Belgium* (dec.), 2018, the Court interpreted *police rank* to also fall within the notion of “other status”.

177. The *collaboration of applicants with secret services* has also been considered as “other status” for the purposes of Article 14 of the Convention (*Sidabras and Džiautas v. Lithuania*, 2004; *Žičkus v. Lithuania*, 2009; *Naidin v. Romania*, 2014). In *Žičkus v. Lithuania*, 2009, the applicants were banned from finding employment in the private sector on the grounds that they had been former KGB officers. In *Naidin v. Romania*, 2014, a former collaborator of the political police had been banned from public-service employment.

178. The case of *Graziani-Weiss v. Austria*, 2011, concerned an obligation for *practicing lawyers and notaries* to act as unpaid guardians to mentally ill persons if appointed to do so, whereas other legally trained persons had not been under such an obligation. The Court held that there had been a difference in treatment between the two groups but that, for the purposes of guardianship in cases where legal representation was necessary, the two groups were not in a relevantly similar situation (§ 65).

## 8. Further examples of “other status”

179. The Court established that being a *prisoner*<sup>7</sup> was an aspect of personal status for the purposes of Article 14 in *Stummer v. Austria* [GC], 2011 (§ 90), where the authorities refused to take work performed in prison into account in calculating the applicant’s pension rights. The Court also acknowledged an unjustified difference in legal regimes for *detainees on remand and convicted prisoners* (*Laduna v. Slovakia*, 2011; *Chaldayev v. Russia*, 2019) as regards visiting rights and access to television.

180. In *Clift v. the United Kingdom*, 2010, the Court considered differences in procedural requirements for early release which depended on *the length of the sentence*. In that case the applicant alleged a difference in treatment based on his position as a prisoner serving a determinate sentence of more than fifteen years. While sentence length bore some relationship to the perceived gravity of the offence, a number of other factors could also be relevant, including the sentencing judge’s assessment of the risk the prisoner posed to the public. Where an early-release scheme applied differently to prisoners depending on the length of their sentences, there was a risk that, unless objectively justified, it would run counter to the need to ensure protection from arbitrary detention under Article 5. Accordingly, the Court concluded that the applicant enjoyed “other status” for the purposes of Article 14.

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7. See the [Guide on prisoners’ rights](#).

181. In *Granos Organicos Nacionales S.A. v. Germany*, 2012, the Court found a difference in treatment between *natural and legal persons* and between *domestic and foreign legal entities*, due to the refusal to attribute legal aid to a foreign company wishing to institute civil proceedings in German courts, although in this particular case the Court held that such difference had been motivated by relevant reasons.

182. The Court has found further differences in treatment as falling within the scope of “other status”, although not related to “personal” characteristics.

183. For example, the Court found that *membership of an organisation* could constitute “other status” for the purpose of Article 14 of the Convention (*Danilenkov and Others v. Russia*, 2009; *Grande Oriente d’Italia di Palazzo Giustiniani v. Italy (no. 2)*, 2007). In *Danilenkov and Others v. Russia*, 2009, the State had failed to afford effective judicial protection against discrimination on the ground of trade-union membership. The case of *Grande Oriente d’Italia di Palazzo Giustiniani v. Italy (no. 2)* (2007) concerned the statutory obligation for Freemasons to declare their membership when applying for regional authority posts.

184. Equally, “other status” can include the *place of residence* (*Carson and Others v. the United Kingdom* [GC], 2010; *Aleksandr Aleksandrov v. Russia*, 2018; *Baralija v. Bosnia and Herzegovina*, 2019). The case of *Carson and Others v. the United Kingdom* [GC], 2010, concerned the absence of right to index-linking for pensioners resident in overseas countries which had no reciprocal arrangements with the State. In *Aleksandr Aleksandrov v. Russia*, 2018, the applicant was refused a non-custodial sentence on the ground that his permanent place of residence had been outside of the region where the offence had been committed and the sentence pronounced. The Court did not find that the difference in treatment had pursued a legitimate aim or had an objective and reasonable justification.

185. In *Özgürlük ve Dayanışma Partisi (ÖDP) v. Turkey*, 2012, the Court acknowledged the existence of a difference in treatment between political parties on the ground of *insufficient popular support*. The case concerned the refusal of financial aid to a political party based on the fact that it had not received the statutory minimum number of votes required to be eligible for aid and did not result in finding a breach of Article 14.

186. The Court also considered that *conflicting decisions by the Supreme Court* could amount to discrimination under Article 14 (*Beian v. Romania (no. 1)*, 2007). A difference in treatment on grounds of *different points in time when pension claims were liquidated* could also amount to discrimination if not justified (*Maggio and Others v. Italy*, 2011).

## 9. Examples of situations not falling within “other status”

187. Certain differences in treatment not linked to a personal status have been considered as not falling within the notion of “other status”.

188. In *Gerger v. Turkey* [GC], 1999, for example, the Court held that differences in treatment between prisoners in relation to parole did not confer on them “other status” as the distinction had not been made between different groups of people, such as in *Clift v. the United Kingdom*, 2010, but rather between different types of offences, according to their gravity.

189. Other examples of differences in treatment not falling within the notion of “other status” for the purpose of Article 14 include

- having or not having acquired the right to a welfare benefit (*Springett and Others v. the United Kingdom* (dec.), 2010);
- duration and nature of an employment contract (*Peterka v. the Czech Republic* (dec.), 2010);
- holding fishing rights in different areas (*Alatulkkila and Others v. Finland*, 2005);

- being sent on different military missions (*De Jong, Baljet and Van den Brink v. the Netherlands*, 1984);
- different legal status with respect to restitution of taxes (*National & Provincial Building Society, Leeds Permanent Building Society and Yorkshire Building Society v. the United Kingdom*, 1997);
- distinction between smaller and larger unions (*National union of Belgian police v. Belgium*, 1975; *Swedish Engine Drivers' Union v. Sweden*, 1976);
- difference between commercial advertising and advertisements forwarding certain ideals (*VgT Verein gegen Tierfabriken v. Switzerland*, 2001).

