

IN THE COURT OF SESSION

Court Ref: P578/22

LIST OF AUTHORTIES FOR THE APPLICANT

SEX MATTERS LIMITED, a company limited by guarantee, incorporated under the companies acts (company number 12974690) and having its registered office at 63-66 Hatton Garden, London EC1N 8LE

INTERVENER

in the reclaiming motion of the decision of the Lord Ordinary in the petition of

FOR WOMEN SCOTLAND LIMITED, a company incorporated under the Companies Act and registered in Scotland with Company number SC669393 and with registered offices at 5 South Charlotte Street, Edinburgh EH2 4AN

PETITIONER AND RECLAIMER

for

Judicial Review of the revised statutory guidance produced by the Scottish Ministers under Section 7 of the Gender Representation on Public Boards (Scotland) Act 2018

1. *Fair Play for Women v Registrar General for Scotland* 2022 SC 199
2. *Goodwin v UK* (2002) 35 EHRR 18
3. *Bellinger v Bellinger* [2003] 2 AC 467
4. *Billy Graham Evangelistic Association v Scottish Event Campus* 2022 SLT (Sh Ct) 219
5. *Wieser v Austria* (Case 2293/03)
6. *Branko Tomašić and Others v. Croatia*, 2009 (case 46598/06)
7. *Opuz v. Turkey*, 2002 (case 33401/02)
8. *A and B v. Georgia*, 2022 (case 73975/16)
9. Monaghan on Equality Law (2nd ed), provides at 4.3 §5.134 and §5.280

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APPLICATION FOR LEAVE TO INTERVENE IN THE PUBLIC INTEREST

SEX MATTERS LIMITED, a company limited by guarantee, incorporated under the companies acts (company number 12974690) and having its registered office at 63-66 Hatton Garden, London, EC1N 8LE

APPLICANT

in the reclaiming motion of the decision of the Lord Ordinary in the petition of

FOR WOMEN SCOTLAND LIMITED, a company incorporated under the Companies Act and registered in Scotland with Company number SC669393 and with registered offices at 5 South Charlotte Street, Edinburgh, EH2 4AN

PETITIONER

for

Judicial Review of the revised statutory guidance produced by the Scottish Ministers under Section 7 of the Gender Representation on Public Boards (Scotland) Act 2018

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FAIR PLAY FOR WOMEN LTD v REGISTRAR GENERAL FOR SCOTLAND

No 16
24 February 2022
[2022] CSIH 7

SECOND DIVISION
Lord Sandison

FAIR PLAY FOR WOMEN LTD, Petitioners and Reclaimers—
GJB Moynihan QC, D Welsh
REGISTRAR GENERAL FOR SCOTLAND, Respondent—DB Ross QC, P Reid
SCOTTISH MINISTERS, Respondents—DB Ross QC, P Reid

Administrative law – Judicial review – Legality – Census – Guidance issued in connection with census question – Guidance providing that census respondents could state different sex from that specified on birth certificate – Whether guidance unlawful by reason of sanctioning or approving unlawful answer – Census Act 1920 (cap 41), sch, para 1

Words and phrases – “sex” – Whether word “sex” in the context of the census to be given strict definition based on biological sex – Census Act 1920 (cap 41), sch, para 1

Section 1(1)(c)(ii) of the Census Act 1920 (cap 41) (‘the 1920 Act’) provides that no particulars shall be required to be stated in census returns other than particulars with respect to such matters as are mentioned in the schedule to the Act. Paragraph 1 of the schedule provides that the following are particulars: “Names, sex, age”. Section 8(1)(d) provides that it shall be an offence to provide a false answer to any census question.

The national census held in Scotland in 2022 required respondents to answer the question “What is your sex?” by choosing one or other of binary “Female” or “Male” options. The census was taken by the National Records of Scotland on behalf of the first respondent. The National Records of Scotland issued guidance on the census. The guidance addressed the “What is your sex” question. It stated, “If you are transgender the answer you give can be different from what is on your birth certificate. You do not need a Gender Recognition Certificate (GRC).”

The petitioner brought proceedings for judicial review of the guidance. The Lord Ordinary refused the petition. The petitioner reclaimed. The petitioner contended that the sex question could be answered lawfully only by reference to the sex recorded on a respondent’s birth certificate or gender recognition certificate. As such, the guidance sanctioned or approved an unlawful answer to the sex question. The Registrar General for Scotland contended that the words “sex” and “gender” had no universal or invariable meaning. An answer which was contrary to a respondent’s birth certificate which was made on reasonable grounds and in good faith would not be false. A rigid interpretation of the 1920 Act was not consistent with the purpose of the legislation.

Held that there was no universal definition of the word “sex” which instead required to be given its normal and ordinary meaning, with a rigid definition based on biological sex which might be appropriate where matters of status and rights were at issue not appropriate in the context of the census, with the result that the guidance sanctioned a lawful approach to the sex question (paras 20–23); and reclaiming motion *refused*.

Observed that the 1920 Act was introduced with the intention that it should apply to all future censuses with the result that elements of it might have become more nuanced over time, and that there was accordingly force in the contention that the 1920 Act should be treated as an instrument that was always speaking (paras 23, 24).

Bellinger v Bellinger [2003] 2 AC 467 and *R (Elan-Cane) v Secretary of State for the Home Department* [2022] 2 WLR 133 considered.

FAIR PLAY FOR WOMEN LTD presented a petition under the judicial review procedure in the Court of Session seeking to bring under judicial review guidance

issued by the National Records of Scotland in connection with the 2022 census. The petitioners sought reduction of the guidance. The petition and answers called before the Lord Ordinary (Sandison) for a hearing. At advising, on 17 February 2022, the Lord Ordinary refused the petition ([2022] CSOH 20; 2022 SLT 300). The petitioners reclaimed.

Cases referred to:

Bellinger v Bellinger [2003] UKHL 21; [2003] 2 AC 467; [2003] 2 WLR 1174; [2003] 2 All ER 593; [2003] 1 FLR 1043; [2003] 2 FCR 1; [2003] HRLR 22; [2003] UKHRR 679; 14 BHRC 127; 72 BMLR 147; [2003] ACD 74; [2003] Fam Law 485; 153 NLJ 594; 147 SJLB 472; *The Independent*, 15 April 2003; *The Times*, 11 April 2003

Chief Constable, West Yorkshire Police v A (No 2) [2004] UKHL 21; [2005] 1 AC 51; [2004] 2 WLR 1209; [2004] 3 All ER 145; [2004] 2 CMLR 37; [2004] Eu LR 841; [2004] ICR 806; [2004] IRLR 573; [2004] 2 FCR 160; [2004] HRLR 25; [2004] UKHRR 694; 17 BHRC 585; 101 (20) LSG 34; 154 NLJ 734; 148 SJLB 572; *The Times*, 7 May 2004

R v Tan [1983] QB 1053; [1983] 3 WLR 361; [1983] 2 All ER 12; 76 Cr App R 300; 147 JP 257; [1983] Crim LR 404; 127 SJ 390

R (on the application of Elan-Cane) v Secretary of State for the Home Department [2021] UKSC 56; [2022] 2 WLR 133; [2022] 2 All ER 1; [2022] HRLR 4; *The Times*, 12 January 2022

R (on the application of Fair Play for Women Ltd v UK Statistics Authority and anr) [2021] EWHC 940

R (on the application of McConnell) v Registrar General for England and Wales [2020] EWCA Civ 559; [2021] Fam 77; [2020] 3 WLR 683; [2020] 2 All ER 813; [2020] 2 FLR 366; [2020] 3 FCR 387; [2020] HRLR 13; 173 BMLR 1

R (on the application of N) v Walsall Metropolitan Borough Council [2014] EWHC 1918; [2015] 1 All ER 165; [2014] PTSR 1356; [2014] COPLR 514; (2015) 18 CCL Rep 579; [2014] WTLR 1649; [2014] ACD 129

Textbooks etc referred to:

National Records of Scotland, *Question Help — Individual Questions 1 to 8: What is your sex?* (National Records of Scotland, Edinburgh, 2 March 2022) (Online: <https://www.census.gov.scot/help/questionnaire-guidance/3> (4 May 2022))

Office for National Statistics, *Paper Questions Help — Individual Questions 1 to 10: What is your sex?* (Office for National Statistics, London, July 2021) (Online: <https://census.gov.uk/help/how-to-answer-questions/paper-questions-help/what-is-your-sex> (4 May 2022))

Scottish Government, *Census (Amendment) (Scotland) Bill: Policy memorandum* (SP Bill 40–PM) (Scottish Government, Edinburgh, October 2018) (Online: http://archive2021.parliament.scot/S5_Bills/CensusScotlandBill/SPBill40PMS052018.pdf (4 May 2022))

Shorter Oxford English Dictionary (6th Stevenson ed, Oxford University Press, Oxford, 2007)

The cause called before the Second Division, comprising the Lord Justice Clerk (Dorrian), Lord Malcolm and Lord Boyd of Duncansby, for a hearing on the summer roll, on 23 February 2022.

At advising, on 24 February 2022, the opinion of the Court was delivered by the Lord Justice Clerk (Dorrian)—

OPINION OF THE COURT—

Introduction

[1] This reclaiming motion (appeal) arises out of a petition for judicial review of official guidance issued by the National Records of Scotland in connection with the

completion of returns for a national census to be taken in Scotland in March 2022. The regulations governing the form of questions to be asked include a question 'What is your sex' which the respondent must answer by means of a binary choice 'Female' or 'Male'. The guidance suggested that some respondents could answer by selecting the sex other than that which appeared on their birth or gender recognition certificate ('GRC'). The reclaimers maintain that the guidance in respect of this question is unlawful and should be reduced. In essence the issue turned on whether in responding to the question an individual is legally bound to answer according to the sex stated on their birth certificate or GRC.

Background

Scotland

[2] As the Lord Ordinary explained, modern censuses take place in accordance with a framework established by the Census Act 1920 (10 & 11 Geo 5 cap 41). The Act permits subordinate legislation to be made directing that a census shall be taken, and specifying the particulars to be stated in the census returns. However, the only particulars which may be specified are those with respect to matters mentioned in the schedule to the Act. From its inception the itemised particulars listed in the schedule included, in para 1, 'Names, sex, age'. The 1920 Act contains no definition of the word 'sex'. Section 8 of the Act provides for penalties to be applied against those who fail to comply with the census, or who make a false declaration. The maximum penalty is a fine in the sum of £1,000. No person, however, will be penalised for refusing or neglecting to state their particulars with respect to the transgender status question (sec 8(1A)(b)).

[3] In October 2018 the Census (Amendment) (Scotland) Bill (SP Bill 40) proposed to amend the 1920 Act. As originally introduced the proposals were to amend para 1 of the schedule by adding after the word 'sex' the words '(including gender identity)'; and to introduce a new para 5B, 'Sexual orientation'. The policy memorandum (SP Bill 40-PM) accompanying the Bill made it clear that the Scottish Ministers considered that the words 'gender identity' were already covered by the reference in the schedule to 'sex'. The principal purpose of the Bill was identified as being to ensure that answering the additional questions would be voluntary and that no penalty would follow a failure to do so. The committee of Parliament which considered the Bill heard evidence about the proposed amendment from a wide variety of interested parties. As the Lord Ordinary noted (para 5):

'It became apparent that there was widespread concern that the addition of "(including gender identity)" after "sex" in the schedule to the 1920 Act risked adding confusion to an issue which many already considered to be far from clear or uncontroversial.'

The Equality Network, responding to consultation on the Bill, suggested that introducing gender identity by means of para 1 of the schedule to the Act created confusion. It further suggested that the proposed amendment could be replaced by the inclusion of a separate para 5C in respect of transgender status and history. The committee endorsed this proposal. In due course the minister proposed the relevant changes to the Bill. The end result was the Census (Amendment) (Scotland) Act 2019 (asp 12) which amended the 1920 Act to introduce para 5B, 'Transgender status and history', and para 5C, 'Sexual orientation'.

[4] The precise questions to be asked in the census are set out in schedules to the Census (Scotland) Regulations 2020 (SSI 2020/143). The relevant questions are:

(a) 'What is your sex?' with a choice to select a box marked 'Male' or a box marked 'Female'. Instructions for the respondent in respect of this question are stated as follows:

'The respondent is required to select one option only.

A voluntary question about trans status or history will follow if the respondent is aged 16 or over.'

(b) 'Do you consider yourself to be trans, or have a trans history?' There are again two boxes available, one marked 'No', and the other marked 'Yes, please describe your trans status (for example, non-binary, trans man, trans woman)'. The instructions for the respondent in respect of this question state:

'This question is voluntary.

Trans is a term used to describe people whose gender is not the same as the sex they were registered at birth.

If the respondent chooses to respond to this question they are required to select one option only.

If the respondent selects "yes" to this question they may type how they describe their trans status in the box provided, for example, non-binary, trans man, trans woman.'

Guidance

[5] The guidance issued by National Records of Scotland in relation to the question 'What is your sex', states:

'How do I answer this question?

If you are transgender the answer you give can be different from what is on your birth certificate. You do not need a Gender Recognition Certificate (GRC).

If you are non-binary or you are not sure how to answer, you could use the sex registered on your official documents, such as your passport.

A voluntary question about trans status or history will follow if you are aged 16 or over. You can respond as non-binary in that question.'

For the 2011 census formal guidance to assist in answering the sex question was published online, as follows:

'More questions?

I am transgender or transsexual. Which option should I select? If you are transgender or transsexual, please select the option for the sex that you identify yourself as. You can select either "male" or "female," whichever you believe is correct, irrespective of the details recorded on your birth certificate. You do not need to have a Gender Recognition Certificate.'

England and Wales

[6] The 1920 Act also provides the framework under which censuses in England and Wales proceed, and the particulars which may be required to be stated, again set out in the schedule to the Act. Paragraph 1 specifying 'Names, sex, age', applies equally in that jurisdiction. The schedule has also been amended for that

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jurisdiction, in connection with the census taken there in 2021. The Census (Return Particulars and Removal of Penalties) Act 2019 (cap 28) added 'Sexual orientation' and 'Gender identity' to the list of particulars, with the proviso that there would be no penalty for failing or declining to answer. The sex question was phrased in the same binary terms as the proposed question in the Scottish census. The UK Statistics Authority produced guidance to assist respondents in answering that question, as follows:

'Please select either "Female" or "Male".'

If you are considering how to answer, use the sex recorded on one of your legal documents, such as a birth certificate, gender recognition certificate, or passport.

If you are aged 16 or over, there is a later voluntary question on gender identity. This asks if the gender you identify with is different from your sex registered at birth. If it is different, you can then record your gender identity.'

[7] The petitioners in the present case challenged that guidance on the basis that it allowed the use of a document other than a birth certificate or GRC, such as a passport, as the basis for the respondent's answer. The sex recorded on a document such as a passport would not necessarily reflect the person's sex recognised by law and shown on a birth certificate or GRC. The court (*R (Fair Play for Women Ltd v UK Statistics Authority and anr)*) held that there was 'a strongly-arguable case' that there was a clear distinction in the legislation between particulars about a person's sex and particulars about a person's gender identity. The former related to the sex recognised by law, not as perceived by the individual respondent. The court indicated that it would be appropriate for the guidance to refer only to birth certificates or GRCs. The UK Statistics Authority agreed to publish its guidance in that form, and subsequently the court issued a consent order declaring that 'sex' in the schedule to the 1920 Act and the subordinate legislation in England and Wales meant sex as recorded on a birth certificate or GRC.

Lord Ordinary's decision ([2022] CSOH 20)

[8] The Lord Ordinary noted that it was agreed that if the guidance issued by National Records of Scotland permitted, sanctioned, approved or authorised unlawful conduct by those consulting it the court could intervene. That really turned, as he identified in his opinion (para 38), on

'whether, absent possession of a GRC, a . . . person not sure how to answer the sex question would be acting lawfully by answering the question other than by reference to the sex recorded on that person's birth certificate.'

The nub of the petitioners' argument was that as a matter of law sex was determined for all legal purposes as that registered at birth, and that the only circumstances in which a person could answer the sex question differently would be where they had been granted a GRC. The Lord Ordinary noted that facilities were available for important documents such as driving licences or passports to be issued by reference to a person's lived sex, which would be difficult to reconcile with any general legal rule that a person's sex can only be considered to be that recorded on a birth certificate. The Lord Ordinary could not identify such a general rule from the authorities with the result that he could not conclude that the guidance permitted, authorised, sanctioned or approved unlawful conduct.

[9] The Lord Ordinary considered (para 41) that the core issue was not so much what the meaning of 'sex' in the 1920 Act might be, but rather

'the related but distinct issue of what a false answer to the question actually posed in accordance with the primary and subordinate legislation might be, and thence whether the guidance complained of encourages (in the senses already set out) such a false answer.'

He noted that numerous questions on the census which are compulsory and could attract a penalty for a failure to answer or for a false answer contain a degree of subjectivity, such as questions about health. At para 42 he noted that a person registered female at birth and never having had cause for concern at that registration may well be answering falsely if she ticked 'male'; but it was not to him obvious that a person registered female at birth, without a GRC, but who has come to live to all practical intents and purposes as a male, perhaps with a greater or lesser degree of pharmaceutical or surgical intervention, would be providing a false answer by ticking the 'male' box.

Submissions

Reclaimers

[10] Senior counsel for the reclaimers identified the issue thus: Does the guidance sanction or approve an unlawful answer to the sex question in the census? The answer to that was a question of statutory interpretation. He acknowledged that sex and gender are interchangeable to a degree, but that interchangeability only worked within certain limits, largely according to the context in which the words were used. The default position, however, was that sex was a binary issue, whereas gender was non-binary. This was apparent from the dictionary definitions of the words, taken from the *Shorter Oxford English Dictionary*. The primary definition of sex was:

'Either of the two main divisions (male and female) into which organisms are placed on the basis of their reproductive functions or capacities'.

That given for gender was:

'The state of being male, female, or neuter; sex; the members of one or other sex. Now chiefly *colloq.* or *euphem.*'

[11] The guidance, by allowing a self-selected answer to the sex question conflated a binary with a non-binary issue, yet offered only the possibility of a binary answer. That binary question, as an expression of gender, could not be answered honestly by a non-gendered person such as the appellant in *R (Elan-Cane) v Secretary of State for the Home Department*, who would select neither 'male' nor 'female', yet if they did not answer they committed an offence. The Scottish Ministers said in terms during stage 1 of the Bill that they did not intend to conflate sex and gender, yet that is the effect of what they have done, despite the fact that both questions seem to reflect a distinction between sex and gender, recognising that gender may not be the sex registered at birth.

[12] Sex as a discriminator was used in a variety of fields of law. The default presumption was that where sex was mentioned it was always biologically determined. It was a term with legal consequence at the level of individual status

but also at a population level as a vital component of the approach to discrimination between the two sexes. In law the natural meaning of sex implied the biologically based distinction between men and women. The law could change this, by statute as under the Gender Recognition Act 2004 (cap 7) ('GRA'), or by court decision as in *Chief Constable, West Yorkshire Police v A (No 2)*, but where it did so it did so clearly and directly. Once a person possessed a GRC they had the acquired gender for certain, but not all, purposes. The GRA carried through restrictions in relation to certain matters relating to marriage, succession, family, and offences which could only be committed by one or other sex.

[13] It is true that the 1920 Act provides no definition of what is meant in that context by 'sex', but some words are so basic they defy the need for definition. Historically there was no definition of the term since, until recent discourse, the meaning was readily and naturally comprehended as a binary term admitting of no understanding but a biological one. It is only in recent times where gender is capable of being changed operatively that this has become a matter of debate.

[14] The law does not allow self-identification. That is the default position as seen by the conditions imposed in the GRA for obtaining a GRC. A person may obtain a passport or driving licence in their non-birth gender but that is not exclusively as a result of self-identification. For example, to obtain a passport on such conditions it is necessary first to prove identity by submitting the individual's birth certificate.

Respondents

[15] It was important to understand what the purpose of the census is. It is to collect ten-yearly data from the population for strategic planning, allocation of resources, and to get an understanding of the country's population, including where and how it lives at the date of the census. It was equally important to recognise what the census is not about: it does not confer, remove or qualify any rights or obligations of those who responded to it.

[16] There was no universal meaning or invariable use of the words sex and gender. It was now recognised and accepted that a person could change their sex: that could be done formally, by obtaining a GRC. A person may also informally change the sex in which they live their lives, and to an extent have that formally recognised by the issuing of a passport or other document. *Bellinger v Bellinger* was a case which turned on its specific facts, relating to the capacity to marry. Marriage was a status which had certain recognised legal consequences.

[17] The reclaimers' argument hinges on the suggestion that a person giving an answer other than per a birth certificate or GRC would be giving a false answer and thus committing an offence. An answer different to that on a birth certificate, made on reasonable grounds and in good faith would not be false. The question was formulated in the present tense. To interpret the question as meaning 'what is your sex on census day' was consistent with the purpose of the question and avoided both the risk of penalisation and the narrow approach urged by the reclaimers.

[18] The 1920 Act is the framework within which censuses are conducted. Prior to that Act, Parliament made specific provision every ten years or so. The intention of introducing the Act was to provide a framework under which future censuses could be carried out without resorting to fresh legislation every ten years. It was an Act which was intended to evolve with the times, and a rigid and unaccommodating definition urged by the reclaimers should be rejected. Consistent with the 1920 Act

and reflective of respect for and recognition of the status of trans people, the sex question should be capable of being answered in the way suggested by the guidance.

Analysis and decision

[19] It is a matter of agreement that before the court could interfere with the guidance issued by National Records of Scotland it would need to be satisfied that the guidance sanctioned or approved unlawful conduct by those consulting it. The unlawful act which the guidance was said to authorise in this case was that of falsely answering the sex question. It was asserted that were a transgender individual not in possession of a GRC to answer the question by reference to the sex which does not appear on their birth certificate, that would be a false answer and would constitute an unlawful act. Whether this would be so hinged on whether the reclaimers were right in submitting that 'sex' as a particular which requires to be stated in a census return in terms of the schedule to the 1920 Act can only mean sex as recorded on a birth certificate or GRC. This proposition rested largely on the submission that for the purposes of statutory construction there was a default definition of sex which involved the adoption of a binary biological categorisation of male and female.

[20] In our opinion the Lord Ordinary was correct to hold that there is no universal legal definition of the word 'sex' which applied by default, and which, in particular, required to be adopted for the purposes of the 1920 Act. There is no definition within the Act itself, and therefore the word 'sex' in para 1 of the schedule must be given the normal and ordinary meaning which its context dictates. However, as senior counsel for the reclaimers demonstrated in his opening submissions by reference to different meanings which might be born by the words sex, gender and intercourse depending on context, the meaning of the word 'sex' is strongly context dependent.

[21] There are some contexts in which a rigid definition based on biological sex must be adopted. *Bellinger v Bellinger* was perhaps a classic example. It is not however an authority for the proposition advanced by the reclaimers. It was not concerned with the general question of whether there was a default definition to be applied to the word 'sex' but to the correct construction of a particular statutory provision which required two parties to be 'respectively male and female'. Moreover, it arose in the specific context of capacity to marry, and validity of marriage. As was noted in *Chief Constable, West Yorkshire Police v A (No 2)* (Lady Hale, para 51):

'Marriage can readily be regarded as a special case . . . marriage is still a status good against the world in which clarity and consistency are vital.'

As senior counsel for the respondents submitted, marriage is a legal status which affects rights in other fields such as immigration, social security, pensions, and housing. There are other circumstances in which matters affecting status, or important rights, in particular the rights of others, may demand a rigid definition to be applied to the term 'sex' of the kind proposed by the reclaimers. Examples, include *R v Tan*, where being a male was an essential prerequisite for the commission of a particular criminal offence. Some of these limitations have been carried over to apply even where a person has successfully obtained a GRC under

the GRA. Examples may be seen in secs 9 and 12 of that Act, as illustrated in *R (McConnell) v Registrar General for England and Wales*. The point which these examples all have in common is that they concern status or important rights.

[22] There are other contexts in which a rigid definition based on biological sex is not appropriate. There are many circumstances in which the words 'sex' and 'gender' have been used synonymously and interchangeably. This was a matter explored by Lord Reed in *R (Elan-Cane) v Secretary of State for the Home Department*. The case concerned a non-gendered biologically female person who had applied for, and been refused, a passport which included a non-gendered marker ('X') for the holder's gender. In explaining (para 52) that there was no legislation in the United Kingdom which recognised non-gendered individuals, and that gender required to be stated under reference to 'male' or 'female' the court several times observed that public bodies and legislation frequently used the terms 'gender' and 'sex' interchangeably. This, of course, also reflects popular and common usage of the terms, synonymously, as was recognised by senior counsel for the reclaimers. In fact even the *Shorter Oxford English Dictionary* definitions to which we were referred reflect that popular usage: that relating to sex, quoted above (see para 10), goes on: '4 The difference between male and female, esp. in humans. Now *spec.* the sum of the physiological and behavioural characteristics distinguishing members of either sex', and for gender: 'b Sex as expressed by social or cultural distinctions'. So the definition of sex contains reference to behavioural characteristics, not merely biological sex; while that of gender contains a reference to sex.

[23] It is at this point pertinent to recall the purpose of a census, as referred to by senior counsel for the respondents. Its primary purpose is to gain information about the population and it does that as a 'snapshot' exercise across the country on one particular day. The census form is, perhaps more than any other official document, a public facing one, seeking responses from the populace about a whole raft of things, some of which may, as the Lord Ordinary noted, contain to a greater or lesser extent subjective elements. It is to be expected that the language used, and the meaning to be attributed to the words used, are to be interpreted according to their popular and common meaning, not according to a specialist, restricted definition which may be adopted where matters of status and rights may be in issue. This applies not only to the census form but to the identification of the relevant particulars which may be required under the 1920 Act: the legislation was drafted for the purpose of enabling these particulars to be asked of the general population in a census and there is no reason to apply anything other than an ordinary, everyday meaning to the words used. We see no reason to think that the fact that it may be necessary to apply a biological definition of sex in prescribed circumstances involving status, proof of identity or other important rights mandates that a similar approach must be adopted when the issue does not involve these matters. We do not think that the question 'What is your sex' should be interpreted as meaning 'What is the sex registered on your birth certificate (or GRC)'. We recognise that in 1920 gender and sex would probably have been understood by most people in rather more simplistic terms than nowadays, but we have no reason to think that the term sex would not, even then, have been treated as synonymous with gender. In this connection in any event we consider that there was force in the submissions for the respondents that the 1920 Act has to be treated as an instrument which is always speaking. Senior counsel for the respondents referred to *R (N) v Walsall Metropolitan Borough Council*. The following passage (para 45), from Leggatt J (as he then was) has particular relevance:

‘It is not difficult to see why an updating construction of legislation is generally to be preferred. Legislation is not and could not be constantly re-enacted and is generally expected to remain in place indefinitely, until it is repealed, for what may be a long period of time. An inevitable corollary of this is that the circumstances in which a law has to be applied may differ significantly from those which existed when the law was made — as a result of changes in technology or in society or in other conditions. This is something which the legislature may be taken to have had in contemplation when the law was made. If the question is asked “is it reasonable to suppose that the legislature intended a court applying the law in the future to ignore such changes and to act as if the world had remained static since the legislation was enacted?” the answer must generally be “no”. A “historical” approach of that kind would usually be perverse and would defeat the purpose of the legislation.’

[24] Given that the 1920 Act was introduced with the intention that it should apply to all future censuses, a purpose it has now served for over a hundred years, it is obvious that the meaning to be attached to certain elements of it may be more nuanced in 2022 than in 1920. Whether or not the words — and to some extent concepts — of sex and gender were used interchangeably and synonymously in 1920 it is clear that in popular usage they have become intertwined in that sense.

[25] Senior counsel for the reclaimers relied strongly on *R (Fair Play for Women Ltd v UK Statistics Authority and anr*, but, in agreement with the Lord Ordinary we do not derive assistance from that case. It was a decision made only on the basis of the existence of a *prima facie* case, and the matter was disposed of by concession. The *prima facie* arguments were not tested in developed argument. Nor do we see it as a problem that there may be a divergence between jurisdictions in this respect. There are already divergences in the specification of particulars which may be required, as seen in para 5 of the schedule to the 1920 Act, and there is no requirement that the questions posed for shared particulars be expressed in the same manner in each jurisdiction.

[26] Given the tight timescale before the start of the census and the consequential need for an expedited decision, we have not addressed in detail all the matters addressed in the opinion of the Lord Ordinary, however we endorse all of his reasoning. For these reasons the reclaiming motion is refused.

THE COURT refused the reclaiming motion.

*Balfour and Manson LLP – Scottish Government Legal Directorate –
Scottish Government Legal Directorate*



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

CASE OF CHRISTINE GOODWIN v. THE UNITED KINGDOM

(Application no. 28957/95)

JUDGMENT

STRASBOURG

11 July 2002

This judgment is final but may be subject to editorial revision.

In the case of Christine Goodwin v. the United Kingdom,

The European Court of Human Rights, sitting as a Grand Chamber composed of the following judges:

Mr L. WILDHABER, *President*,

Mr J.-P. COSTA,

Sir Nicolas BRATZA,

Mrs E. PALM,

Mr L. CAFLISCH,

Mr R. TÜRMESEN,

Mrs F. TULKENS,

Mr K. JUNGWIERT,

Mr M. FISCHBACH,

Mr V. BUTKEVYCH,

Mrs N. VAJIĆ,

Mr J. HEDIGAN,

Mrs H.S. GREVE,

Mr A.B. BAKA,

Mr K. TRAJA,

Mr M. UGREKHELIDZE,

Mrs A. MULARONI, *judges*,

and also of Mr P. J. MAHONEY, *Registrar*,

Having deliberated in private on 20 March and 3 July 2002,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case originated in an application (no. 28957/95) against the United Kingdom of Great Britain and Northern Ireland lodged with the European Commission of Human Rights (“the Commission”) under former Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by a United Kingdom national, Ms Christine Goodwin (“the applicant”), on 5 June 1995.

2. The applicant, who had been granted legal aid, was represented by Bindman & Partners, solicitors practising in London. The United Kingdom Government (“the Government”) were represented by their Agent, Mr D. Walton of the Foreign and Commonwealth Office, London.

3. The applicant alleged violations of Articles 8, 12, 13 and 14 of the Convention in respect of the legal status of transsexuals in the United Kingdom and particularly their treatment in the sphere of employment, social security, pensions and marriage.

4. The application was declared admissible by the Commission on 1 December 1997 and transmitted to the Court on 1 November 1999 in accordance with Article 5 § 3, second sentence, of Protocol No. 11 to the Convention, the Commission not having completed its examination of the case by that date.

5. The application was allocated to the Third Section of the Court (Rule 52 § 1 of the Rules of Court).

6. The applicant and the Government each filed observations on the merits (Rule 59 § 1).

7. On 11 September 2001, a Chamber of that Section, composed of the following judges: Mr J.-P. Costa, Mr W. Fuhrmann, Mr P. Kūris, Mrs F. Tulkens, Mr K. Jungwiert, Sir Nicolas Bratza and Mr K. Traja, and also of Mrs S. Dollé, Section Registrar, relinquished jurisdiction in favour of the Grand Chamber, neither of the parties having objected to relinquishment (Article 30 of the Convention and Rule 72).

8. The composition of the Grand Chamber was determined according to the provisions of Article 27 §§ 2 and 3 of the Convention and Rule 24 of the Rules of Court. The President of the Court decided that in the interests of the proper administration of justice, the case should be assigned to the Grand Chamber that had been constituted to hear the case of *I. v. the United Kingdom* (application no. 25680/94) (Rules 24, 43 § 2 and 71).

9. The applicant and the Government each filed a memorial on the merits. In addition, third-party comments were received from Liberty, which had been given leave by the President to intervene in the written procedure (Article 36 § 2 of the Convention and Rule 61 § 3).

10. A hearing in this case and the case of *I. v. the United Kingdom* (no. 25680/94) took place in public in the Human Rights Building, Strasbourg, on 20 March 2002 (Rule 59 § 2).

There appeared before the Court:

(a) *for the Government*

Mr D. WALTON,	<i>Agent,</i>
Mr RABINDER SINGH,	<i>Counsel,</i>
Mr J. STRACHAN,	<i>Counsel,</i>
Mr C. LLOYD,	
Ms A. POWICK,	
Ms S. EISA,	<i>Advisers;</i>

(b) *for the applicant*

Ms L. COX, Q.C.,	<i>Counsel,</i>
Mr T. EICKE,	<i>Counsel,</i>
Ms J. SOHRAB,	<i>Solicitor.</i>

The applicant was also present.

The Court heard addresses by Ms Cox and Mr Rabinder Singh.

11. On 3 July 2002, Mrs Tsatsa-Nikolovska and Mr Zagrebelsky who were unable to take part in further consideration of the case, were replaced by Mrs Mularoni and Mr Caflisch.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

12. The applicant is a United Kingdom citizen born in 1937 and is a post-operative male to female transsexual.

13. The applicant had a tendency to dress as a woman from early childhood and underwent aversion therapy in 1963-64. In the mid-1960s, she was diagnosed as a transsexual. Though she married a woman and they had four children, her conviction was that her “brain sex” did not fit her body. From that time until 1984 she dressed as a man for work but as a woman in her free time. In January 1985, the applicant began treatment in earnest, attending appointments once every three months at the Gender Identity Clinic at the Charing Cross Hospital, which included regular consultations with a psychiatrist as well as on occasion a psychologist. She was prescribed hormone therapy, began attending grooming classes and voice training. Since this time, she has lived fully as a woman. In October 1986, she underwent surgery to shorten her vocal chords. In August 1987, she was accepted on the waiting list for gender re-assignment surgery. In 1990, she underwent gender re-assignment surgery at a National Health Service hospital. Her treatment and surgery was provided for and paid for by the National Health Service.