## VI. Discrimination by topic

### A. Private and family life

190. The Court examined complaints under Article 14 in conjunction with Article 8 concerning discrimination in the enjoyment of the right to respect for private and family life in a variety of situations.<sup>8</sup>

191. The Court clarified that the right to respect for “family life” did not safeguard the mere desire to found a family (*E.B. v. France* [GC], 2008, § 41); instead, it presupposed the existence of one (*Marckx v. Belgium*, 1979, § 31), or at the very least the potential relationship between, for example, a child born out of wedlock and his or her natural father (*Nylund v. Finland* (dec.), 1999), or the relationship that arises from a genuine marriage, even if family life has not yet been fully established (*Abdulaziz, Cabales and Balkandali v. the United Kingdom*, 1985, § 62), or the relationship that arises from a lawful and genuine adoption (*Pini and Others v. Romania*, 2004, § 148).

192. In this context the Court examined several cases concerning access to children under Article 14 in conjunction with Article 8:

- the refusal to grant a father access to a child born out of wedlock (*Sommerfeld v. Germany* [GC], 2003);
- deprivation of custody on the sole ground of the mother’s religious convictions (*Hoffmann v. Austria*, 1993);
- the impossibility of second-parent adoption in same-sex couples (*X and Others v. Austria* [GC], 2013);
- the difference in treatment between male and female military personnel regarding rights to parental leave (*Konstantin Markin v. Russia* [GC], 2012);
- the difference in treatment between a father and a mother as regards the time-limits related to the possibility of instituting proceedings to contest paternity (*Rasmussen v. Denmark*, 1984);
- legislation permitting deferral of prison sentence for mothers, but not fathers, of young children (*Alexandru Enache v. Romania*, 2017); or
- family reunification (*Biao v. Denmark* [GC], 2016)<sup>9</sup>;
- restriction on contact rights based on the father’s mental disorder (*Cînta v. Romania*, 2020)<sup>10</sup>

193. Although the Court stated that Article 8 does not guarantee the right to found a family or the right to adopt (*E.B. v. France* [GC], 2008, § 41), it could nonetheless examine cases concerning, for example, the right to establish and develop relationships with other human beings or the decisions to have and not to have a child under the notion of “private life” within the meaning of Article 8 of the Convention (*ibid.*, § 43). As a result, the Court examined respect for Article 14 in cases involving:

- a refusal to grant approval for the purposes of adoption, on the ground of the applicant’s lifestyle as a lesbian living with another woman (*E.B. v. France* [GC], 2008);
- a refusal of simple adoption order in favour of the homosexual partner of the biological mother (*Gas and Dubois v. France*, 2012);
- the impossibility of second-parent adoption in a same-sex couple (*X and Others v. Austria* [GC], 2013); or

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8. In this connection, see also the [Guide on Article 8 of the Convention](#) (right to respect for private and family life).

9. See under “Immigration” below.

<sup>10</sup>. See under “Health and disability” above.

- the ban on adoption of children by specific nationals (*A.H. and Others v. Russia*, 2017);
- the obligation to resort to adoption in order to recognise the filiation between the biological mother and her child born through surrogacy (*D. v. France*<sup>\*</sup>, 2020).

194. The Court has also found a violation of Article 14 in cases concerned with the entering into a civil union or marriage. The case of *Muñoz Díaz v. Spain*, 2009, concerned the refusal to recognise the validity of a Roma marriage for the purposes of establishing entitlement to a survivor's pension. The Court found discrimination given the applicant's good faith as to the validity of the marriage. In *Şerife Yiğit v. Turkey* [GC], 2010, on the contrary, the applicant who had married in a purely religious ceremony was aware of her situation and the Court found no discrimination. In *Vallianatos and Others v. Greece* [GC], 2013, the Court found discriminatory the introduction of a "civil union" restricted to different-sex couples, thereby excluding same-sex couples from its scope. The case of *Ratzenböck and Seydl v. Austria*, 2017, concerned a different-sex couple who was denied access for a registered partnership, created and reserved exclusively for same-sex couples. The Court observed the context of the creation of such a civil partnership and the fact that the applicants had access to marriage and did not find the situation to amount to discrimination. Similar questions were sometimes examined by the Court under Article 8 alone such as in *Oliari and Others v. Italy*, 2015, concerning a lack of legal recognition of same-sex partnerships.

## B. Political rights

195. The prohibition of discrimination in relation to political rights is directly related to the promotion of democracy, as one of the main goals of the Council of Europe. The Court has found a violation of Article 14 in conjunction with Article 10 guaranteeing freedom of expression,<sup>11</sup> or with Article 11 protecting freedom of peaceful assembly and association,<sup>12</sup> or with Article 3 of Protocol No. 1 concerning the right to free elections.<sup>13</sup>

196. In *Bayev and Others v. Russia*, 2017, the applicants were fined for having staged a protest against laws banning the promotion of homosexuality among minors. The Court established that the national legislation created an unjustified difference in treatment between heterosexual majority and homosexual minority reinforcing stigma and prejudice and encouraging homophobia (§ 83) and found a violation of Article 14 in conjunction with Article 10.

197. As regards Article 14 in conjunction with Article 11, the Court found violations in cases concerning

- the obligation for Freemasons to declare their membership when applying for regional authority posts (*Grande Oriente d'Italia di Palazzo Giustiniani v. Italy (no. 2)*, 2007);
- the refusal to grant permission to protest or hold public assemblies based on discriminatory criteria (*Bączkowski and Others v. Poland*, 2007; *Genderdoc-M v. Moldova*, 2012; *Alekseyev and Others v. Russia*, 2018);
- the State's failure to protect demonstrators from homophobic violence and to launch effective investigation (*Identoba and Others v. Georgia*, 2015);
- and the obligation of small landowners to become members of a hunting association (*Chassagnou and Others v. France* [GC], 1999).

In *Danilenkov and Others v. Russia*, 2009, the Court also found that the State had failed to fulfil its positive obligation to afford effective and clear judicial protection against discrimination on the ground of trade-union membership in a case involving a seaport company using various techniques

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<sup>\*</sup> Not yet final.

11. In this connection, see also the forthcoming Guide on Article 10 of the Convention (freedom of expression).

12. In this connection, see also the [Guide on Article 11 of the Convention](#) (freedom of assembly and association).

13. In this connection, see also the [Guide on Article 3 of Protocol No. 1](#) (right to free elections).

to encourage employees to abandon their union membership, including their reassignment to special work teams with limited opportunities, unlawful dismissals, wage reductions, disciplinary sanctions and refusals to reinstate the trade-union members following court judgments. In *Zhdanov and Others v. Russia*, 2019, the refusal to register associations set up to promote and protect LGBT rights was considered to be discriminatory on grounds of sexual orientation.

198. In some cases the Court found violations of Article 10 or Article 11 and did not find it necessary to examine whether or not there had been a violation Article 14. This was the case, for instance, in *Lashmankin and Others v. Russia*, 2017, which concerned the arbitrary and discriminatory power of authorities to propose changes in location, time or manner of conduct of a public event which could constitute interference with the participants' right to freedom of assembly.

199. Finally, the Court found violations of Article 14 in conjunction with Article 3 of Protocol No. 1 in several cases related to *the ability to stand for elections* (*Sejdić and Finci v. Bosnia and Herzegovina* [GC], 2009, which concerned the inability of a Roma and a Jew to stand for parliamentary elections; *Zornić v. Bosnia and Herzegovina*, 2014, which concerned the ineligibility to stand for election without declaration of affiliation to one of the constitutionally defined "constituent peoples"; *Baralija v. Bosnia and Herzegovina*, 2019, which concerned the impossibility to vote or stand in local elections due to the applicant's place of residence; *Danis and Association of Ethnic Turks v. Romania*, 2015, and *Cegolea v. Romania*, 2020, concerning the additional eligibility requirement applicable solely to candidates of national minority organisations not already represented in Parliament) and related to *the right to vote* (*Aziz v. Cyprus*, 2004, concerning the impossibility for Turkish Cypriots to vote in parliamentary elections). However, the Court reiterated the States' wide margin of appreciation in organising their electoral systems, including the establishment of an electoral threshold for political parties aspiring to representation in parliament, and concluded to the absence of a violation of Article 14 in conjunction with Article 3 of Protocol No. 1 in a case concerning the exclusion of a political party from by-election for failing to reach the electoral threshold at the previous general election (*Cernea v. Romania*, 2018).

## C. Employment

200. Although the Convention does not guarantee the right to employment, Article 8 has been interpreted as covering the sphere of employment under certain circumstances.

201. In *Sidabras and Džiautas v. Lithuania*, 2004, the imposition of employment restrictions in the civil service and in various spheres of the private sector on former members of the KGB affected their ability to develop relationships with the outside world to a very significant degree and has created serious difficulties for them in terms of earning their living, with obvious repercussions on the enjoyment of their private lives (§ 48). In *Bigaeva v. Greece*, 2009, the Court found discriminatory the imposition of nationality requirement on an aspirant lawyer at the final stage of the admission procedure after completion of the compulsory training. The case of *I.B. v. Greece*, 2013, concerned the dismissal from work of an employee suffering from HIV infection, resulting from pressure by other employees. The Court found a violation due to the domestic court's failure to weigh up the rights of the two parties in a manner consistent with the Convention.

202. Protection against discrimination in the realm of employment has also been guaranteed by the Court in relation to the freedom to join or not to join a trade union under Article 11 (*Danilenkov and Others v. Russia*, 2009), and in conjunction with the freedom of religion under Article 9 (*Eweida and Others v. the United Kingdom*, 2013, concerning disciplinary measures against employees for refusing to perform duties they considered incompatible with their religious beliefs).

203. In a different context, in *Acar and Others v. Turkey* (dec.), 2017, employment-related claims of workers which had been accrued more than one year prior to the opening of the insolvency proceedings were not granted priority in the ensuing bankruptcy proceedings concerning their

employer. In declaring the applicants' discrimination complaint inadmissible, the Court found that Tukey's insolvency legislation complied with relevant international standards and that the applicants had had a window of opportunity to enforce their claims individually by starting regular enforcement proceedings against the debtor before it was declared insolvent.

204. In some cases, however, the Court found a violation of the substantive Article and did not find it necessary to examine whether or not there had been a violation of Article 14. This was the case, for instance, in *Redfearn v. the United Kingdom*, 2012, where the applicant had been dismissed from work on account of his political affiliation to a far-right political party and could not access a claim for unfair dismissal, the latter being restricted to people employed for more than a year. The Court considered that it was incumbent on the respondent State to take reasonable and appropriate measures to protect employees, including those with less than one year's service, from dismissal on grounds of political opinion or affiliation and found a violation of Article 11 of the Convention (§ 57).

## D. Social rights

205. There is no right to social security under the Convention, though it is clear from the Court's case-law that some forms of social security such as benefit payments and pensions may fall within the ambit of Article 1 of Protocol No. 1 because they can be deemed as "possessions" within the meaning of that provision (*Stec and Others v. the United Kingdom* [GC], 2006; *Luczak v. Poland*, 2007; *Andrejeva v. Latvia* [GC], 2009; *Koua Poirrez v. France*, 2003; *Gaygusuz v. Austria*, 1996; *Pichkur v. Ukraine*, 2013), or within the ambit of Article 8, particularly when social benefits help the family unity (*Weller v. Hungary*, 2009; *Bah v. the United Kingdom*, 2011; *Gouri v. France* (dec.), 2017; *Belli and Arquier-Martinez v. Switzerland*, 2018; *Petrovic v. Austria*, 1998; *Okpiz v. Germany*, 2005).

206. As a result, the protection against discrimination has been found to cover a variety of social benefits such as

- pension payments (*Pichkur v. Ukraine*, 2013; *Andrejeva v. Latvia* [GC], 2009) or survivor's pension payment (*Aldeguer Tomás v. Spain*, 2016; *Willis v. the United Kingdom*, 2002);
- unemployment benefits (*Gaygusuz v. Austria*, 1996);
- disability benefits (*Koua Poirrez v. France*, 2003; *Belli and Arquier-Martinez v. Switzerland*, 2018; *Popović and Others v. Serbia*<sup>\*</sup>, 2020);
- housing benefits (*Vrountou v. Cyprus*, 2015);
- parental leave allowance (*Petrovic v. Austria*, 1998);
- child benefits (*Okpiz v. Germany*, 2005);
- insurance cover (*P.B. and J.S. v. Austria*, 2010); or
- social security payment for the purposes of supporting families with children (*Weller v. Hungary*, 2009).