14. The applicant divorced from her former wife on a date unspecified but continued to enjoy the love and support of her children.

15. The applicant claims that between 1990 and 1992 she was sexually harassed by colleagues at work. She attempted to pursue a case of sexual harassment in the Industrial Tribunal but claimed that she was unsuccessful because she was considered in law to be a man. She did not challenge this decision by appealing to the Employment Appeal Tribunal. The applicant was subsequently dismissed from her employment for reasons connected with her health, but alleges that the real reason was that she was a transsexual.

16. In 1996, the applicant started work with a new employer and was required to provide her National Insurance (“NI”) number. She was concerned that the new employer would be in a position to trace her details

as once in the possession of the number it would have been possible to find out about her previous employers and obtain information from them. Although she requested the allocation of a new NI number from the Department of Social Security (“DSS”), this was rejected and she eventually gave the new employer her NI number. The applicant claims that the new employer has now traced back her identity as she began experiencing problems at work. Colleagues stopped speaking to her and she was told that everyone was talking about her behind her back.

17. The DSS Contributions Agency informed the applicant that she would be ineligible for a State pension at the age of 60, the age of entitlement for women in the United Kingdom. In April 1997, the DSS informed the applicant that her pension contributions would have to be continued until the date at which she reached the age of 65, being the age of entitlement for men, namely April 2002. On 23 April 1997, she therefore entered into an undertaking with the DSS to pay direct the NI contributions which would otherwise be deducted by her employer as for all male employees. In the light of this undertaking, on 2 May 1997, the DSS Contributions Agency issued the applicant with a Form CF 384 Age Exemption Certificate (see Relevant domestic law and practice below).

18. The applicant's files at the DSS were marked “sensitive” to ensure that only an employee of a particular grade had access to her files. This meant in practice that the applicant had to make special appointments for even the most trivial matters and could not deal directly with the local office or deal with queries over the telephone. Her record continues to state her sex as male and despite the “special procedures” she has received letters from the DSS addressed to the male name which she was given at birth.

19. In a number of instances, the applicant stated that she has had to choose between revealing her birth certificate and foregoing certain advantages which were conditional upon her producing her birth certificate. In particular, she has not followed through a loan conditional upon life insurance, a re-mortgage offer and an entitlement to winter fuel allowance from the DSS. Similarly, the applicant remains obliged to pay the higher motor insurance premiums applicable to men. Nor did she feel able to report a theft of 200 pounds sterling to the police, for fear that the investigation would require her to reveal her identity.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. Names

20. Under English law, a person is entitled to adopt such first names or surname as he or she wishes. Such names are valid for the purposes of identification and may be used in passports, driving licences, medical and insurance cards, etc. The new names are also entered on the electoral roll.

B. Marriage and definition of gender in domestic law

21. Under English law, marriage is defined as the voluntary union between a man and a woman. In the case of *Corbett v. Corbett* ([1971] Probate Reports 83), Mr Justice Ormrod ruled that sex for that purpose is to be determined by the application of chromosomal, gonadal and genital tests where these are congruent and without regard to any surgical intervention. This use of biological criteria to determine sex was approved by the Court of Appeal in *R. v. Tan* ([1983] Queen's Bench Reports 1053) and given more general application, the court holding that a person born male had been correctly convicted under a statute penalising men who live on the earnings of prostitution, notwithstanding the fact that the accused had undergone gender reassignment therapy.

22. Under section 11(b) of the Matrimonial Causes Act 1973, any marriage where the parties are not respectively male and female is void. The test applied as to the sex of the partners to a marriage is that laid down in the above-mentioned case of *Corbett v. Corbett*. According to that same decision a marriage between a male-to-female transsexual and a man might also be avoided on the basis that the transsexual was incapable of consummating the marriage in the context of ordinary and complete sexual intercourse (*obiter per* Mr Justice Ormrod).

This decision was reinforced by Section 12(a) of the Matrimonial Causes Act 1973, according to which a marriage that has not been consummated owing to the incapacity of either party to consummate may be voidable. Section 13(1) of the Act provides that the court must not grant a decree of nullity if it is satisfied that the petitioner knew the marriage was voidable, but led the respondent to believe that she would not seek a decree of nullity, and that it would be unjust to grant the decree.

C. Birth certificates

23. Registration of births is governed by the Births and Deaths Registration Act 1953 ("the 1953 Act"). Section 1(1) of that Act requires that the birth of every child be registered by the Registrar of Births and

Deaths for the area in which the child is born. An entry is regarded as a record of the facts at the time of birth. A birth certificate accordingly constitutes a document revealing not current identity but historical facts.

24. The sex of the child must be entered on the birth certificate. The criteria for determining the sex of a child at birth are not defined in the Act. The practice of the Registrar is to use exclusively the biological criteria (chromosomal, gonadal and genital) as laid down by Mr Justice Ormrod in the above-mentioned case of *Corbett v. Corbett*.

25. The 1953 Act provides for the correction by the Registrar of clerical errors or factual errors. The official position is that an amendment may only be made if the error occurred when the birth was registered. The fact that it may become evident later in a person's life that his or her "psychological" sex is in conflict with the biological criteria is not considered to imply that the initial entry at birth was a factual error. Only in cases where the apparent and genital sex of a child was wrongly identified, or where the biological criteria were not congruent, can a change in the initial entry be made. It is necessary for that purpose to adduce medical evidence that the initial entry was incorrect. No error is accepted to exist in the birth entry of a person who undergoes medical and surgical treatment to enable that person to assume the role of the opposite sex.

26. The Government point out that the use of a birth certificate for identification purposes is discouraged by the Registrar General, and for a number of years birth certificates have contained a warning that they are not evidence of the identity of the person presenting it. However, it is a matter for individuals whether to follow this recommendation.

D. Social security, employment and pensions

27. A transsexual continues to be recorded for social security, national insurance and employment purposes as being of the sex recorded at birth.

1. National Insurance

28. The DSS registers every British citizen for National Insurance purposes ("NI") on the basis of the information in their birth certificate. Non-British citizens who wish to register for NI in the United Kingdom may use their passport or identification card as evidence of identity if a birth certificate is unavailable.

29. The DSS allocates every person registered for NI with a unique NI number. The NI number has a standard format consisting of two letters followed by three pairs of numbers and a further letter. It contains no indication in itself of the holder's sex or of any other personal information. The NI number is used to identify each person with a NI account (there are at present approximately 60 million individual NI accounts). The DSS are thereby able to record details of all NI contributions paid into the account

during the NI account holder's life and to monitor each person's liabilities, contributions and entitlement to benefits accurately. New numbers may in exceptional cases be issued to persons e.g. under the witness protection schemes or to protect the identity of child offenders.

30. Under Regulation 44 of the Social Security (Contributions) Regulations 1979, made under powers conferred by paragraph 8(1)(p) of Schedule 1 to the Social Security Contributions and Benefits Act 1992, specified individuals are placed under an obligation to apply for a NI number unless one has already been allocated to them.

31. Under Regulation 45 of the 1979 Regulations, an employee is under an obligation to supply his NI number to his employer on request.

32. Section 112(1) of the Social Security Administration Act 1992 provides:

“(1) If a person for the purpose of obtaining any benefit or other payment under the legislation ...[as defined in section 110 of the Act]... whether for himself or some other person, or for any other purpose connected with that legislation -

(a) makes a statement or representation which he knows to be false; or

(b) produces or furnishes, or knowingly causes or knowingly allows to be produced or furnished, any document or information which he knows to be false in a material particular, he shall be guilty of an offence.”

33. It would therefore be an offence under this section for any person to make a false statement in order to obtain a NI number.

34. Any person may adopt such first name, surname or style of address (e.g. Mr, Mrs, Miss, Ms) that he or she wishes for the purposes of the name used for NI registration. The DSS will record any such amendments on the person's computer records, manual records and NI number card. But, the DSS operates a policy of only issuing one NI number for each person regardless of any changes that occur to that person's sexual identity through procedures such as gender re-assignment surgery. A renewed application for leave to apply for judicial review of the legality of this policy brought by a male-to-female transsexual was dismissed by the Court of Appeal in the case of *R v. Secretary of State for Social Services ex parte Hooker* (1993) (*unreported*). McCowan LJ giving the judgment of the Court stated (at page 3 of the transcript):

“...since it will not make the slightest practical difference, far from the Secretary of State's decision being an irrational one, I consider it a perfectly rational decision. I would further reject the suggestion that the applicant had a legitimate expectation that a new number would be given to her for psychological purposes when, in fact, its practical effect would be nil.”

35. Information held in the DSS NI records is confidential and will not normally be disclosed to third parties without the consent of the person concerned. Exceptions are possible in cases where the public interest is at stake or the disclosure is necessary to protect public funds. By virtue of

Section 123 of the Social Security Administration Act 1992, it is an offence for any person employed in social security administration to disclose without lawful authority information acquired in the course of his or her employment.

36. The DSS operates a policy of normally marking records belonging to persons known to be transsexual as nationally sensitive. Access to these records is controlled by DSS management. Any computer printer output from these records will normally be referred to a special section within the DSS to ensure that identity details conform with those requested by the relevant person.

37. NI contributions are made by way of deduction from an employee's pay by the employer and then by payment to the Inland Revenue (for onward transmission to the DSS). Employers at present will make such deductions for a female employee until she reaches the pensionable age of 60 and for a male employee until he reaches the pensionable age of 65. The DSS operates a policy for male-to-female transsexuals whereby they may enter into an undertaking with the DSS to pay direct to the DSS any NI contributions due after the transsexual has reached the age of 60 which have ceased to be deducted by the employer in the belief that the employee is female. In the case of female-to-male transsexuals, any deductions which are made by an employer after the age of 60 may be reclaimed directly from the DSS by the employee.

38. In some cases employers will require proof that an apparent female employee has reached, or is about to reach, the age of 60 and so entitled not to have the NI deductions made. Such proof may be provided in the form of an Age Exemption Certificate (form CA4180 or CF384). The DSS may issue such a certificate to a male-to-female transsexual where such a person enters into an undertaking to pay any NI contributions direct to the DSS.

2. State pensions

39. A male-to-female transsexual is currently entitled to a State pension at the retirement age of 65 applied to men and not the age of 60 which is applicable to women. A full pension will be payable only if she has made contributions for 44 years as opposed to the 39 years required of women.

40. A person's sex for the purposes of pensionable age is determined according to biological sex at birth. This approach was approved by the Social Security Commissioner (a judicial officer, who specialises in social security law) in a number of cases:

In the case entitled *R(P) 2/80*, a male-to-female transsexual claimed entitlement to a pensionable age of 60. The Commissioner dismissed the claimant's appeal and stated at paragraph 9 of his decision:

“(a) In my view, the word “woman” in section 27 of the Act means a person who is biologically a woman. Sections 28 and 29 contain many references to a woman in terms which indicate that a person is denoted who is capable of forming a valid marriage with a husband. That can only be a person who is biologically a woman.

(b) I doubt whether the distinction between a person who is biologically, and one who is socially, female has ever been present in the minds of the legislators when enacting relevant statutes. However that may be, it is certain that Parliament has never conferred on any person the right or privilege of changing the basis of his national insurance rights from those appropriate to a man to those appropriate to a woman. In my judgment, such a fundamental right or privilege would have to be expressly granted. ...

(d) I fully appreciate the unfortunate predicament of the claimant, but the merits are not all on her side. She lived as a man from birth until 1975, and, during the part of that period when she was adult, her insurance rights were those appropriate to a man. These rights are in some respects more extensive than those appropriate to a woman. Accordingly, an element of unfairness to the general public might have to be tolerated so as to allow the payment of a pension to her at the pensionable age of a woman.”

41. The Government have instituted plans to eradicate the difference between men and women concerning age of entitlement to State pensions. Equalisation of the pension age is to begin in 2010 and it is anticipated that by 2020 the transition will be complete. As regards the issue of free bus passes in London, which also differentiated between men and women concerning age of eligibility (65 and 60 respectively), the Government have also announced plans to introduce a uniform age.

3. *Employment*

42. Under section 16(1) of the Theft Act 1968, it is a criminal offence liable to a sentence of imprisonment to dishonestly obtain a pecuniary advantage by deception. Pecuniary advantage includes, under section 16(2)(c), being given the opportunity to earn remuneration in employment. Should a post-operative transsexual be asked by a prospective employer to disclose all their previous names, but fail to make full disclosure before entering into a contract of employment, an offence might be committed. Furthermore, should the employer discover the lack of full disclosure, there might also be a risk of dismissal or an action by the employer for damages.

43. In its judgment of 30 April 1996, in the case of *P. v. S. and Cornwall County Council*, the European Court of Justice (ECJ) held that discrimination arising from gender reassignment constituted discrimination on grounds of sex and, accordingly, Article 5 § 1 of Council Directive 76/207/EEC of 9 February 1976 on the implementation of the principle of equal treatment for men and women as regards access to employment, vocational training and promotion and working conditions, precluded dismissal of a transsexual for a reason related to a gender reassignment. The

ECJ held, rejecting the argument of the United Kingdom Government that the employer would also have dismissed P. if P. had previously been a woman and had undergone an operation to become a man, that

“... where a person is dismissed on the ground that he or she intends to undergo or has undergone gender reassignment, he or she is treated unfavourably by comparison with persons of the sex to which he or she was deemed to belong before undergoing gender reassignment.

To tolerate such discrimination would be tantamount, as regards such a person, to a failure to respect the dignity and freedom to which he or she is entitled and which the Court has a duty to safeguard.” (paragraphs 21–22)

44. The ruling of the ECJ was applied by the Employment Appeal Tribunal in a decision handed down on 27 June 1997 (*Chessington World of Adventures Ltd v. Reed* [1997] 1 Industrial Law Reports).

45. The Sexual Discrimination (Gender Re-assignment) Regulations 1999 were issued to comply with the ruling of the European Court of Justice in *P. v. S. and Cornwall County Council* (30 April 1996). This provides generally that transsexual persons should not be treated less favourably in employment because they are transsexual (whether pre- or post-operative).

E. Rape

46. Prior to 1994, for the purposes of the law of rape, a male-to-female transsexual would have been regarded as a male. Pursuant to section 142 of the Criminal Justice and Public Order Act 1994, for rape to be established there has to be “vaginal or anal intercourse with a person”. In a judgment of 28 October 1996, the Reading Crown Court found that penile penetration of a male to female transsexual's artificially constructed vagina amounted to rape: *R. v. Matthews* (*unreported*).

F. Imprisonment

47. Prison rules require that male and female prisoners shall normally be detained separately and also that no prisoner shall be stripped and searched in the sight of a person of the opposite sex (Rules 12(1) and 41(3) of the Prison Rules 1999 respectively).

48. According to the Report of the Working Group on Transsexual People (Home Office April 2000, see further below, paragraphs 49-50), which conducted a review of law and practice, post-operative transsexuals where possible were allocated to an establishment for prisoners of their new gender. Detailed guidelines concerning the searching of transsexual prisoners were under consideration by which post-operative male to female transsexuals would be treated as women for the purposes of searches and searched only by women (see paragraphs 2.75-2.76).

G. Current developments

1. Review of the situation of transsexuals in the United Kingdom

49. On 14 April 1999, the Secretary of State for the Home Department announced the establishment of an Interdepartmental Working Group on Transsexual People with the following terms of reference:

“to consider, with particular reference to birth certificates, the need for appropriate legal measures to address the problems experienced by transsexuals, having due regard to scientific and societal developments, and measures undertaken in other countries to deal with this issue.”

50. The Working Group produced a report in April 2000 in which it examined the current position of transsexuals in the United Kingdom, with particular reference to their status under national law and the changes which might be made. It concluded:

“5.1. Transsexual people deal with their condition in different ways. Some live in the opposite sex without any treatment to acquire its physical attributes. Others take hormones so as to obtain some of the secondary characteristics of their chosen sex. A smaller number will undergo surgical procedures to make their bodies resemble, so far as possible, those of their acquired gender. The extent of treatment may be determined by individual choice, or by other factors such as health or financial resources. Many people revert to their biological sex after living for some time in the opposite sex, and some alternate between the two sexes throughout their lives. Consideration of the way forward must therefore take into account the needs of people at these different stages of change.

5.2. Measures have already been taken in a number of areas to assist transsexual people. For example, discrimination in employment against people on the basis of their transsexuality has been prohibited by the Sex Discrimination (Gender Reassignment) Regulations 1999 which, with few exceptions, provide that a transsexual person (whether pre- or post-operative) should not be treated less favourably because they are transsexual. The criminal justice system (i.e. the police, prisons, courts, etc.) try to accommodate the needs of transsexual people so far as is possible within operational constraints. A transsexual offender will normally be charged in their acquired gender, and a post-operative prisoner will usually be sent to a prison appropriate to their new status. Transsexual victims and witnesses will, in most circumstances, similarly be treated as belonging to their acquired gender.

5.3. In addition, official documents will often be issued in the acquired gender where the issue is identifying the individual rather than legal status. Thus, a transsexual person may obtain a passport, driving licence, medical card etc, in their new gender. We understand that many non-governmental bodies, such as examination authorities, will often re-issue examination certificates etc. (or otherwise provide evidence of qualifications) showing the required gender. We also found that at least one insurance company will issue policies to transsexual people in their acquired gender.

5.4. Notwithstanding such provisions, transsexual people are conscious of certain problems which do not have to be faced by the majority of the population. Submissions to the Group suggested that the principal areas where the transsexual community is seeking change are birth certificates, the right to marry and full recognition of their new gender for all legal purposes.

5.5. We have identified three options for the future;

- to leave the current situation unchanged;
- to issue birth certificates showing the new name and, possibly, the new gender;
- to grant full legal recognition of the new gender subject to certain criteria and procedures.

We suggest that before taking a view on these options the Government may wish to put the issues out to public consultation.”

51. The report was presented to Parliament in July 2000. Copies were placed in the libraries of both Houses of Parliament and sent to 280 recipients, including Working Group members, Government officials, Members of Parliament, individuals and organisations. It was publicised by a Home Office press notice and made available to members of the public through application to the Home Office in writing, E-mail, by telephone or the Home Office web site.

2. *Recent domestic case-law*

52. In the case of *Bellinger v. Bellinger*, EWCA Civ 1140 [2001], 3 FCR 1, the appellant who had been classified at birth as a man had undergone gender re-assignment surgery and in 1981 had gone through a form of marriage with a man who was aware of her background. She sought a declaration under the Family Law Act 1986 that the marriage was valid. The Court of Appeal held, by a majority, that the appellant's marriage was invalid as the parties were not respectively male and female, which terms were to be determined by biological criteria as set out in the decision of *Corbett v. Corbett* [1971]. Although it was noted that there was an increasing emphasis upon the impact of psychological factors on gender, there was no clear point at which such factors could be said to have effected a change of gender. A person correctly registered as male at birth, who had undergone gender reassignment surgery and was now living as a woman was biologically a male and therefore could not be defined as female for the purposes of marriage. It was for Parliament, not for the courts, to decide at what point it would be appropriate to recognise that a person who had been assigned to one sex at birth had changed gender for the purposes of marriage. Dame Elizabeth Butler-Sloss, President of the Family Division noted the warnings of the European Court of Human Rights about continued lack of response to the situation of transsexuals and observed that largely as

a result of these criticisms an interdepartmental working group had been set up, which had in April 2000 issued a careful and comprehensive review of the medical condition, current practice in other countries and the state of English law in relevant aspects of the life of an individual:

“[95.] ... We inquired of Mr Moylan on behalf of the Attorney-General, what steps were being taken by any government department, to take forward any of the recommendations of the Report, or to prepare a consultation paper for public discussion.

[96.] To our dismay, we were informed that no steps whatsoever have been, or to the knowledge of Mr Moylan, were intended to be, taken to carry this matter forward. It appears, therefore, that the commissioning and completion of the report is the sum of the activity on the problems identified both by the Home Secretary in his terms of reference, and by the conclusions of the members of the working group. That would seem to us to be a failure to recognise the increasing concerns and changing attitudes across western Europe which have been set out so clearly and strongly in judgments of Members of the European Court at Strasbourg, and which in our view need to be addressed by the UK...

[109.] We would add however, with the strictures of the European Court of Human Rights well in mind, that there is no doubt that the profoundly unsatisfactory nature of the present position and the plight of transsexuals requires careful consideration. The recommendation of the interdepartmental working group for public consultation merits action by the government departments involved in these issues. The problems will not go away and may well come again before the European Court sooner rather than later.”

53. In his dissenting judgment, Lord Justice Thorpe considered that the foundations of the judgment in *Corbett v. Corbett* were no longer secure, taking the view that an approach restricted to biological criteria was no longer permissible in the light of scientific, medical and social change.

“[155.] To make the chromosomal factor conclusive, or even dominant, seems to me particularly questionable in the context of marriage. For it is an invisible feature of an individual, incapable of perception or registration other than by scientific test. It makes no contribution to the physiological or psychological self. Indeed in the context of the institution of marriage as it is today it seems to me right as a matter of principle and logic to give predominance to psychological factors just as it seem right to carry out the essential assessment of gender at or shortly before the time of marriage rather than at the time of birth...

[160.] The present claim lies most evidently in the territory of the family justice system. That system must always be sufficiently flexible to accommodate social change. It must also be humane and swift to recognise the right to human dignity and to freedom of choice in the individual's private life. One of the objectives of statute law reform in this field must be to ensure that the law reacts to and reflects social change. That must also be an objective of the judges in this field in the construction of existing statutory provisions. I am strongly of the opinion that there are not sufficiently compelling reasons, having regard to the interests of others affected or, more relevantly, the interests of society as a whole, to deny this appellant legal recognition of her marriage. I would have allowed this appeal.”

He also noted the lack of progress in domestic reforms:

“[151.] ...although the [interdepartmental] report has been made available by publication, Mr Moylan said that there has since been no public consultation. Furthermore when asked whether the Government had any present intention of initiating public consultation or any other process in preparation for a parliamentary Bill, Mr Moylan said that he had no instructions. Nor did he have any instructions as to whether the Government intended to legislate. My experience over the last 10 years suggests how hard it is for any department to gain a slot for family law reform by primary legislation. These circumstances reinforce my view that it is not only open to the court but it is its duty to construe s 11(c) either strictly, alternatively liberally as the evidence and the submissions in this case justify.”

3. Proposals to reform the system of registration of births, marriages and deaths

54. In January 2002, the Government presented to Parliament the document “Civil Registration: Vital Change (Birth, Marriage and Death Registration in the 21st Century)” which set out plans for creating a central database of registration records which moves away from a traditional snapshot of life events towards the concept of a living record or single “through life” record:

“In time, updating the information in a birth record will mean that changes to a person's names, and potentially, sex will be able to be recorded.” (para. 5.1)

“5.5 Making changes

There is strong support for some relaxation to the rules that govern corrections to the records. Currently, once a record has been created, the only corrections that can be made are where it can be shown that an error was made at the time of registration and that this can be established. Correcting even the simplest spelling error requires formal procedures and the examination of appropriate evidence. The final records contains the full original and corrected information which is shown on subsequently issued certificates. The Government recognises that this can act as a disincentive. In future, changes (to reflect developments after the original record was made) will be made and formally recorded. Documents issued from the records will contain only the information as amended, though all the information will be retained. ...”

H. Liberty's third party intervention

55. Liberty updated the written observations submitted in the case of Sheffield and Horsham concerning the legal recognition of transsexuals in comparative law (Sheffield and Horsham v. the United Kingdom judgment of 30 July 1998, *Reports of Judgments and Decisions* 1998-V, p. 2021, § 35). In its 1998 study, it had found that over the previous decade there had been an unmistakable trend in the member States of the Council of Europe towards giving full legal recognition to gender re-assignment. In particular, it noted that out of thirty seven countries analysed only four (including the

United Kingdom) did not permit a change to be made to a person's birth certificate in one form or another to reflect the re-assigned sex of that person. In cases where gender re-assignment was legal and publicly funded, only the United Kingdom and Ireland did not give full legal recognition to the new gender identity.

56. In its follow up study submitted on 17 January 2002, Liberty noted that while there had not been a statistical increase in States giving full legal recognition of gender re-assignment within Europe, information from outside Europe showed developments in this direction. For example, there had been statutory recognition of gender re-assignment in Singapore, and a similar pattern of recognition in Canada, South Africa, Israel, Australia, New Zealand and all except two of the States of the United States of America. It cited in particular the cases of *Attorney-General v. Otahuhu Family Court* [1995] 1 NZLR 60 and *Re Kevin* [2001] FamCA 1074 where in New Zealand and Australia transsexual persons' assigned sex was recognised for the purposes of validating their marriages: In the latter case, Mr Justice Chisholm held:

"I see no basis in legal principle or policy why Australian law should follow the decision in Corbett. To do so would, I think, create indefensible inconsistencies between Australian marriage law and other Australian laws. It would take the law in a direction that is generally contrary to development in other countries. It would perpetuate a view that flies in the face of current medical understanding and practice. Most of all, it would impose indefensible suffering on people who have already had more than their share of difficulty, with no benefit to society...

...Because the words 'man' and 'woman' have their ordinary contemporary meaning, there is no formulaic solution to determining the sex of an individual for the purpose of the law of marriage. That is, it cannot be said as a matter of law that the question in a particular case will be determined by applying a single criterion, or limited list of criteria. Thus it is wrong to say that a person's sex depends on any single factor, such as chromosomes or genital sex; or some limited range of factors, such as the state of the person's gonads, chromosomes or genitals (whether at birth or at some other time). Similarly, it would be wrong in law to say that the question can be resolved by reference solely to the person's psychological state, or by identifying the person's 'brain sex'.

To determine a person's sex for the law of marriage, all relevant matters need to be considered. I do not seek to state a complete list or suggest that any factors necessarily have more importance than others. However the relevant matters include, in my opinion, the person's biological and physical characteristics at birth (including gonads, genitals and chromosomes); the person's life experiences, including the sex in which he or she was brought up and the person's attitude to it; the person's self-perception as a man or a woman; the extent to which the person has functioned in society as a man or a woman; any hormonal, surgical or other medical sex re-assignment treatments the person has undergone, and the consequences of such treatment; and the person's biological, psychological and physical characteristics at the time of the marriage...

For the purpose of ascertaining the validity of a marriage under Australian law the question whether a person is a man or a woman is to be determined as of the date of marriage...”

57. As regarded the eligibility of post-operative transsexuals to marry a person of sex opposite to their acquired gender, Liberty's survey indicated that 54% of Contracting States permitted such marriage (Annex 6 listed Austria, Belgium, Denmark, Estonia, Finland, France, Germany, Greece, Iceland, Italy, Latvia, Luxembourg, the Netherlands, Norway, Slovakia, Spain, Sweden, Switzerland, Turkey and Ukraine), while 14% did not (Ireland and the United Kingdom did not permit marriage, while no legislation existed in Moldova, Poland, Romania and Russia). The legal position in the remaining 32% was unclear.

III. INTERNATIONAL TEXTS

58. Article 9 of the Charter of Fundamental Rights of the European Union, signed on 7 December 2000, provides:

“The right to marry and the right to found a family shall be guaranteed in accordance with the national laws governing the exercise of these rights.”

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

59. The applicant claims a violation of Article 8 of the Convention, the relevant part of which provides as follows:

“1. Everyone has the right to respect for his private ... life...

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.”

A. Arguments of the parties

1. *The applicant*

60. The applicant submitted that despite warnings from the Court as to the importance for keeping under review the need for legal reform the

Government had still not taken any constructive steps to address the suffering and distress experienced by the applicant and other post-operative transsexuals. The lack of legal recognition of her changed gender had been the cause of numerous discriminatory and humiliating experiences in her everyday life. In the past, in particular from 1990 to 1992, she was abused at work and did not receive proper protection against discrimination. She claimed that all the special procedures through which she had to go in respect of her NI contributions and State retirement pension constituted in themselves an unjustified difference in treatment, as they would have been unnecessary had she been recognised as a woman for legal purposes. In particular, the very fact that the DSS operated a policy of marking the records of transsexuals as sensitive was a difference in treatment. As a result, for example, the applicant cannot attend the DSS without having to make a special appointment.

61. The applicant further submitted that the danger of her employer learning about her past identity was real. It was possible for the employer to trace back her employment history on the basis of her NI number and this had in fact happened. She claimed that her recent failure to obtain a promotion was the result of the employer realising her status.

62. As regarded pensionable age, the applicant submitted that she had worked for 44 years and that the refusal of her entitlement to a State retirement pension at the age of 60 on the basis of the pure biological test for determining sex was contrary to Article 8 of the Convention. She was similarly unable to apply for a free London bus pass at the age of 60 as other women were but had to wait until the age of 65. She was also required to declare her birth sex or disclose her birth certificate when applying for life insurance, mortgages, private pensions or car insurance, which led her not to pursue these possibilities to her advantage.

63. The applicant argued that rapid changes, in respect of the scientific understanding of, and the social attitude towards, transsexualism were taking place not only across Europe but elsewhere. She referred, *inter alia*, to Article 29 of the Netherlands Civil Code, Article 6 of Law No. 164 of 14 April 1982 of Italy, and Article 29 of the Civil Code of Turkey as amended by Law No. 3444 of 4 May 1988, which allowed the amendment of civil status. Also, under a 1995 New Zealand statute, Part V, Section 28, a court could order the legal recognition of the changed gender of a transsexual after examination of medical and other evidence. The applicant saw no convincing reason why a similar approach should not be adopted in the United Kingdom. The applicant also pointed to increasing social acceptance of transsexuals and interest in issues of concern to them reflected by coverage in the press, radio and television, including sympathetic dramatisation of transsexual characters in mainstream programming.

2. *The Government*

64. Referring to the Court's case-law, the Government maintained that there was no generally accepted approach among the Contracting States in respect of transsexuality and that, in view of the margin of appreciation left to States under the Convention, the lack of recognition in the United Kingdom of the applicant's new gender identity for legal purposes did not entail a violation of Article 8 of the Convention. They disputed the applicant's assertion that scientific research and "massive societal changes" had led to wide acceptance, or consensus on issues, of transsexualism.

65. The Government accepted that there may be specific instances where the refusal to grant legal recognition of a transsexual's new sexual identity may amount to a breach of Article 8, in particular where the transsexual as a result suffered practical and actual detriment and humiliation on a daily basis (see the *B. v. France* judgment of 25 March 1992, Series A no. 232-C, pp. 52-54, §§ 59-63). However, they denied that the applicant faced any comparable practical disadvantages, as she had been able *inter alia* to obtain important identification documents showing her chosen names and sexual identity (e.g. new passport and driving licence).

66. As regards the specific difficulties claimed by the applicant, the Government submitted that an employer was unable to establish the sex of the applicant from the NI number itself since it did not contain any encoded reference to her sex. The applicant had been issued with a new NI card with her changed name and style of address. Furthermore, the DSS had a policy of confidentiality of the personal details of a NI number holder and, in particular, a policy and procedure for the special protection of transsexuals. As a result, an employer had no means of lawfully obtaining information from the DSS about the previous sexual identity of an employee. It was also in their view highly unlikely that the applicant's employer would discover her change of gender through her NI number in any other way. The refusal to issue a new NI number was justified, the uniqueness of the NI number being of critical importance in the administration of the national insurance system, and for the prevention of the fraudulent use of old NI numbers.

67. The Government argued that the applicant's fear that her previous sexual identity would be revealed upon reaching the age of 60, when her employer would no longer be required to make NI contribution deductions from her pay, was entirely without foundation, the applicant having already been issued with a suitable Age Exemption Certificate on Form CF384.

68. Concerning the impossibility for the applicant to obtain a State retirement pension at the age of 60, the Government submitted that the distinction between men and women as regarded pension age had been held to be compatible with European Community law (Article 7(1)(a) of Directive 79/7/EEC; European Court of Justice, *R. v. Secretary of State for Social Security ex parte Equal Opportunities Commission* Case C-9/91 [1992] ECR I-4927). Also, since the preserving of the applicant's legal

status as a man was not contrary as such to Article 8 of the Convention, it would constitute favourable treatment unfair to the general public to allow the applicant's pension entitlement at the age of 60.

69. Finally, as regards allegations of assault and abuse at work, the Government submitted that the applicant could have pressed charges under the criminal law against harassment and assault. Harassment in the workplace on the grounds of transsexuality would also give rise to a claim under the Sex Discrimination Act 1975 where the employers knew of the harassment and took no steps to prevent it. Adequate protection was therefore available under domestic law.

70. The Government submitted that a fair balance had therefore been struck between the rights of the individual and the general interest of the community. To the extent that there were situations where a transsexual may face limited disclosure of their change of sex, these situations were unavoidable and necessary e.g. in the context of contracts of insurance where medical history and gender affected the calculation of premiums.

B. The Court's assessment

1. Preliminary considerations

71. This case raises the issue whether or not the respondent State has failed to comply with a positive obligation to ensure the right of the applicant, a post-operative male to female transsexual, to respect for her private life, in particular through the lack of legal recognition given to her gender re-assignment.

72. The Court recalls that the notion of “respect” as understood in Article 8 is not clear cut, especially as far as the positive obligations inherent in that concept are concerned: having regard to the diversity of practices followed and the situations obtaining in the Contracting States, the notion's requirements will vary considerably from case to case and the margin of appreciation to be accorded to the authorities may be wider than that applied in other areas under the Convention. In determining whether or not a positive obligation exists, regard must also be had to the fair balance that has to be struck between the general interest of the community and the interests of the individual, the search for which balance is inherent in the whole of the Convention (*Cossey v. the United Kingdom* judgment of 27 September 1990, Series A no. 184, p. 15, § 37).