207. In *Pichkur v. Ukraine*, 2013, for example, the applicant complained that his pension payments were terminated on the ground that he had been permanently resident abroad. In this context the Court stated that the rise of population mobility, higher levels of international cooperation and integration, as well as developments in the area of banking services and information technologies no longer justify largely technically motivated restrictions in respect of beneficiaries of social security payments living abroad (§ 53). The absence of justification for the difference in treatment by the authorities resulted in a breach of Article 14 in conjunction with Article 1 of Protocol No. 1. In *Willis v. the United Kingdom*, 2002, the Court found the unavailability of widows' allowances to male widower discriminatory on grounds of sex. Following this judgment the Court applied the same

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\* Not yet final

solution to a number of other cases: *Runkee and White v. the United Kingdom*, 2007; *Cross v. the United Kingdom*, 2007; *Blackgrove v. the United Kingdom*, 2009; etc.

208. The Court also found the possibility of affiliation with a specific social security scheme to be protected against discrimination. In *Luczak v. Poland*, 2007, the applicant complained against his inability to be affiliated to the farmers' social-security scheme on account of his nationality. The Court concluded that the Government had failed to present any convincing explanation of how the need to protect the underdeveloped and economically inefficient agricultural sector in Poland was served by refusing the applicant's admission to the farmers' scheme during the period in question (§§ 51 and 59).

209. In *Popović and Others v. Serbia*<sup>\*</sup>, 2020, the applicants, who were civilian beneficiaries of disability benefits, maintained that they were awarded a lower amount of the same benefit than those classified as military beneficiaries, despite having exactly the same paraplegic disability. The Court held that the relevant difference in treatment between the two groups had been a consequence of their distinct positions and the corresponding undertakings on the part of the respondent State to provide them with benefits to a greater or lesser extent. That included a moral debt that States might feel obliged to honour in response to the service provided by their war veterans.

210. However, the margin of appreciation accorded to States in the area of social rights is relatively wide. The Court has emphasised that, because of their direct knowledge of their society and its needs, States were in principle better placed than the international judge to appreciate what was in the public interest on social or economic grounds. It has also recognised that it would generally respect the legislature's policy choice in this area unless it was manifestly without reasonable foundation (*Luczak v. Poland*, 2007, § 48).<sup>14</sup>

211. The case of *Stummer v. Austria* [GC], 2011, concerned the refusal to take work performed in prison by the applicant into account in the calculation of his pension rights. The Court considered that, in a context of changing standards, a Contracting State could not be reproached for giving priority to the insurance scheme it considered most relevant for the reintegration of prisoners upon their release. In *Andrle v. the Czech Republic*, 2011, the Court found that the lowering of the pensionable age for women who had raised children – which did not exist for men – was a measure taken to rectify the inequality in question and that the timing and the extent of the measures aimed at equalising the pensionable age had not been manifestly unreasonable. In *Beeckman and Others v. Belgium* (dec.), 2018, the change in salary scales to which the applicant police officers had been attached, done in the framework of a reorganisation of the police force, was found to fall within the State's large margin of appreciation in the matter.

212. However, the Court may decide not to examine a case under Article 14 when it has already found a separate breach of the substantive Article of the Convention. For example, in *Kjartan Ásmundsson v. Iceland*, 2004, which concerned the termination of a disability pension, the Court found a violation of Article 1 of Protocol No. 1 (protection of property) and did not deem necessary to examine the case under Article 14 taken together with Article 1 of Protocol No. 1.

## E. Immigration

213. The Court has repeatedly stressed that the Convention does not guarantee the right of an alien to enter or to settle in a particular country (*Pajić v. Croatia*, 2016, § 79; *Novruk and Others v. Russia*, 2016, § 83; *Ibrogimov v. Russia*, 2018, § 18). However, in cases concerning family reunification or the

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<sup>\*</sup> Not yet final

<sup>14</sup>. See under "Proportionality" above.

maintenance of the link between adult children and their parents, the Court considered the facts of the case to fall “within the ambit” of one or more provisions of the Convention or its Protocols.

214. Even if Article 8 does not impose general family reunification obligations (*Jeunesse v. the Netherlands* [GC], 2014, § 107), an immigration control measure otherwise compatible with Article 8 could amount to discrimination and a breach of Article 14 (*Abdulaziz, Cabales and Balkandali v. the United Kingdom*, 1985, § 71; *Biao v. Denmark* [GC], 2016, § 118). In *Pajić v. Croatia*, 2016, the Court found that the relevant domestic law excluding the possibility of obtaining family reunification for same-sex couples while allowing it for unmarried different-sex couples amounted to discrimination. In *Taddeucci and McCall v. Italy*, 2016, the State did not treat unmarried couples differently according to their sexual orientation, but limited the concept of “family member” to heterosexual couples, given that only the latter could get married and acquire the status of “spouse” in view of family reunification. In *Biao v. Denmark* [GC], 2016, the refusal to grant family reunion was based on existing ties with another country and the Court found that the domestic immigration measure had had an indirect discriminatory impact in breach of Article 14 on grounds of ethnic origin and nationality.

215. Nevertheless, the Court recognised that case-law on these matters is rather sparse (*Biao v. Denmark* [GC], 2016, § 118). In *Abdulaziz, Cabales and Balkandali v. the United Kingdom*, 1985, the applicants were lawfully and permanently settled in the United Kingdom whereas their respective husbands were refused permission to remain or join them. The Court found the difference in treatment between men settled in the United Kingdom and women so settled to obtain family reunification to be discriminatory on grounds of sex (§§ 74-83). In parallel, one of the applicants claimed that she had been discriminated on grounds of birth due to the requirement that the wife or fiancée of the intending entrant to be born or have a parent born in the United Kingdom. However, the Court found the difference in treatment to be justified by the aim of protecting those whose link with a country stemmed from birth (§§ 87-89). In *Hode and Abdi v. the United Kingdom*, 2012, concerning the inability of immigrants with limited leave to remain as refugees to be joined by post-flight spouses, the Court accepted that offering incentives to certain groups of immigrants may amount to a legitimate aim for the purposes of Article 14 of the Convention (§ 53), but went on to find a violation in that particular case.