73. The Court recalls that it has already examined complaints about the position of transsexuals in the United Kingdom (see the *Rees v. the United Kingdom* judgment of 17 October 1986, Series A no. 106, the *Cossey v. the United Kingdom* judgment, cited above; the *X., Y. and Z. v. the United Kingdom* judgment of 22 April 1997, *Reports of Judgments and Decisions* 1997-II, and the *Sheffield and Horsham v. the United Kingdom* judgment of

30 July 1998, *Reports* 1998-V, p. 2011). In those cases, it held that the refusal of the United Kingdom Government to alter the register of births or to issue birth certificates whose contents and nature differed from those of the original entries concerning the recorded gender of the individual could not be considered as an interference with the right to respect for private life (the above-mentioned Rees judgment, p. 14, § 35, and Cossey judgment, p. 15, § 36). It also held that there was no positive obligation on the Government to alter their existing system for the registration of births by establishing a new system or type of documentation to provide proof of current civil status. Similarly, there was no duty on the Government to permit annotations to the existing register of births, or to keep any such annotation secret from third parties (the above-mentioned Rees judgment, p. 17, § 42, and Cossey judgment, p. 15, §§ 38-39). It was found in those cases that the authorities had taken steps to minimise intrusive enquiries (for example, by allowing transsexuals to be issued with driving licences, passports and other types of documents in their new name and gender). Nor had it been shown that the failure to accord general legal recognition of the change of gender had given rise in the applicants' own case histories to detriment of sufficient seriousness to override the respondent State's margin of appreciation in this area (the Sheffield and Horsham judgment cited above, p. 2028-29, § 59).

74. While the Court is not formally bound to follow its previous judgments, it is in the interests of legal certainty, foreseeability and equality before the law that it should not depart, without good reason, from precedents laid down in previous cases (see, for example, *Chapman v. the United Kingdom* [GC], no. 27238/95, ECHR 2001-I, § 70). However, since the Convention is first and foremost a system for the protection of human rights, the Court must have regard to the changing conditions within the respondent State and within Contracting States generally and respond, for example, to any evolving convergence as to the standards to be achieved (see, amongst other authorities, the Cossey judgment, p. 14, § 35, and *Stafford v. the United Kingdom* [GC], no. 46295/99, judgment of 28 May 2002, to be published in ECHR 2002-, §§ 67-68). It is of crucial importance that the Convention is interpreted and applied in a manner which renders its rights practical and effective, not theoretical and illusory. A failure by the Court to maintain a dynamic and evolutive approach would indeed risk rendering it a bar to reform or improvement (see the above-cited *Stafford v. the United Kingdom* judgment, § 68). In the present context the Court has, on several occasions since 1986, signalled its consciousness of the serious problems facing transsexuals and stressed the importance of keeping the need for appropriate legal measures in this area under review (see the Rees judgment, § 47; the Cossey judgment, § 42; the Sheffield and Horsham judgment, § 60).

75. The Court proposes therefore to look at the situation within and outside the Contracting State to assess “in the light of present-day conditions” what is now the appropriate interpretation and application of the Convention (see the *Tyrer v. the United Kingdom* judgment of 25 April 1978, Series A no. 26, § 31, and subsequent case-law).

2. *The applicant's situation as a transsexual*

76. The Court observes that the applicant, registered at birth as male, has undergone gender re-assignment surgery and lives in society as a female. Nonetheless, the applicant remains, for legal purposes, a male. This has had, and continues to have, effects on the applicant's life where sex is of legal relevance and distinctions are made between men and women, as, *inter alia*, in the area of pensions and retirement age. For example, the applicant must continue to pay national insurance contributions until the age of 65 due to her legal status as male. However as she is employed in her gender identity as a female, she has had to obtain an exemption certificate which allows the payments from her employer to stop while she continues to make such payments herself. Though the Government submitted that this made due allowance for the difficulties of her position, the Court would note that she nonetheless has to make use of a special procedure that might in itself call attention to her status.

77. It must also be recognised that serious interference with private life can arise where the state of domestic law conflicts with an important aspect of personal identity (see, *mutatis mutandis*, *Dudgeon v. the United Kingdom* judgment of 22 October 1981, Series A no. 45, § 41). The stress and alienation arising from a discordance between the position in society assumed by a post-operative transsexual and the status imposed by law which refuses to recognise the change of gender cannot, in the Court's view, be regarded as a minor inconvenience arising from a formality. A conflict between social reality and law arises which places the transsexual in an anomalous position, in which he or she may experience feelings of vulnerability, humiliation and anxiety.

78. In this case, as in many others, the applicant's gender re-assignment was carried out by the national health service, which recognises the condition of gender dysphoria and provides, *inter alia*, re-assignment by surgery, with a view to achieving as one of its principal purposes as close an assimilation as possible to the gender in which the transsexual perceives that he or she properly belongs. The Court is struck by the fact that nonetheless the gender re-assignment which is lawfully provided is not met with full recognition in law, which might be regarded as the final and culminating step in the long and difficult process of transformation which the transsexual has undergone. The coherence of the administrative and legal practices within the domestic system must be regarded as an important factor in the assessment carried out under Article 8 of the Convention.

Where a State has authorised the treatment and surgery alleviating the condition of a transsexual, financed or assisted in financing the operations and indeed permits the artificial insemination of a woman living with a female-to-male transsexual (as demonstrated in the case of X., Y. and Z. v. the United Kingdom, cited above), it appears illogical to refuse to recognise the legal implications of the result to which the treatment leads.

79. The Court notes that the unsatisfactory nature of the current position and plight of transsexuals in the United Kingdom has been acknowledged in the domestic courts (see *Bellinger v. Bellinger*, cited above, paragraph 52) and by the Interdepartmental Working Group which surveyed the situation in the United Kingdom and concluded that, notwithstanding the accommodations reached in practice, transsexual people were conscious of certain problems which did not have to be faced by the majority of the population (paragraph 50 above).

80. Against these considerations, the Court has examined the countervailing arguments of a public interest nature put forward as justifying the continuation of the present situation. It observes that in the previous United Kingdom cases weight was given to medical and scientific considerations, the state of any European and international consensus and the impact of any changes to the current birth register system.

3. *Medical and scientific considerations*

81. It remains the case that there are no conclusive findings as to the cause of transsexualism and, in particular, whether it is wholly psychological or associated with physical differentiation in the brain. The expert evidence in the domestic case of *Bellinger v. Bellinger* was found to indicate a growing acceptance of findings of sexual differences in the brain that are determined pre-natally, though scientific proof for the theory was far from complete. The Court considers it more significant however that transsexualism has wide international recognition as a medical condition for which treatment is provided in order to afford relief (for example, the Diagnostic and Statistical Manual fourth edition (DSM-IV) replaced the diagnosis of transsexualism with “gender identity disorder”; see also the International Classification of Diseases, tenth edition (ICD-10)). The United Kingdom national health service, in common with the vast majority of Contracting States, acknowledges the existence of the condition and provides or permits treatment, including irreversible surgery. The medical and surgical acts which in this case rendered the gender re-assignment possible were indeed carried out under the supervision of the national health authorities. Nor, given the numerous and painful interventions involved in such surgery and the level of commitment and conviction required to achieve a change in social gender role, can it be suggested that there is anything arbitrary or capricious in the decision taken by a person to undergo gender re-assignment. In those circumstances, the ongoing scientific and

medical debate as to the exact causes of the condition is of diminished relevance.

82. While it also remains the case that a transsexual cannot acquire all the biological characteristics of the assigned sex (Sheffield and Horsham, cited above, p. 2028, § 56), the Court notes that with increasingly sophisticated surgery and types of hormonal treatments, the principal unchanging biological aspect of gender identity is the chromosomal element. It is known however that chromosomal anomalies may arise naturally (for example, in cases of intersex conditions where the biological criteria at birth are not congruent) and in those cases, some persons have to be assigned to one sex or the other as seems most appropriate in the circumstances of the individual case. It is not apparent to the Court that the chromosomal element, amongst all the others, must inevitably take on decisive significance for the purposes of legal attribution of gender identity for transsexuals (see the dissenting opinion of Thorpe LJ in *Bellinger v. Bellinger* cited in paragraph 52 above; and the judgment of Chisholm J in the Australian case, *Re Kevin*, cited in paragraph 55 above).

83. The Court is not persuaded therefore that the state of medical science or scientific knowledge provides any determining argument as regards the legal recognition of transsexuals.

4. *The state of any European and international consensus*

84. Already at the time of the Sheffield and Horsham case, there was an emerging consensus within Contracting States in the Council of Europe on providing legal recognition following gender re-assignment (see § 35 of that judgment). The latest survey submitted by Liberty in the present case shows a continuing international trend towards legal recognition (see paragraphs 55-56 above). In Australia and New Zealand, it appears that the courts are moving away from the biological birth view of sex (as set out in the United Kingdom case of *Corbett v. Corbett*) and taking the view that sex, in the context of a transsexual wishing to marry, should depend on a multitude of factors to be assessed at the time of the marriage.

85. The Court observes that in the case of Rees in 1986 it had noted that little common ground existed between States, some of which did permit change of gender and some of which did not and that generally speaking the law seemed to be in a state of transition (see § 37). In the later case of Sheffield and Horsham, the Court's judgment laid emphasis on the lack of a common European approach as to how to address the repercussions which the legal recognition of a change of sex may entail for other areas of law such as marriage, filiation, privacy or data protection. While this would appear to remain the case, the lack of such a common approach among forty-three Contracting States with widely diverse legal systems and traditions is hardly surprising. In accordance with the principle of subsidiarity, it is indeed primarily for the Contracting States to decide on the

measures necessary to secure Convention rights within their jurisdiction and, in resolving within their domestic legal systems the practical problems created by the legal recognition of post-operative gender status, the Contracting States must enjoy a wide margin of appreciation. The Court accordingly attaches less importance to the lack of evidence of a common European approach to the resolution of the legal and practical problems posed, than to the clear and uncontested evidence of a continuing international trend in favour not only of increased social acceptance of transsexuals but of legal recognition of the new sexual identity of post-operative transsexuals.

5. Impact on the birth register system

86. In the Rees case, the Court allowed that great importance could be placed by the Government on the historical nature of the birth record system. The argument that allowing exceptions to this system would undermine its function weighed heavily in the assessment.

87. It may be noted however that exceptions are already made to the historic basis of the birth register system, namely, in the case of legitimisation or adoptions, where there is a possibility of issuing updated certificates to reflect a change in status after birth. To make a further exception in the case of transsexuals (a category estimated as including some 2,000-5,000 persons in the United Kingdom according to the Interdepartmental Working Group Report, p. 26) would not, in the Court's view, pose the threat of overturning the entire system. Though previous reference has been made to detriment suffered by third parties who might be unable to obtain access to the original entries and to complications occurring in the field of family and succession law (see the Rees judgment, p. 18, § 43), these assertions are framed in general terms and the Court does not find, on the basis of the material before it at this time, that any real prospect of prejudice has been identified as likely to arise if changes were made to the current system.

88. Furthermore, the Court notes that the Government have recently issued proposals for reform which would allow ongoing amendment to civil status data (see paragraph 54). It is not convinced therefore that the need to uphold rigidly the integrity of the historic basis of the birth registration system takes on the same importance in the current climate as it did in 1986.

6. Striking a balance in the present case

89. The Court has noted above (paragraphs 76-79) the difficulties and anomalies of the applicant's situation as a post-operative transsexual. It must be acknowledged that the level of daily interference suffered by the applicant in *B. v. France* (judgment of 25 March 1992, Series A no. 232) has not been attained in this case and that on certain points the risk of

difficulties or embarrassment faced by the present applicant may be avoided or minimised by the practices adopted by the authorities.

90. Nonetheless, the very essence of the Convention is respect for human dignity and human freedom. Under Article 8 of the Convention in particular, where the notion of personal autonomy is an important principle underlying the interpretation of its guarantees, protection is given to the personal sphere of each individual, including the right to establish details of their identity as individual human beings (see, *inter alia*, *Pretty v. the United Kingdom*, no. 2346/02, judgment of 29 April 2002, § 62, and *Mikulić v. Croatia*, no. 53176/99, judgment of 7 February 2002, § 53, both to be published in ECHR 2002-...). In the twenty first century the right of transsexuals to personal development and to physical and moral security in the full sense enjoyed by others in society cannot be regarded as a matter of controversy requiring the lapse of time to cast clearer light on the issues involved. In short, the unsatisfactory situation in which post-operative transsexuals live in an intermediate zone as not quite one gender or the other is no longer sustainable. Domestic recognition of this evaluation may be found in the report of the Interdepartmental Working Group and the Court of Appeal's judgment of *Bellinger v. Bellinger* (see paragraphs 50, 52-53).

91. The Court does not underestimate the difficulties posed or the important repercussions which any major change in the system will inevitably have, not only in the field of birth registration, but also in the areas of access to records, family law, affiliation, inheritance, criminal justice, employment, social security and insurance. However, as is made clear by the report of the Interdepartmental Working Group, these problems are far from insuperable, to the extent that the Working Group felt able to propose as one of the options full legal recognition of the new gender, subject to certain criteria and procedures. As Lord Justice Thorpe observed in the *Bellinger* case, any “spectral difficulties”, particularly in the field of family law, are both manageable and acceptable if confined to the case of fully achieved and post-operative transsexuals. Nor is the Court convinced by arguments that allowing the applicant to fall under the rules applicable to women, which would also change the date of eligibility for her state pension, would cause any injustice to others in the national insurance and state pension systems as alleged by the Government. No concrete or substantial hardship or detriment to the public interest has indeed been demonstrated as likely to flow from any change to the status of transsexuals and, as regards other possible consequences, the Court considers that society may reasonably be expected to tolerate a certain inconvenience to enable individuals to live in dignity and worth in accordance with the sexual identity chosen by them at great personal cost.

92. In the previous cases from the United Kingdom, this Court has since 1986 emphasised the importance of keeping the need for appropriate legal measures under review having regard to scientific and societal developments (see references at paragraph 73). Most recently in the Sheffield and Horsham case in 1998, it observed that the respondent State had not yet taken any steps to do so despite an increase in the social acceptance of the phenomenon of transsexualism and a growing recognition of the problems with which transsexuals are confronted (cited above, paragraph 60). Even though it found no violation in that case, the need to keep this area under review was expressly re-iterated. Since then, a report has been issued in April 2000 by the Interdepartmental Working Group which set out a survey of the current position of transsexuals in *inter alia* criminal law, family and employment matters and identified various options for reform. Nothing has effectively been done to further these proposals and in July 2001 the Court of Appeal noted that there were no plans to do so (see paragraphs 52-53). It may be observed that the only legislative reform of note, applying certain non-discrimination provisions to transsexuals, flowed from a decision of the European Court of Justice of 30 April 1996 which held that discrimination based on a change of gender was equivalent to discrimination on grounds of sex (see paragraphs 43-45 above).

93. Having regard to the above considerations, the Court finds that the respondent Government can no longer claim that the matter falls within their margin of appreciation, save as regards the appropriate means of achieving recognition of the right protected under the Convention. Since there are no significant factors of public interest to weigh against the interest of this individual applicant in obtaining legal recognition of her gender re-assignment, it reaches the conclusion that the fair balance that is inherent in the Convention now tilts decisively in favour of the applicant. There has, accordingly, been a failure to respect her right to private life in breach of Article 8 of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 12 OF THE CONVENTION

94. The applicant also claimed a violation of Article 12 of the Convention, which provides as follows:

“Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right.”

A. Arguments of the parties

1. *The applicant*

95. The applicant complained that although she currently enjoyed a full physical relationship with a man, she and her partner could not marry because the law treated her as a man. She argued that the *Corbett v. Corbett* definition of a person's sex for the purpose of marriage had been shown no longer to be sufficient in the recent case of *Bellinger v. Bellinger* and that even if a reliance on biological criteria remained acceptable, it was a breach of Article 12 to use only some of those criteria for determining a person's sex and excluding those who failed to fulfil those elements.

2. *The Government*

96. The Government referred to the Court's previous case-law (the above-cited *Rees*, *Cossey* and *Sheffield and Horsham* judgments) and maintained that neither Article 12 nor Article 8 of the Convention required a State to permit a transsexual to marry a person of his or her original sex. They also pointed out that the domestic law approach had been recently reviewed and upheld by the Court of Appeal in *Bellinger v. Bellinger*, the matter now pending before the House of Lords. In their view, if any change in this important or sensitive area were to be made, it should come from the United Kingdom's own courts acting within the margin of appreciation which this Court has always afforded. They also referred to the fact that any change brought the possibility of unwanted consequences, submitting that legal recognition would potentially invalidate existing marriages and leave transsexuals and their partners in same-sex marriages. They emphasised the importance of proper and careful review of any changes in this area and the need for transitional provisions.

B. The Court's assessment

97. The Court recalls that in the cases of *Rees*, *Cossey* and *Sheffield and Horsham* the inability of the transsexuals in those cases to marry a person of the sex opposite to their re-assigned gender was not found in breach of Article 12 of the Convention. These findings were based variously on the reasoning that the right to marry referred to traditional marriage between persons of opposite biological sex (the *Rees* judgment, p. 19, § 49), the view that continued adoption of biological criteria in domestic law for determining a person's sex for the purpose of marriage was encompassed within the power of Contracting States to regulate by national law the exercise of the right to marry and the conclusion that national laws in that respect could not be regarded as restricting or reducing the right of a

transsexual to marry in such a way or to such an extent that the very essence of the right was impaired (the Cossey judgment, p. 18, §§ 44-46, the Sheffield and Horsham judgment, p. 2030, §§ 66-67). Reference was also made to the wording of Article 12 as protecting marriage as the basis of the family (Rees, *loc. cit.*).

98. Reviewing the situation in 2002, the Court observes that Article 12 secures the fundamental right of a man and woman to marry and to found a family. The second aspect is not however a condition of the first and the inability of any couple to conceive or parent a child cannot be regarded as *per se* removing their right to enjoy the first limb of this provision.

99. The exercise of the right to marry gives rise to social, personal and legal consequences. It is subject to the national laws of the Contracting States but the limitations thereby introduced must not restrict or reduce the right in such a way or to such an extent that the very essence of the right is impaired (see the Rees judgment, p. 19, § 50; the F. v. Switzerland judgment of 18 December 1987, Series A no. 128, § 32).

100. It is true that the first sentence refers in express terms to the right of a man and woman to marry. The Court is not persuaded that at the date of this case it can still be assumed that these terms must refer to a determination of gender by purely biological criteria (as held by Ormrod J. in the case of *Corbett v. Corbett*, paragraph 21 above). There have been major social changes in the institution of marriage since the adoption of the Convention as well as dramatic changes brought about by developments in medicine and science in the field of transsexuality. The Court has found above, under Article 8 of the Convention, that a test of congruent biological factors can no longer be decisive in denying legal recognition to the change of gender of a post-operative transsexual. There are other important factors – the acceptance of the condition of gender identity disorder by the medical professions and health authorities within Contracting States, the provision of treatment including surgery to assimilate the individual as closely as possible to the gender in which they perceive that they properly belong and the assumption by the transsexual of the social role of the assigned gender. The Court would also note that Article 9 of the recently adopted Charter of Fundamental Rights of the European Union departs, no doubt deliberately, from the wording of Article 12 of the Convention in removing the reference to men and women (see paragraph 58 above).

101. The right under Article 8 to respect for private life does not however subsume all the issues under Article 12, where conditions imposed by national laws are accorded a specific mention. The Court has therefore considered whether the allocation of sex in national law to that registered at birth is a limitation impairing the very essence of the right to marry in this case. In that regard, it finds that it is artificial to assert that post-operative transsexuals have not been deprived of the right to marry as, according to law, they remain able to marry a person of their former opposite sex. The

applicant in this case lives as a woman, is in a relationship with a man and would only wish to marry a man. She has no possibility of doing so. In the Court's view, she may therefore claim that the very essence of her right to marry has been infringed.

102. The Court has not identified any other reason which would prevent it from reaching this conclusion. The Government have argued that in this sensitive area eligibility for marriage under national law should be left to the domestic courts within the State's margin of appreciation, adverting to the potential impact on already existing marriages in which a transsexual is a partner. It appears however from the opinions of the majority of the Court of Appeal judgment in *Bellinger v. Bellinger* that the domestic courts tend to the view that the matter is best handled by the legislature, while the Government have no present intention to introduce legislation (see paragraphs 52-53).

103. It may be noted from the materials submitted by Liberty that though there is widespread acceptance of the marriage of transsexuals, fewer countries permit the marriage of transsexuals in their assigned gender than recognise the change of gender itself. The Court is not persuaded however that this supports an argument for leaving the matter entirely to the Contracting States as being within their margin of appreciation. This would be tantamount to finding that the range of options open to a Contracting State included an effective bar on any exercise of the right to marry. The margin of appreciation cannot extend so far. While it is for the Contracting State to determine *inter alia* the conditions under which a person claiming legal recognition as a transsexual establishes that gender re-assignment has been properly effected or under which past marriages cease to be valid and the formalities applicable to future marriages (including, for example, the information to be furnished to intended spouses), the Court finds no justification for barring the transsexual from enjoying the right to marry under any circumstances.

104. The Court concludes that there has been a breach of Article 12 of the Convention in the present case.

III. ALLEGED VIOLATION OF ARTICLE 14 OF THE CONVENTION

105. The applicant also claimed a violation of Article 14 of the Convention, which provides as follows:

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

106. The applicant complained that the lack of legal recognition of her changed gender was the cause of numerous discriminatory experiences and prejudices. She referred in particular to the fact that she could not claim her

State pension until she was 65 and to the fact that she could not claim a “freedom pass” to give her free travel in London, a privilege which women were allowed to enjoy from the age 60 and men from the age of 65.

107. The Government submitted that no issues arose which were different from those addressed under Article 8 of the Convention and that the complaints failed to disclose any discrimination contrary to the above provision.

108. The Court considers that the lack of legal recognition of the change of gender of a post-operative transsexual lies at the heart of the applicant's complaints under Article 14 of the Convention. These issues have been examined under Article 8 and resulted in the finding of a violation of that provision. In the circumstances, the Court considers that no separate issue arises under Article 14 of the Convention and makes no separate finding.

IV. ALLEGED VIOLATION OF ARTICLE 13 OF THE CONVENTION

109. The applicant claimed a violation of Article 13 of the Convention, which provides as follows:

“Everyone whose rights and freedoms as set forth in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.”

110. The applicant complained that she had no effective remedy available to her in respect of the matters complained of above.

111. The Government submitted that no arguable breach of any Convention right arose to engage the right to a remedy under Article 13. In any event, since 2 October 2000 when the Human Rights Act 1998 came into force, the Convention rights could be relied on in national courts and the applicant would now have a remedy in a national court for any breach of a Convention right.

112. The Court reiterates that Article 13 of the Convention guarantees the availability at the national level of a remedy to enforce the substance of the Convention rights and freedoms in whatever form they might happen to be secured in the domestic legal order. Its effect is to require the provision of a domestic remedy to deal with the substance of an “arguable complaint” under the Convention and to grant appropriate relief (see, amongst other authorities, the *Aksoy v. Turkey* judgment of 25 September 1996, *Reports* 1996-VI, p. 2286, § 95).

113. Having found above that there have been violations of Articles 8 and 12 of the Convention, the applicant's complaints in this regard are without doubt arguable for the purposes of Article 13 of the Convention. The case-law of the Convention institutions indicates, however, that Article 13 cannot be interpreted as requiring a remedy against the state of domestic law, as otherwise the Court would be imposing on Contracting

States a requirement to incorporate the Convention (see the *James and Others v. the United Kingdom* judgment of 21 February 1986, Series A no. 98, p. 48, § 86). Insofar therefore as no remedy existed in domestic law prior to 2 October 2000 when the Human Rights Act 1998 took effect, the applicant's complaints fall foul of this principle. Following that date, it would have been possible for the applicant to raise her complaints before the domestic courts, which would have had a range of possible redress available to them.

114. The Court finds in the circumstances no breach of Article 13 of the Convention in the present case.

V. APPLICATION OF ARTICLE 41 OF THE CONVENTION

115. Article 41 of the Convention provides:

“If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party.”

A. Damage

116. The applicant claimed pecuniary damage of a total of 38,200 pounds sterling (GBP). This represented a sum of GBP 31,200 in respect of the pension which she had been unable to claim at age 60 and GBP 7,000 as the estimated value of the pensioner's bus pass which she had not been eligible to obtain. The applicant also claimed for non-pecuniary damage the sum of GBP 40,000 in respect of distress, anxiety and humiliation.

117. The Government submitted that were the Court to find any breach of the Convention this finding would of itself be sufficient just satisfaction for the purposes of Article 41 of the Convention.

118. The Court recalls that there must be a clear causal connection between the pecuniary damage claimed by the applicant and the violation of the Convention and that this may, in the appropriate case, include compensation in respect of loss of earnings or other sources of income (see, amongst other authorities, the *Barberà, Messegué and Jabardo v. Spain* judgment of 13 June 1994 (Article 50), Series A no. 285-C, pp. 57-58, §§ 16-20; the *Cakıcı v. Turkey* judgment of 8 July 1999, *Reports* 1999-IV, § 127).

119. The Court observes that the applicant was unable to retire at age 60 as other female employees were entitled and to obtain a state pension or to claim a bus pass for free travel. The degree of financial detriment suffered

as a result, if any, is not clear-cut however as the applicant, though perhaps not by choice, continued to work and to enjoy a salary as a result. While it has adverted above to the difficulties and stresses of the applicant's position as a post-operative transsexual, it would note that over the period until 1998 similar issues were found to fall within the United Kingdom's margin of appreciation and that no breach arose.

120. The Court has found that the situation, as it has evolved, no longer falls within the United Kingdom's margin of appreciation. It will be for the United Kingdom Government in due course to implement such measures as it considers appropriate to fulfil its obligations to secure the applicant's, and other transsexuals', right to respect for private life and right to marry in compliance with this judgment. While there is no doubt that the applicant has suffered distress and anxiety in the past, it is the lack of legal recognition of the gender re-assignment of post-operative transsexuals which lies at the heart of the complaints in this application, the latest in a succession of cases by other applicants raising the same issues. The Court does not find it appropriate therefore to make an award to this particular applicant. The finding of violation, with the consequences which will ensue for the future, may in these circumstances be regarded as constituting just satisfaction.

B. Costs and expenses

121. The applicant claims for legal costs and expenses GBP 17,000 for solicitors' fees and GBP 24,550 for the fees of senior and junior counsel. Costs of travel to the Court hearing, together with accommodation and other related expenses were claimed in the sum of GBP 2,822. This made a total of GBP 44,372.

122. The Government submitted that the sum appeared excessive in comparison to other cases from the United Kingdom and in particular as regarded the amount of GBP 39,000 claimed in respect of the relatively recent period during which the applicant's current solicitors have been instructed which would only relate to the consolidated observations and the hearing before the Court.

123. The Court finds that the sums claimed by the applicant for legal costs and expenses, for which no detail has been provided by way of hours of work and fee rates, are high having regard to the level of complexity of, and procedures adopted in, this case. Having regard to the sums granted in other United Kingdom cases and taking into account the sums of legal aid paid by the Council of Europe, the Court awards for this head 39,000 euros (EUR), together with any value-added tax that may be payable. The award is made in euros, to be converted into pounds sterling at the date of settlement, as the Court finds it appropriate that henceforth all just

satisfaction awards made under Article 41 of the Convention should in principle be based on the euro as the reference currency.

C. Default interest

124. As the award is expressed in euros to be converted into the national currency at the date of settlement, the Court considers that the default interest rate should also reflect the choice of the euro as the reference currency. It considers it appropriate to take as the general rule that the rate of the default interest to be paid on outstanding amounts expressed in euro should be based on the marginal lending rate of the European Central Bank to which should be added three percentage points.

FOR THESE REASONS, THE COURT

1. *Holds* unanimously that there has been a violation of Article 8 of the Convention;
2. *Holds* unanimously that there has been a violation of Article 12 of the Convention;
3. *Holds* unanimously that no separate issue arises under Article 14 the Convention;
4. *Holds* unanimously that there has been no violation of Article 13 of the Convention;
5. *Holds* unanimously that the finding of violation constitutes in itself sufficient just satisfaction for the non-pecuniary damage sustained by the applicant;
6. *Holds* unanimously that the respondent State is to pay the applicant, within three months, EUR 39,000 (thirty nine thousand euros) in respect of costs and expenses, together with any value-added tax that may be chargeable, to be converted into pounds sterling at the date of settlement;
7. *Holds* by fifteen votes to two that simple interest at a rate equal to the marginal lending rate of the European Central Bank plus three percentage points shall be payable from the expiry of the above-mentioned three months until settlement;

8. *Dismisses* unanimously the remainder of the applicant's claim for just satisfaction.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 11 July 2002.

Luzius WILDHABER
President

Paul MAHONEY
Registrar

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the following separate opinions are annexed to this judgment:

- (a) concurring opinion of Mr Fischbach;
- (b) partly dissenting opinion of Mr Türmen;
- (c) partly dissenting opinion of Mrs Greve.

L.W.
P.J.M

CONCURRING OPINION OF JUDGE FISCHBACH

Even though I voted with the majority of the Court as concerns point 7 of the operative part of the judgment, I would have preferred a fixed rate of default interest to have been set.

PARTLY DISSENTING OPINION OF JUDGE TÜRMEK

As concerns default interest, I would have preferred, at point 7 of the operative part of the judgment, for a fixed rate to have been set.

PARTLY DISSENTING OPINION OF JUDGE GREVE

In the present case I do not share the views of the majority of my colleagues concerning the default interest to be paid.

There is agreement among the judges that the euro is *a suitable reference currency* for all awards under Article 41. The Court wants such *awards paid promptly*, and the default interest rate is intended to be an incentive for prompt payment *without* it having a *punitive character*. So far I fully agree.

Under the Court's new policy awards are made in the euro to be converted into national currencies at the day of settlement. This means that in the present case the applicant will suffer a loss in the value of her award if her national currency, the pound sterling, continues to gain strength vis-à-vis the euro. Conversion into national currency first at the day of settlement in contradistinction to a conversion at the day of the judgement will favour applicants from the euro countries and applicants that have national currencies on a par with the euro, or weaker. All other applicants will suffer a loss under the changed policy. This, in my opinion, conflicts with the provisions of Article 14 in combination with Article 41. Moreover, it conflicts with the Court's desire that the awards shall to be as fair as possible, that is to maintain the value of the award as accurately as possible.

The latter objective is also the rationale for changing the Court's previous practice of using the default interest rate in each member State as basis for the Court's decision in individual cases.

The majority is attempting to secure that awards become fair by using varying interest rates as they evolve throughout the period of default. The marginal lending rate used by the European Central Bank (ECB) when lending money overnight to commercial banks plus three percentage points will be used. This will in the present case, as in many other cases, give the applicant a lower default interest rate than the rate previously used by the Court, the national default interest rate.

The marginal lending rate is interest paid by banks to the ECB, when they need quick emergency loans. That is, it is a rate which forms the ceiling for the commercial money market; and of little, if any, practical interest to most of the applicants in the Court. The default interest rates provided for in each of the States parties to the Convention for their part do reflect the situation in the national money markets regarding the rates to be paid by applicants who may have to opt for borrowing money while awaiting payment of an award of just satisfaction. For this reason national default interest rates compensate the individuals in a manner not secured by the new default interest rate opted for by the Court's majority.

Furthermore, I believe that an applicant receiving an award ought to be able to know herself the applicable default interest rate. The marginal lending rate used by the ECB when lending money overnight to commercial banks is not easily available to all applicants in Europe. The rate has been

CHRISTINE GOODWIN v. THE UNITED KINGDOM JUDGMENT
PARTLY DISSENTING OPINION OF JUDGE GREVE

39

stable for quite some time but if need be it could be set on a weekly if not even daily basis. Although it will be for the State to prove that it has actually paid the applicant in compliance with the judgment, and for the Committee of Ministers in the Council of Europe to check that this is correct, I find this to be an added bureaucratic procedure which makes it more difficult for applicants to keep track themselves. At all events the basis on which the Court's majority sets the new default interest rate is removed from the actual rate which an applicant, who needs to borrow money on an interim basis while awaiting payment of the award in a judgement, will have to pay. This is not compensated by the new varying interest rate, and this rather abstract search for fairness does not, in my opinion, merit a potentially bureaucratic new procedure.

A

House of Lords

Bellinger v Bellinger (Lord Chancellor intervening)

[2003] UKHL 21

B

2003 Jan 20, 21;
April 10Lord Nicholls of Birkenhead, Lord Hope of Craighead,
Lord Hobhouse of Woodborough, Lord Scott of Foscote
and Lord Rodger of Earlsferry

C

Husband and wife — Nullity — Capacity to marry — Gender — Wife correctly registered as male at birth — Thereafter living as female and undergoing gender reassignment surgery — Wife seeking declaration of validity of marriage — Whether female or male for purposes of marriage — Whether violations of right to respect for private and family life and right to marry — Matrimonial Causes Act 1973 (c 18), s 11(c) — Human Rights Act 1998 (c 42), s 4, Sch 1, Pt I, arts 8, 12

D

The petitioner was a transsexual female born in 1946 who had been correctly classified and registered at birth as male but had undergone gender reassignment surgery and treatment. In 1981 she went through a ceremony of marriage with a man who supported her petition for a declaration that the marriage was valid at its inception and subsisting. The judge refused to grant the declaration on the ground that “male” and “female” in section 11(c) of the Matrimonial Causes Act 1973¹ were to be determined by reference to biological criteria and that the petitioner was a male and not a woman for the purposes of marriage. The Court of Appeal dismissed the petitioner’s appeal.