216. The Court also found that an applicant could not rely on the existence of “family life” in relation to adults who did not belong to his or her core family and who had not been shown to be or to have been dependent on him or her. However, the link between adult children and their parents falls under the head of “private life” within the meaning of Article 8 of the Convention (*Novruk and Others v. Russia*, 2016, §§ 88-89) and accordingly Article 14 in conjunction with Article 8 could apply in such cases. In *Novruk and Others v. Russia*, 2016, the Court found discriminatory the difference in treatment of HIV-positive aliens regarding their application for residence permit and permanent ban on re-entering Russia on ground of their health status.

## F. Right to education

217. Article 2 of Protocol No. 1 to the Convention contains a freestanding right to education.<sup>15</sup> Accordingly, the Court considers complaints of discrimination in the context of education as falling within the ambit of Article 14 (*Ponometryov v. Bulgaria*, 2011, §§ 48-49).

218. The Court found violations of Article 14 read in conjunction with Article 2 of Protocol No. 1 in a number of cases concerning the right to education of Roma pupils. These cases concerned the disproportionate number of Roma children placed in special schools for children with mental disabilities (*D.H. and Others v. the Czech Republic* [GC], 2007; *Horváth and Kiss v. Hungary*, 2013), in Roma-only classes (*Oršuš and Others v. Croatia* [GC], 2010), or in Roma-only schools (*Lavida and*

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15. In this connection, see also the [Guide on Article 2 of Protocol No. 1](#) (right to education).

*Others v. Greece*, 2013); as well as their inability to access school before being assigned to special classrooms in an annex to the main primary school buildings (*Sampanis and Others v. Greece*, 2008). In all of these cases the Court found that the differential treatment, albeit unintentional, which Roma pupils were subject to, had constituted a form of indirect discrimination (*D.H. and Others v. the Czech Republic* [GC], 2007; *Sampanis and Others v. Greece*, 2008; *Horváth and Kiss v. Hungary*, 2013; *Lavida and Others v. Greece*, 2013; *Oršuš and Others v. Croatia* [GC], 2010).

219. The Court has also examined cases of discrimination in relation to the provision of reasonable accommodation for persons with disabilities (*Enver Şahin v. Turkey*, 2018; *Çam v. Turkey*, 2016). The case of *Çam v. Turkey*, 2016, concerned a blind person who was refused enrolment in a music academy despite having successfully passed the competitive entrance examination. In *Enver Şahin v. Turkey*, 2018, the applicant had an accident which left him disabled and the university failed to conduct a concrete individual assessment of his needs regarding access to the university premises. In both cases the Court held that Article 14 must be read in light of the Convention on the Rights of Persons with Disabilities (CRPD) with respect to the “reasonable accommodation” – understood as necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case (*Enver Şahin v. Turkey*, 2018, § 60; *Çam v. Turkey*, 2016, § 65). It was not the Court’s task to define the principle of “reasonable accommodation” to be implemented in the educational sphere (*Enver Şahin v. Turkey*, 2018, § 61; *Çam v. Turkey*, 2016, § 66). However, the Court took the view that it was important for States to be particularly careful in making their choices in this sphere, having regard to the impact of the latter on children with disabilities, whose particular vulnerability could not be overlooked (*Enver Şahin v. Turkey*, 2018, § 61; *Çam v. Turkey*, 2016, § 67).

220. In *Ponomaryovi v. Bulgaria*, 2011, the applicants, who were living in Bulgaria as foreigners without permanent residence, had been required to pay fees to pursue secondary education. The Court found the situation to amount to discrimination on the ground of their immigration status given that aliens with a permanent residence permit had been entitled to primary and secondary education free of charge.

## G. Discrimination through violence

221. The guarantees of Article 14 also apply when the applicant is a victim of violence directly caused by the State authorities or by a private individual because of their belonging to a particular group.

222. The Court has examined cases of violence based on the victim’s

- gender (*Opuz v. Turkey*, 2009; *Eremia v. the Republic of Moldova*, 2013; *Halime Kılıç v. Turkey*, 2016; *M.G. v. Turkey*, 2016);
- race and ethnic origin (*Nachova and Others v. Bulgaria* [GC], 2005; *Moldovan and Others v. Romania (no. 2)*, 2005; *Škorjanec v. Croatia*, 2017; *Makuchyan and Minasyan v. Azerbaijan and Hungary\**, 2020);
- religion (*Milanović v. Serbia*, 2010; *Members of the Gldani Congregation of Jehovah’s Witnesses and Others v. Georgia*, 2007);
- political opinion (*Virabyan v. Armenia*, 2012); and
- sexual orientation (*Identoba and Others v. Georgia*, 2015; *M.C. and A.C. v. Romania*, 2016).

223. In those cases the Court has found violations of Article 14 taken in conjunction with Article 2 (*Nachova and Others v. Bulgaria* [GC], 2005; *Angelova and Iliev v. Bulgaria*, 2007), Article 3 (*Eremia*

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\* Not yet final.

*v. the Republic of Moldova*, 2013; *B.S. v. Spain*, 2012; *Abdu v. Bulgaria*, 2014), Article 6 and Article 8 (*Moldovan and Others v. Romania (no. 2)*, 2005) of the Convention.

224. The Court has examined cases of violence caused by discriminatory attitudes under both the substantive and procedural limbs of the relevant Articles.

## 1. Substantive aspect

225. When presented with a complaint of a violation of Article 14 because of alleged discriminatory violence perpetrated by a State official, the Court's task under the substantive limb of Articles 2 or 3 is to establish whether or not discriminatory attitudes towards the group to which the victim belongs, or allegedly belongs, was a causal factor in the impugned conduct of the authorities (*Stoica v. Romania*, 2008, § 118; *Antayev and Others v. Russia*, 2014, § 123).