E

On the petitioner’s appeal, claiming alternatively a declaration that section 11(c) was incompatible with articles 8 and 12 of Schedule 1 Part I to the Human Rights Act 1998²—

F

Held, (1) dismissing the appeal, that “male” and “female” in section 11(c) of the 1973 Act were to be given their ordinary meaning and referred to a person’s biological gender as determined at birth, so that, for the purposes of marriage, a person born with one sex could not later become a person of the opposite sex; that therefore English law did not recognise a marriage between two people who were of the same gender at birth, even if one of them had undergone gender reassignment treatment which altered the anatomical features of the body to give the appearance of those of the opposite gender; that any other conclusion would amount to a major change in the law and would also create anomalies and uncertainties due to the lack of objective criteria by which gender reassignment treatment could be assessed; that such a fundamental change in the law, which would interfere with the traditional concept of marriage and give rise to complex and sensitive issues, should be made only by Parliament after careful deliberation and not by judicial intervention; and that, accordingly, the petitioner having been born male could not be regarded as female as a result of gender reassignment treatment, and therefore the marriage was not valid as the parties were not respectively male and female within the meaning of section 11(c) (post, paras 36–49, 56–58, 62–65, 71, 77, 80–83).

G

Corbett v Corbett (orse Ashley) [1971] P 83 considered.

H

¹ Matrimonial Causes Act 1973, s 11(c): “A marriage . . . shall be void on the following grounds only, that is to say . . . that the parties are not respectively male and female . . .”

² Human Rights Act 1998, Sch 1, Pt I, art 8: “(1) Everyone has the right to respect for his private and family life, his home and his correspondence.”

Art 12: “Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right.”

(2) That since there was no provision for the recognition of gender reassignment for the purposes of marriage, section 11(c) was a continuing obstacle to the petitioner entering into a valid marriage with a man and was therefore incompatible with the petitioner's right to respect for her private and family life and with her right to marry pursuant to articles 8 and 12 respectively, and a declaration would be granted to that effect (post, paras 52, 55, 68–71, 79, 80, 81).

Goodwin v United Kingdom (2002) 35 EHRR 447 considered.

Decision of the Court of Appeal [2001] EWCA Civ 1140; [2002] Fam 150; [2002] 2 WLR 411; [2002] 1 All ER 311 affirmed.

The following cases are referred to in the judgments:

Attorney General v Otahuhu Family Court [1995] 1 NZLR 603

Corbett v Corbett (or se Ashley) [1971] P 83; [1970] 2 WLR 1306; [1970] 2 All ER 33

Cossey v United Kingdom (1990) 13 EHRR 622

Goodwin v United Kingdom (2002) 35 EHRR 447

I v United Kingdom (Application No 25680/94) (unreported) 11 July 2002, ECHR

Kevin, In re (Validity of Marriage of Transsexual) [2001] Fam CA 1074; Appeal No

EA 97/2001; (unreported) 21 February 2003, Family Court of Australia

M v M (1984) 42 RFL (2d) 55

Marckx v Belgium (1979) 2 EHRR 330

R v A (No 2) [2001] UKHL 25; [2002] 1 AC 45; [2001] 2 WLR 1546; [2001] 3 All ER 1, HL(E)

R v Kansal (No 2) [2001] UKHL 62; [2002] 2 AC 69; [2001] 3 WLR 1562; [2002] 1 All ER 257, HL(E)

R v Lambert [2001] UKHL 37; [2002] 2 AC 545; [2001] 3 WLR 206; [2001] 3 All ER 577, HL(E)

R v Lyons [2002] UKHL 44; [2003] 1 AC 976; [2002] 3 WLR 1562; [2002] 4 All ER 1028, HL(E)

R v Tan [1983] QB 1053; [1983] 3 WLR 361; [1983] 2 All ER 12, CA

Rees v United Kingdom (1986) 9 EHRR 56

S (Minors) (Care Order: Implementation of Care Plan), In re [2002] UKHL 10; [2002] 2 AC 291; [2002] 2 WLR 720; [2002] 2 All ER 192, HL(E)

S-T (formerly J) v J [1998] Fam 103; [1997] 3 WLR 1287; [1998] 1 All ER 431, CA

Secretary, Department of Social Security v SRA (1993) 118 ALR 467

Sheffield and Horsham v United Kingdom (1998) 27 EHRR 163

W v W (1976) (2) SA 308

W v W (Physical Inter-sex) [2001] Fam 111; [2001] 2 WLR 674

Walden v Lichtenstein (Application No 33916/96) (unreported) 16 March 2000, ECHR

The following additional cases were cited in argument:

Fitzpatrick v Sterling Housing Association Ltd [2001] 1 AC 27; [1999] 3 WLR 1113; [1999] 4 All ER 705, HL(E)

R v Secretary of State for Employment, Ex p Seymour-Smith (No 2) [2000] 1 WLR 435; [2000] 1 All ER 857, HL(E)

APPEAL from the Court of Appeal

By leave of the House of Lords (Lord Bingham of Cornhill, Lord Hope of Craighead and Lord Hobhouse of Woodborough) granted on 17 January 2002, the petitioner, Elizabeth Ann Bellinger, supported by the respondent, Michael Jeffrey Bellinger, appealed from a decision of the Court of Appeal (Dame Elizabeth Butler-Sloss P and Robert Walker LJ, Thorpe LJ dissenting) on 17 July 2001 dismissing the petitioner's appeal from a decision of Johnson J on 2 November 2000 refusing to grant a declaration under section 55 of the Family Law Act 1986 that the petitioner's marriage to the

- A respondent was valid at its inception and subsisting notwithstanding the fact that the petitioner was born a male.

The facts are stated in the opinion of Lord Nicholls of Birkenhead.

- B *Pamela Scriven QC* and *Ashley Bayston* for the petitioner. The fundamental issue in the appeal is whether the court should approve and apply *Corbett v Corbett (orse Ashley)* [1971] P 83 in deciding what constitutes a man or a woman in the context of the Matrimonial Causes Act 1973. The premise on which the reasoning in that case was based was that the biological factors ascertainable at birth were the only relevant factors. That premise cannot now stand as it ignores the psychological features which are an inbuilt part of gender.

- C There is no statutory definition of “male” and “female”. The court must now consider “male” and “female” in section 11(c) of the 1973 Act in their broad meaning and not in the narrow and artificially constrained meaning given in the *Corbett* case. The court should not be bound by the classification of gender at the time of the birth but should look at the reality of the situation at the time of the marriage. That involves taking account of matters such as the psychological state and life style of the person concerned. [Reference was made to *Attorney General v Otahuhu Family Court* [1995] 1 NZLR 603; *In re Kevin (Validity of Marriage of Transsexual)* [2001] Fam CA 1074].

- E The *Corbett* case was looking at things as they were in 1970. Medical opinion and understanding of human sexuality have moved on, and the *Corbett* criteria for the determination of sex are no longer acceptable. The essential limitation of those criteria lies in the exclusion of the psychological factors regardless of whether or not further research proves such factors to relate to brain differentiation.

- F Since the *Corbett* case major changes have taken place in society in relation to the institution of marriage and in relation to the understanding of transsexualism. It is the responsibility of the court in the construction of a word or phrase that is reactive or reflective of change to do so in the way stated by Lord Slynn of Hadley in *Fitzpatrick v Sterling Housing Association Ltd* [2001] 1 AC 27, 33.

- G It is clear from the Hansard records of the parliamentary debates that it was Parliament’s intention when passing section 1(c) of the Nullity of Marriages Act 1971 (which subsequently became section 11(c) of the 1973 Act) that “male” and “female” should be left undefined and would be capable of bearing meanings other than those ascribed to them in the *Corbett* case, and that a person’s sex would be a question of fact to be determined in the light of evolving medical evidence and opinion.

- H Section 11(c) of the 1973 Act, which has not previously been construed by the Court of Appeal or the House of Lords, should be construed in the light of moral, ethical and societal values as they are now rather than as they were at the date of first enactment or subsequent consolidation. Parliament clearly intended some judicial licence. The majority of the Court of Appeal failed to respond to Parliament’s intention.

If, in addition to self-identity, the petitioner has female physical characteristics it must be said that she is female. Post-operative gender reassessment patients are indistinguishable from members of the sex to which they have changed. It is therefore unfair and irrational for the law to

regard them differently. [Reference was made to *Goodwin v United Kingdom* (2002) 35 EHRR 447.] The petitioner has fulfilled all the conditions for surgical realignment and has been in a happy and fulfilling marriage for over 20 years. The court must look at the situation as it was at the time of the marriage. She is entitled to a declaration that she is female and that the marriage was binding. A

Alternatively, if the narrow definition in the *Corbett* case still stands, section 11(c) of the 1973 Act should be held to be incompatible with articles 8 and 12 of the European Convention on Human Rights. B

Philip Sales and *Kassie Smith* for the Lord Chancellor. By application of the ordinary rules of construction established in domestic law, and apart from the Human Rights Act 1998, the term “female” in section 11(c) of the 1973 Act cannot be construed so as to cover a male to female transsexual person. In 1981 domestic law did not allow transsexual persons to marry in their acquired gender and the same has been true since the Human Rights Act 1998 came into force. C

The concepts of “male” and “female” in the context of the 1973 Act are fixed and not changeable. Marriage confers a legal status which affects other legal rights in fields such as contract, crime, pensions and inheritance. Therefore clear objective criteria should apply to determine whether a marriage is valid or not. The psychological criterion is unsatisfactory for the purposes of the legal function which of section 11(c) must fulfil. It does not provide a clear, determinate indication of when a person acquires a different sex from that given by reference to the criteria available at birth. The 1973 Act does not contemplate that marital status should change except by divorce. D

Parliament intended that sexual identity should conform with the registration of sex at birth. The only criteria that can be applied to determine a child’s sex at birth remain the physiological *Corbett* criteria, which provide a consistent approach and legal certainty. [Reference was made to *Fitzpatrick v Sterling Housing Association Ltd* [2001] 1 AC 27.] The adoption of new criteria is a matter for Parliament and not for the courts. A birth certificate has an on going function and Parliament contemplate there should be stability of sexual identity over time. E

Section 11(c) was introduced to reflect the law as decided in the *Corbett* case [1971] P 83. There is an overlap between the religious concepts and the legal concepts of marriage, and the religious background is important in the interpretation of this legislation. The presumption is that marriage is a union between a man and a woman. F

The wide range of circumstances considered in *In re Kevin (Validity of Marriage of Transsexual)* [2001] Fam CA 1074, para 330 would be unsatisfactory as a test for determining “male” and “female” for the purposes of section 11(c). It would be unfair that those who have had gender reassignment surgery should have an advantage over those who have similar psychological needs but cannot have surgery. Surgery is only one of a range of medical procedures designed to alleviate psychological gender identity disorder. G

In *Goodwin v United Kingdom* 35 EHRR 447 the court was concerned not only with marriage but with a range of domestic laws and policies which failed to recognise a transsexual person’s acquired gender. The court H

- A intended that the United Kingdom government should have a reasonable period within which to adjust the law to take account of the court's judgment. During that period there will be objective justification on grounds of legal certainty and the need for principled and coherent reform of the law by the legislature for maintaining and applying section 11(c). [Reference was made to *Marck v Belgium* (1979) 2 EHRR 330; *Walden v Lichtenstein* (Application No 33916/96) (unreported) 16 March 2000 and *R v Secretary of State for Employment, Ex p Seymour-Smith* (No 2) [2000] 1 WLR 435.]
- B

A declaration of incompatibility would serve no useful purpose because it would merely trigger the power of the minister to amend the law under section 10 of the Human Rights Act; but by virtue of the *Goodwin* decision and the terms of section 10 the minister already has those powers.

- C In principle a declaration of incompatibility should not be granted where the matter is already covered by a judgment of the European Court of Human Rights because it would encourage needless litigation.

Scriven QC replied.

Their Lordships took time for consideration.

- D 10 April. **LORD NICHOLLS OF BIRKENHEAD**

1 My Lords, can a person change the sex with which he or she is born? Stated in an over-simplified and question-begging form, this is the issue raised by this appeal. More specifically, the question is whether the petitioner, Mrs Elizabeth Bellinger, is validly married to Mr Michael Bellinger. On 2 May 1981 Mr and Mrs Bellinger went through a ceremony of marriage to each other. Section 1(c) of the Nullity of Marriage Act 1971, re-enacted in section 11(c) of the Matrimonial Causes Act 1973, provides that a marriage is void unless the parties are "respectively male and female". The question is whether, at the time of the marriage, Mrs Bellinger was "female" within the meaning of that expression in the statute. In these proceedings she seeks a declaration that the marriage was valid at its inception and is subsisting. The trial judge, Johnson J, refused to make this declaration: see [2001] 1 FLR 389. So did the Court of Appeal, by a majority of two to one: see [2002] Fam 150. The majority comprised Dame Elizabeth Butler-Sloss P and Robert Walker LJ. Thorpe LJ dissented.

E

F

- 2 In an alternative claim, advanced for the first time before your Lordships' House, Mrs Bellinger seeks a declaration that section 11(c) of the Matrimonial Causes Act 1973 is incompatible with articles 8 and 12 of the European Convention on Human Rights. The Lord Chancellor has intervened in the proceedings as the minister with policy responsibility for that statutory provision.
- G

- 3 Mrs Bellinger was born on 7 September 1946. At birth she was correctly classified and registered as male. That is common ground. For as long as she can remember, she felt more inclined to be female. She had an increasing urge to live as a woman rather than as a man. Despite her inclinations, and under some pressure, in 1967 she married a woman. She was then 21. The marriage broke down. They separated in 1971 and were divorced in 1975.
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4 Since then Mrs Bellinger has dressed and lived as a woman. She underwent treatment, described below. When she married Mr Bellinger he

was fully aware of her background. He has throughout been entirely supportive of her. She was described on her marriage certificate as a spinster. Apart from that, the registrar did not ask about her gender status, nor did Mrs Bellinger volunteer any information. Since their marriage Mr and Mrs Bellinger have lived happily together as husband and wife, and have presented themselves in this way to the outside world.

The indicia of sex and transsexual people

5 The indicia of human sex or gender (for present purposes the two terms are interchangeable) can be listed, in no particular order, as follows. (1) Chromosomes: XY pattern in males, XX in females. (2) Gonads: testes in males, ovaries in females. (3) Internal sex organs other than the gonads: for instance, sperm ducts in males, uterus in females. (4) External genitalia. (5) Hormonal patterns and secondary sexual characteristics, such as facial hair and body shape: no one suggests these criteria should be a primary factor in assigning sex. (6) Style of upbringing and living. (7) Self-perception. Some medical research has suggested that this factor is not exclusively psychological. Rather, it is associated with biological differentiation within the brain. The research has been very limited, and in the present state of neuroscience the existence of such an association remains speculative.

6 In the vast majority of cases these indicia in an individual all point in the same direction. There is no difficulty in assigning male or female gender to the individual. But nature does not draw straight lines. Some people have the misfortune to be born with physiological characteristics which deviate from the normal in one or more respects, and to lesser or greater extent. These people attract the convenient shorthand description of inter-sexual. In such cases classification of the individual as male or female is best done by having regard to all the factors I have listed. If every person has to be classified as either male or female, that is the best that can be done. That was the course, in line with medical opinion, followed by Charles J in *W v W (Physical Inter-sex)* [2001] Fam 111, 146D–F. That is not the problem arising in the present case.

7 Transsexual people are to be distinguished from inter-sexual people. Transsexual is the label given, not altogether happily, to a person who has the misfortune to be born with physical characteristics which are congruent but whose self-belief is incongruent. Transsexual people are born with the anatomy of a person of one sex but with an unshakeable belief or feeling that they are persons of the opposite sex. They experience themselves as being of the opposite sex. Mrs Bellinger is such a person. The aetiology of this condition remains uncertain. It is now generally recognised as a psychiatric disorder, often known as gender dysphoria or gender identity disorder. It can result in acute psychological distress.