226. Although the Court has repeatedly found violations of Articles 2 or 3 in their procedural aspect in cases where the applicants had alleged that discriminatory motivations were behind the attacks they suffered by State agents, it has found a breach of the substantive aspect of these Articles in far fewer cases (*Stoica v. Romania*, 2008; *Antayev and Others v. Russia*, 2014).

227. In *Stoica v. Romania*, 2008, a case concerning racially motivated ill-treatment of a Roma minor by a police officer during an incident with the police, the Court found for the first time a breach of the substantive aspect of Article 3 taken in conjunction with Article 14. Being satisfied that a prima facie case of racially biased ill-treatment had been made by the applicants, the Court shifted the burden of proof to the Government. As neither the prosecutor in charge of the criminal investigation nor the Government could explain in any other way the incidents or put forward any arguments showing that the incidents were racially neutral, the Court found a violation of Article 14 read in conjunction with the substantive aspect of Article 3. A similar reasoning was followed in *Antayev and Others v. Russia*, 2014, concerning the ill-treatment of Chechen suspects on the grounds of their ethnic origin. In *Lingurar v. Romania* [Committee], 2019, the manner in which the authorities conducted and justified a police raid showed that the police had exercised their powers in a discriminatory manner, expecting the applicants to be aggressive criminals due to their Roma ethnic origin. Consequently the Court found a violation of Article 14 in conjunction with Article 3 of the Convention under its substantive limb due to ethnic profiling.

## 2. Procedural aspect

228. Following the case of *Nachova and Others v. Bulgaria* [GC], 2005, the Court has found violations of the procedural aspect of Articles 2 or 3 read in conjunction with Article 14 in a number of cases, due to the failure of the domestic authorities to carry out an effective investigation of the discriminatory motives at the origin of the ill-treatment or death of the victims of discriminatory violence (*Bekos and Koutropoulos v. Greece*, 2005; *Turan Cakir v. Belgium*, 2009; *Abdu v. Bulgaria*, 2014; *Angelova and Iliev v. Bulgaria*, 2007; *Eremia v. the Republic of Moldova*, 2013; *Members of the Gldani Congregation of Jehovah's Witnesses and Others v. Georgia*, 2007; *Virabyan v. Armenia*, 2012; *Bălșan v. Romania*, 2017; *Talpis v. Italy*, 2017; *Škorjanec v. Croatia*, 2017).

229. The authorities' duty to investigate the existence of a possible link between discriminatory attitudes and any act of violence is an aspect of their procedural obligations arising under Articles 2 and 3 of the Convention, but may also be seen as implicit in their responsibilities under Article 14 (*Nachova and Others v. Bulgaria* [GC], 2005, § 161; *Bekos and Koutropoulos v. Greece*, 2005, § 70). Owing to the interplay between Article 14 and the substantive provisions, issues of discriminatory violence may fall to be examined under only one of the two provisions, 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.

230. Where there is suspicion that discriminatory attitudes induced a violent act, it is particularly important that the official investigation is pursued with vigour and impartiality, having regard to the need to reassert continuously society's condemnation of discriminatory hatred and to maintain the confidence of minorities in the ability of the authorities to protect them from the threat of discriminatory violence (*Nachova and Others v. Bulgaria* [GC], 2005, § 160).

231. In this respect, when investigating violent incidents and, in particular, deaths at the hands of State agents or private individuals, State authorities have the additional duty to take all reasonable steps to unmask any racist motive and to establish whether or not discriminatory hatred or prejudice may have played a role in the events (*Ognyanova and Choban v. Bulgaria*, 2006, § 145; *Turan Cakir v. Belgium*, 2009, § 77; *Abdu v. Bulgaria*, 2014, § 44; *Angelova and Iliev v. Bulgaria*, 2007, § 115; *Eremia v. the Republic of Moldova*, 2013, § 85; *Members of the Gldani Congregation of Jehovah's Witnesses and Others v. Georgia*, 2007, § 140; *Virabyan v. Armenia*, 2012, § 218). Failing to unmask discriminatory motives and treating discriminatory induced violence and brutality on an equal footing with cases that have no discriminatory 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 of the Convention (*Nachova and Others v. Bulgaria* [GC], 2005, § 160; *Stoica v. Romania*, 2008, § 119; *Virabyan v. Armenia*, 2012, § 218; *Šečić v. Croatia*, 2007, § 67).

232. Admittedly, proving discriminatory motives may often be extremely difficult in practice. The respondent State's obligation to investigate possible discriminatory overtones to a violent act is an obligation to use best endeavours and not absolute (*Nachova and Others v. Bulgaria* [GC], 2005, § 160; *Bekos and Koutropoulos v. Greece*, 2005, § 69; *Stoica v. Romania*, 2008, § 119). 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 discriminatory induced violence (*Nachova and Others v. Bulgaria* [GC], 2005, § 160; *Bekos and Koutropoulos v. Greece*, 2005, § 69; *Ognyanova and Choban v. Bulgaria*, 2006, § 145).

233. In *Makuchyan and Minasyan v. Azerbaijan and Hungary*<sup>\*</sup>, 2020, the Court was called upon to examine whether the failure by Azerbaijan to enforce a prison sentence, for a hate crime against two Armenians, which had been imposed abroad on an Azerbaijani military officer (the latter being, instead, glorified as a hero, promoted and awarded benefits upon his return to Azerbaijan), had been motivated by the ethnic origin of the victims. In the Court's view, the applicants had put forward sufficiently strong, clear and concordant inferences as to make a convincing *prima facie* case that the measures taken by the Azerbaijani authorities in respect of their officer, leading to his virtual impunity and, indeed, the glorification of his extremely cruel hate crime, had had a causal link to the Armenian ethnicity of his victims and had thus been racially motivated. For their part, the Azerbaijani Government had failed to disprove the applicants' arguable allegation of discrimination and the Court found a violation of Article 14 in conjunction with the procedural limb of Article 2 of the Convention.

## H. Access to justice

234. Under the Convention, the right of access to justice is guaranteed in the context of the right to a fair trial under Article 6 and by Article 13 (right to an effective remedy). The Court has dealt with cases relating to discrimination in access to justice under Article 14 in conjunction with Article 6 (*Sâmbata Bihor Greek Catholic Parish v. Romania*, 2010; *Mizzi v. Malta*, 2006).

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<sup>\*</sup> Not yet final.

235. In its case-law on the matter, the Court has found differences in treatment amounting to discrimination in access to justice when domestic courts based their decision on protected grounds under Article 14. The case of *Schuler-Zraggen v. Switzerland*, 1993, concerned the refusal to grant invalidity benefits based on the mere assumption that women gave up work when they gave birth to a child. The domestic court thus inferred that the applicant would have given up work even if she had not had health problems. The Court considered the reasoning of the domestic court to create a difference in treatment on grounds of sex. In *Paraskeva Todorova v. Bulgaria*, 2010, the domestic court refused to suspend the prison sentence of an accused of Roma origin on the ground that she belonged to a minority group for whom a suspended sentence was not a conviction and that such a sentence would not fulfil the function of general and specific prevention (§ 38). The Court found discrimination based on the applicant's ethnic origin.

236. The case of *Moldovan and Others v. Romania (no. 2)*, 2005, was brought by Roma villagers following the killing of fellow Roma and the destruction of their homes. The Court observed that the applicants' ethnicity appeared to have been decisive for the length and the result of the domestic proceedings – including repeated discriminatory remarks made by the authorities and their blank refusal to award non-pecuniary damages – and found a violation of Article 14 in conjunction with Article 6.

237. In *Anakomba Yula v. Belgium*, 2009, the applicant was refused legal aid for the purpose of contesting paternity of her child within a one-year time-limit because she had been unlawfully residing in Belgium. The applicant, who had already taken steps to regularise her situation, could not reasonably have been expected to wait until she had renewed her permit thereby risking the lapse of the one-year time-limit prescribed by domestic law for contesting paternity. The Court found a violation of Article 14 taken together with Article 6 given the specific circumstances of the case.

## I. Right to respect for home

238. In its case-law the Court found discrimination in relation to the right to respect for home in cases involving the destruction and damaging of people's houses based on their ethnicity (*Burlyya and Others v. Ukraine*, 2018; *Moldovan and Others v. Romania (no. 2)*, 2005). In both cases the authorities failed to protect or react in an appropriate way to the attacks on villages motivated by anti-Roma sentiment.

239. In *Buckley v. the United Kingdom*, 1996, the applicant was refused a planning permit which would have enabled her to live in a caravan on land she owned. She claimed that the national legislation on which the refusal had been based was discriminatory on the grounds of her Roma ethnic origin. Under Article 8, the Court interpreted the right to respect for home as including mobile homes such as caravans, even in a situation where they had been located illegally (§ 60). However, the Court did not consider the national legislation to be discriminatory as it did not appear that the applicant was at any time penalised or subjected to any detrimental treatment for attempting to follow a traditional Gypsy lifestyle (§ 88).

240. The Court found that the right to succeed to a deceased partner's tenancy also related to the applicant's right to respect for "home" within the meaning of Article 8 (*Karner v. Austria*, 2003, § 33; *Kozak v. Poland*, 2010, § 84). In both cases the applicants were homosexuals who had been refused the right to succeed to a tenancy after the death of their companions and the Court found discrimination on the ground of their sexual orientation.

## J. Property issues

241. The case-law of the Court concerning discrimination amounting to a violation of Article 14 taken together with Article 1 of Protocol No. 1 (protection of property) is extensive and diverse. As

already stated, some forms of social security such as benefit payments and pensions may fall within the ambit of Article 1 of Protocol No. 1 because they constitute “possessions” within the meaning of that provision.<sup>16</sup> A variety of other situations have also been examined by the Court.

242. The Court examined, under Article 14 in conjunction with Article 1 of Protocol No. 1, cases related to inheritance rights of children (*Mazurek v. France*, 2000; *Fabris v. France* [GC], 2013) as well as of spouses (*Molla Sali v. Greece* [GC], 2018) and to the right to receive a survivor’s pension (*Aldeguer Tomás v. Spain*, 2016). In *Aldeguer Tomás v. Spain*, 2016, the applicant complained that he had been discriminated against on the grounds of his sexual orientation in that, as the survivor of a *de facto* same-sex union, he had been denied a survivor’s pension following the death of his partner. The Court established that Article 14 in conjunction with Article 1 of Protocol No. 1 and Article 8 was applicable but did not find that it had been breached.

243. In *Saumier v. France*, 2017, the applicant claimed damages following her occupational illness which left her severely disabled. In order to determine the applicability of Article 14 in conjunction with Article 1 of Protocol No. 1, the Court established that the national legislation at stake amounted to rules of tort under which claims for compensation came into existence as soon as the damage occurred, that a claim of this nature “constituted an asset” and therefore amounted to “a possession” within the meaning of the first sentence of Article 1 of Protocol No. 1 (§§ 43-50). However, the Court held that there had been no difference in treatment between persons placed in similar or comparable situations in that case, including given the specificity of the employer-employee relationship which was a contractual relationship in which the employee was legally subordinate to the employer.

244. In its case-law the Court has also linked to Article 1 of Protocol No. 1:

- eligibility for tax relief on the purchase of a suitable property for a disabled child (*Guberina v. Croatia*, 2016);
- obligation of small landowners to become members of a hunting association, thus allowing hunting on their properties (*Chassagnou and Others v. France* [GC], 1999);
- decrease in nominal value of bonds in view of rescheduling the national debt without the consent of private investors (*Mamatas and Others v. Greece*, 2016);
- exclusion of landlords of controlled property leased out as bans clubs from a law allowing for the termination of the protected leases (*Bradshaw and Others v. Malta*, 2018); or
- alleged discrimination in provision of disability benefits to civilian as opposed to military beneficiaries (*Popović and Others v. Serbia*<sup>\*</sup>, 2020).

## K. Deprivation of liberty

245. In its case-law the Court protects the right to be free from arbitrary deprivation of liberty based on discriminatory grounds under Article 14 taken together with Article 5 (right to liberty and security) (*Aleksandr Aleksandrov v. Russia*, 2018; *Rangelov v. Germany*, 2012; *Clift v. the United Kingdom*, 2010), and the right to be free from inhuman or degrading treatment or punishment based on discriminatory grounds during detention under Article 14 in conjunction with Article 3 (*Martzaklis and Others v. Greece*, 2015; *X v. Turkey*, 2012).

246. In *Aleksandr Aleksandrov v. Russia*, 2018, the applicant was sentenced to a term of imprisonment by a court in Moscow which could have imposed a non-custodial sentence such as probation. However, the domestic court ordered his imprisonment on the sole ground that he had no permanent residence in Moscow. The applicant complained that he had been the victim of a

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16. See under “Social rights” above.

\* Not yet final

breach of Article 14 taken in conjunction with Article 5 on the ground of his place of residence. The Court found that the difference in treatment had no legitimate aim or objective and reasonable justification and amounted to discrimination.

247. The Court also found that there had been discrimination in breach of Article 14 in conjunction with Article 5 in a case concerning the refusal of relaxation of conditions of preventive detention due to the applicant's foreign nationality (*Rangelov v. Germany*, 2012) or the differences in procedural requirements for early release which depended on the length of the sentence (*Clift v. the United Kingdom*, 2010).

248. In *Khamtokhu and Aksenchik v. Russia* [GC], 2017, the applicants were adult men serving life sentences. They complained that they had been treated less favourably than female, juvenile and senior offenders found guilty of the same crimes because the latter could not be given a life sentence. Despite the fact that, in principle, matters of appropriate sentencing fall outside the scope of Article 5, the Court found the national legislation exempting certain categories of offender from life imprisonment to fall within the scope of Article 5 for the purposes of the applicability of Article 14. In this particular case, however, the Court found that there had been no violation of Article 14 on grounds of age or sex. As regards the exemption of juvenile offenders from life imprisonment, the Court held that it was consonant with the approach common to the legal systems of all the Contracting States and with international standards and that its purpose was evidently to facilitate the rehabilitation of juvenile delinquents. As regards women, the Court held that there was a public interest to exempt female offenders from life imprisonment by way of a general rule due to the needs of women for protection against gender-based violence, abuse and sexual harassment in the prison environment, as well as the needs for protection of pregnancy and motherhood.

249. The Court found the treatment of prisoners to amount to discrimination under Article 14 taken together with Article 3 in several cases. In *Martzaklis and Others v. Greece*, 2015, the applicants were HIV-positive prisoners who were held in poor physical and sanitary conditions without adequate treatment in a prison psychiatric wing. The Court held that the placement in isolation to prevent the spread of disease had not been necessary, because the prisoners were HIV-positive and had not developed AIDS, and found a violation of Article 3 in conjunction with Article 14 of the Convention. Conversely, in *Dikaïou and Others v. Greece*<sup>\*</sup>, the Court found no violation of Article 14 taken in conjunction with Article 3 of the Convention, where HIV positive applicants had been put together in one cell within an ordinary prison wing. In *X v. Turkey*, 2012, the applicant was a homosexual prisoner who had been held in total isolation for more than eight months in order to protect him from fellow prisoners. The Court was not convinced that the need to take safety measures to protect the applicant's physical well-being was the primary reason for his total exclusion from prison life. The main reason for the measure was his homosexuality. As a result the Court found that the applicant had been discriminated against on grounds of his sexual orientation.

250. The case-law of the Court also reveals the obligation for States to conduct appropriate and effective investigations in cases of alleged ill-treatment of persons in custody whether politically (*Virabyan v. Armenia*, 2012) or racially motivated (*Bekos and Koutropoulos v. Greece*, 2005).

251. In some cases, however, the Court examined the situation under the substantive Article and did not deem it necessary to examine it separately under Article 14 of the Convention. The case of *D.G. v. Ireland*, 2002, for example, concerned the detention of a minor in a penal institution lacking appropriate facilities. The Court found a violation of Article 5 but, in so far as the applicant compared his situation to that of other minors, it considered that no separate issue arose under Article 14 of the Convention. In *Stasi v. France*, 2011, the applicant complained that he had been ill-treated in prison because of his homosexuality and that the authorities had not taken the necessary measures to protect him. The Court found that the authorities had taken all effective measures to protect him

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<sup>\*</sup> Not final yet.

from physical harm during detention and that there had not been a breach of Article 3 without separately examining his complaint under Article 14.

## List of cited cases

The case-law cited in this Guide refers to judgments or decisions delivered by the Court and to decisions or reports of the European Commission of Human Rights (“the Commission”).

Unless otherwise indicated, all references are to a judgment on the merits delivered by a Chamber of the Court. The abbreviation “(dec.)” indicates that the citation is of a decision of the Court and “[GC]” that the case was heard by the Grand Chamber.

Chamber judgments that are not final within the meaning of Article 44 of the Convention are marked with an asterisk (\*) in the list below. Article 44 § 2 of the Convention provides: “The judgment of a Chamber shall become final (a) when the parties declare that they will not request that the case be referred to the Grand Chamber; or (b) three months after the date of the judgment, if reference of the case to the Grand Chamber has not been requested; or (c) when the panel of the Grand Chamber rejects the request to refer under Article 43”. In cases where a request for referral is accepted by the Grand Chamber panel, the Chamber judgment does not become final and thus has no legal effect; it is the subsequent Grand Chamber judgment that becomes final.

The hyperlinks to the cases cited in the electronic version of the Guide are directed to the HUDOC database (<http://hudoc.echr.coe.int>) which provides access to the case-law of the Court (Grand Chamber, Chamber and Committee judgments and decisions, communicated cases, advisory opinions and legal summaries from the Case-Law Information Note) and of the Commission (decisions and reports), and to the resolutions of the Committee of Ministers.

The Court delivers its judgments and decisions in English and/or French, its two official languages. HUDOC also contains translations of many important cases into more than thirty non-official languages, and links to around one hundred online case-law collections produced by third parties. All the language versions available for cited cases are accessible via the “Language versions” tab in the HUDOC database, a tab which can be found after you click on the case hyperlink.

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