8 The treatment of this condition depends upon its severity and the circumstances of the individual. In severe cases conventional psychiatric treatment is inadequate. Ultimately the most that medical science can do in order to alleviate the condition is, in appropriate cases, to rid the body of its intensely disliked features and make it accord, so far as possible, with the anatomy craved. This is done by means of hormonal and other treatment and major surgery, popularly known as a “sex change” operation. In this regard medical science and surgical expertise have advanced much in recent years. Hormonal treatment can change a person’s secondary sexual

- A characteristics. Irreversible surgery can adapt or remove genitalia and other organs, external and internal. By this means a normal body of one sex can be altered so as to give the appearance of a normal body of the other sex. But there are still limits to what can be done. Gonads cannot be constructed. The creation of replica genital organs is particularly difficult with female to male gender reassignment surgery. Chromosomal patterns remain unchanged. The change of body can never be complete.
- B 9 Surgery of this nature is the last step in what are typically four steps of treatment. The four steps are psychiatric assessment, hormonal treatment, a period of living as a member of the opposite sex subject to professional supervision and therapy (the “real life experience”), and finally, in suitable cases, gender reassignment surgery. In February 1981 Mrs Bellinger, having been through the previous stages of treatment, successfully underwent this form of surgery. This involved removal of her testes and penis and, in the words of Johnson J, “the creation of an orifice which can be described as an artificial vagina, but she was still without uterus or ovaries or any other biological characteristics of a woman.” A chromosomal test, dated 8 April 1999, showed her to have a karyotype 46XY pattern, an apparently normal male karyotype.
- C 10 For completeness I should mention in passing that a transsexual person is to be distinguished from a homosexual person. A homosexual is a person who is attracted sexually to persons of the same sex. Nor should a transsexual person be confused with a transvestite. A transvestite is a person who, usually for the purpose of his or her sexual gratification, enjoys dressing in the clothes of the opposite sex.
- D
- E *The present state of the law*
- 11 The present state of English law regarding the sex of transsexual people is represented by the well known decision of Ormrod J in *Corbett v Corbett (orse Ashley)* [1971] P 83, 104, 106. That case, like the present one, concerned the gender of a male to female transsexual in the context of the validity of a marriage. Ormrod J held that, in this context, the law should adopt the chromosomal, gonadal and genital tests. If all three are congruent, that should determine a person’s sex for the purpose of marriage. Any operative intervention should be ignored. The biological sexual constitution of an individual is fixed at birth, at the latest, and cannot be changed either by the natural development of organs of the opposite sex or by medical or surgical means.
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- G 12 In *R v Tan* [1983] QB 1053, 1063–1064, the Court of Appeal, comprising May LJ and Parker and Staughton JJ, applied the *Corbett* approach in the context of criminal law. The court upheld convictions which were dependent on Gloria Greaves, a post-operative male to female transsexual, still being in law a man. In *S-T (formerly J) v J* [1998] Fam 103, 122, a case of a female to male transsexual, the correctness of the decision in *Corbett* seems not to have been challenged. But Ward LJ suggested that the decision would bear re-examination.
- H 13 The decision in *Corbett* has attracted much criticism, from the medical profession and elsewhere. The criteria for designating a person as male or female are complex. It is too “reductionistic” to have regard only to the three *Corbett* factors of chromosomes, gonads and genitalia. This approach ignores “the compelling significance of the psychological status of

the person as a man or a woman". Further, the application of the *Corbett* approach leads to a substantially different outcome in the cases of a post-operative inter-sexual person and a post-operative transsexual person, even though, post-operatively, the bodies of the two individuals may be remarkably similar.

14 In overseas jurisdictions *Corbett* has not been universally followed. It was followed, for instance, in South Africa in *W v W* (1976) (2) SA 308 and in Canada in *M v M* (1984) 42 RFL (2d) 55. But more recently the trend has been in the opposite direction. Thus, for instance, in New Zealand and Australia post-operative transsexuals' assigned sex has been recognised for the purpose of validating their marriages. In New Zealand in *Attorney General v Otauhu Family Court* [1995] 1 NZLR 603, 630, Ellis J noted that once a transsexual person has undergone surgery, he or she is no longer able to operate in his or her original sex. He held there is no social advantage in the law not recognising the validity of the marriage of a transsexual in the sex of reassignment. An adequate test is whether the person in question has undergone surgical and medical procedures that have effectively given the person the physical conformation of a person of a specified sex.

15 In Australia Chisholm J reached a similar conclusion in *In re Kevin (Validity of Marriage of Transsexual)* [2001] Fam CA 1074, a case decided after the decision of the Court of Appeal in the present case. Chisholm J's extensive judgment contains a powerful critique of the existing law and a useful review of international developments. Having regard to the view I take of this case, it is not necessary for me to elaborate on his views. Suffice to say, his conclusion was that there is no "formulaic solution" to determining the sex of an individual for the purpose of the law of marriage. All relevant matters need to be considered, including the person's life experiences and self-perception. Post-operative transsexual people will normally be members of their reassigned sex.

16 This decision was the subject of an appeal. Very recently, on 21 February 2003, the full court of the Federal Family Court dismissed the appeal: Appeal No EA/97/2001 (unreported). The judgment of the full court contains an invaluable survey of the authorities and the issues. The court concluded that in the relevant Commonwealth marriage statute the words "man" and "woman" should be given their ordinary, everyday contemporary meaning. Chisholm J was entitled to conclude, as a question of fact, that the word "man" includes a post-operative female to male transsexual person. The full court left open the "more difficult" question of pre-operative transsexual persons.

The decisions of the courts below

17 The trial judge, Johnson J, recognised there has been a marked change in social attitudes to problems such as those of Mrs Bellinger since *Corbett v Corbett (orse Ashley)* [1971] P 83 was decided in 1970. The law on this matter in this country is, or is becoming, a minority position, at least so far as Europe is concerned. But the law is clear, and as a judge he had to accept the law as it is. What is also clear is that this is no simple matter. Potentially there are serious implications to be considered in relation to the law of marriage and other areas of life: see [2001] 1 FLR 389, 402.

18 Likewise, the majority of the Court of Appeal, having considered up to date medical evidence, adhered to the *Corbett* approach. The three

- A criteria relied upon by Ormrod J remain the only basis upon which to decide upon the gender of a child at birth. There is, in informed medical circles, a growing momentum for recognition of transsexual people for every purpose and in a manner similar to those who are inter-sexed. This reflects changes in social attitudes as well as advances in medical research. But recognition of a change of gender for the purposes of marriage would require some certainty regarding the point at which the change takes place. This point is not easily ascertainable. At what point would it be consistent with public policy to recognise that a person should be treated for all purposes, including marriage, as a person of the opposite sex to that which he or she was correctly assigned at birth? This is a question for Parliament, not the courts: see [2002] Fam 150, 176–178, paras 97–109.
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- 19 In his dissenting judgment Thorpe LJ questioned whether it was right, particularly in the context of marriage, to make the chromosomal factor conclusive, or even dominant. It is an invisible feature of an individual, incapable of perception other than by scientific test. In the context of the institution of marriage as it is today it is right to give predominance to psychological factors and to carry out the essential assessment of gender at or shortly before the time of marriage rather than at the time of birth: [2002] Fam 150, 190–191, para 155.
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The European Court of Human Rights

- 20 This issue has been before the European Court of Human Rights on several occasions in the last 20 years. During this period the development of human rights law on this issue has been remarkably rapid. Until very recently the court consistently held that application of the *Corbett* criteria, and consequent non-recognition of change of gender by post-operative transsexual persons, did not constitute a violation of article 8 (right to respect for private life) or article 12 (right to marry): *Rees v United Kingdom* (1986) 9 EHRR 56, *Cossey v United Kingdom* (1990) 13 EHRR 622, and *Sheffield and Horsham v United Kingdom* (1998) 27 EHRR 163. It is to be noted, however, that in the latter case the court was critical of the United Kingdom's apparent failure to take any steps to keep this area of the law under review. There is, the court said, an increased social acceptance of transsexualism and an increased recognition of the problems which post-operative transsexual people encounter. The court reiterated that this area "needs to be kept under review by contracting states": paragraph 60.
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- 21 In its most recent decision the court has taken the view that the sands of time have run out. The United Kingdom's margin of appreciation no longer extends to declining to give legal recognition to all cases of gender reassignment. This was the decision of the court, sitting as a grand chamber, in the case of *Goodwin v United Kingdom* (2002) 35 EHRR 447. Judgment was given in July 2002, that is, after the Court of Appeal gave its judgment in the present case. Christine Goodwin was a post-operative male to female transsexual. The court held unanimously that the United Kingdom was in breach of articles 8 and 12.
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- H 22 The court's judgment was wide-ranging. As it happens, this was not a "marriage" case. Christine Goodwin had married as a man and later been divorced. Her complaint was that in several respects she, as a post-operative transsexual person, was not treated fairly by the laws or practices of this country. She was unable to pursue a claim for sexual harassment in an

employment tribunal because she was considered in law to be a man. She was not eligible for a state pension at 60, the age of entitlement for women. She remained obliged to pay the higher car insurance premiums applicable to men. In many instances she had to choose between revealing her birth certificate and forgoing advantages conditional upon her producing her birth certificate. Her inability to marry as a woman seems not to have been the subject of specific complaint by her. But in its judgment the court expressed its views on this and other aspects of the lack of legal recognition of her gender reassignment.

23 Some of the main points in the judgment of the court can be summarised as follows. In the interests of legal certainty, foreseeability and equality before the law the court should not depart, without good reason, from precedents laid down in previous cases. But the court must have regard to changing conditions within the respondent state and within contracting states generally. The court must respond to any evolving convergence on the standards to be achieved: paragraph 74. A test of congruent biological factors can no longer be decisive in denying legal recognition to the change of gender of a post-operative transsexual: paragraph 100. With increasingly sophisticated types of surgery and hormonal treatments the principal unchanging biological aspect of gender identity is the chromosomal element. It is not apparent that this must inevitably be of decisive significance: paragraph 82. The court recognised that it is for a contracting state to determine, amongst other matters, the conditions under which a person claiming legal recognition as a transsexual establishes that gender reassignment has been properly effected. But it found “no justification for barring the transsexual from enjoying the right to marry under any circumstances”: paragraph 103.

24 This decision of the court was essentially prospective in character. The court made this plain. Until 1998, the date of the decision in *Sheffield and Horsham v United Kingdom* 27 EHRR 163, the court had found that the United Kingdom’s treatment of post-operative transsexual people was within this country’s margin of appreciation and that this treatment did not violate the Convention. By the *Goodwin* decision the court found that “the situation, as it has evolved, *no longer* falls within the United Kingdom’s margin of appreciation”: paragraphs 119–120 (emphasis added).

Developments since the Goodwin decision

25 This decision of the European Court of Human Rights prompted three developments. First, in written answers to the House of Commons on 23 July 2002, the Parliamentary Secretary to the Lord Chancellor’s Department noted that the Interdepartmental Working Group on Transsexual People had been reconvened. Its terms of reference include re-examining the implications of granting full legal status to transsexual people in their acquired gender. The minister stated that the working group had been asked to consider urgently the implications of the *Goodwin* judgment.

26 The second development has an important bearing on the outcome of this appeal. On 13 December 2002 the Government announced its intention to bring forward primary legislation which will allow transsexual people who can demonstrate they have taken decisive steps towards living fully and permanently in the acquired gender to marry in that gender. The

A legislation will also deal with other issues arising from the legal recognition of acquired gender. A draft outline Bill will be published in due course.

27 The third development was that before your Lordships' House counsel for the Lord Chancellor accepted that, from the time of the *Goodwin* decision, those parts of English law which fail to give legal recognition to the acquired gender of transsexual persons are in principle incompatible with articles 8 and 12 of the Convention. Domestic law, including section 11(c) of the Matrimonial Causes Act 1973, will have to change.

Gender reassignment

28 The distinction between male and female exists throughout the animal world. It corresponds to the different roles played in the reproductive process. A male produces sperm which fertilise the female's eggs. In this country, as elsewhere, classification of a person as male or female has long conferred a legal status. It confers a legal status, in that legal as well as practical consequences follow from the recognition of a person as male or female. The legal consequences affect many areas of life, from marriage and family law to gender-specific crime and competitive sport. It is not surprising, therefore, that society through its laws decides what objective biological criteria should be applied when categorising a person as male or female. Individuals cannot choose for themselves whether they wish to be known or treated as male or female. Self-definition is not acceptable. That would make nonsense of the underlying biological basis of the distinction.

29 This approach did not give rise to legal difficulty before the advent of gender reassignment treatment. This was noted by Lord Reed in his article "Splitting the difference: transsexuals and European Human Rights law" (September 2000). Gender identity disorder seems always to have existed. But before the advent of gender reassignment treatment a claim by a transsexual person to be recognised in his or her self-perceived gender would have been hopeless. The anatomy of his or her body of itself would have refuted the claim.

30 The position has now changed. Recognition of transsexualism as a psychiatric disorder has been accompanied by the development of sophisticated techniques of medical treatment. The anatomical appearance of the body can be substantially altered, by forms of treatment which are permissible as well as possible. It is in these changed circumstances that society is now facing the question of how far it is prepared to go to alleviate the plight of the small minority of people who suffer from this medical condition. Should self-perceived gender be recognised?

31 Recognition of gender reassignment will involve some blurring of the normally accepted biological distinction between male and female. Some blurring already exists, unavoidably, in the case of inter-sexual persons. When assessing the gender of inter-sexual persons, matters taken into account include self-perception and style of upbringing and living. Recognition of gender reassignment will involve further blurring. It will mean that in law a person who, unlike an inter-sexual person, had all the biological characteristics of one sex at birth may subsequently be treated as a member of the opposite sex.

32 Thus the circumstances in which, and the purposes for which, gender reassignment is recognised are matters of much importance. These are not easy questions. The circumstances of transsexual people vary widely. The

distinction between male and female is material in widely differing contexts. The criteria appropriate for recognising self-perceived gender in one context, such as marriage, may not be appropriate in another, such as competitive sport.

33 Stated very shortly, this is the setting for the legal issues arising on this appeal, to which I now turn.

Gender and marriage: part of a wider problem

34 My Lords, I am profoundly conscious of the humanitarian considerations underlying Mrs Bellinger's claim. Much suffering is involved for those afflicted with gender identity disorder. Mrs Bellinger and others similarly placed do not undergo prolonged and painful surgery unless their turmoil is such that they cannot otherwise live with themselves. Non-recognition of their reassigned gender can cause them acute distress. I have this very much in mind.

35 I also have in mind that increasingly, in the more compassionate times in which we live, there is an international trend towards recognising gender reassignment and not condemning post-operative transsexual people to live in what was aptly described by the European Court of Human Rights in the *Goodwin* case 35 EHRR 447 as an intermediate zone, not quite one gender or the other. And in this country gender reassignment has already received legal recognition for some purposes, for example, for the purpose of the discrimination legislation, in section 2A of the Sex Discrimination Act 1975. This section was introduced into the statute by the Sex Discrimination (Gender Reassignment) Regulations 1999 (SI 1999/1102).

36 Despite this, I am firmly of the view that your Lordships' House, sitting in its judicial capacity, ought not to accede to the submissions made on behalf of Mrs Bellinger. Recognition of Mrs Bellinger as female for the purposes of section 11(c) of the Matrimonial Causes Act 1973 would necessitate giving the expressions "male" and "female" in that Act a novel, extended meaning: that a person may be born with one sex but later become, or become regarded as, a person of the opposite sex.

37 This would represent a major change in the law, having far reaching ramifications. It raises issues whose solution calls for extensive enquiry and the widest public consultation and discussion. Questions of social policy and administrative feasibility arise at several points, and their interaction has to be evaluated and balanced. The issues are altogether ill-suited for determination by courts and court procedures. They are pre-eminently a matter for Parliament, the more especially when the government, in unequivocal terms, has already announced its intention to introduce comprehensive primary legislation on this difficult and sensitive subject.

38 Given this latter circumstance, intervention by the courts would be peculiarly inappropriate when the change being sought in the law raises issues such as the following.

39 First, much uncertainty surrounds the circumstances in which gender reassignment should be recognised for the purposes of marriage. The present case concerns one individual and her particular condition and circumstances. Although some of the evidence produced is of a general nature, the evidence before the House is focused on the facts of this case. So were the arguments. In particular, Miss Scriven submitted that wherever the

A line marking the transition from one sex to the other is to be drawn, Mrs Bellinger is on the reassigned gender side of the line.

40 I do not consider this would be a proper or, indeed, a responsible basis on which to change the law. Surgical intervention takes many forms and, for a variety of reasons, is undertaken by different people to different extents. For men it may mean castration or inversion of the penis to create a false vagina. For women it may mean a mastectomy, hysterectomy, or creation of a false penis by phalloplasty. There seems to be no “standard” operation or recognised definition of the outcome of completed surgery. Today the case before the House concerns Mrs Bellinger. Tomorrow’s case in the High Court will relate to a transsexual person who has been able to undergo a less extensive course of surgery. The following week will be the case of a transsexual person who has undergone hormonal treatment but who, for medical reasons, has not been able to undergo any surgery. Then there will be a transsexual person who is medically able to undergo all or part of the surgery but who does not wish to do so. By what criteria are cases such as these to be decided?

41 But the problem is more fundamental than this. It is questionable whether the successful completion of some sort of surgical intervention should be an essential prerequisite to the recognition of gender reassignment. If it were, individuals may find themselves coerced into major surgical operations they otherwise would not have. But the aim of the surgery is to make the individual feel more comfortable with his or her body, not to “turn a man into a woman” or vice versa. As one medical report has expressed it, a male to female transsexual person is no less a woman for not having had surgery, or any more a woman for having had it: see *Secretary, Department of Social Security v SRA* (1993) 118 ALR 467, 477.

42 These are deep waters. Plainly, there must be some objective, publicly available criteria by which gender reassignment is to be assessed. If possible the criteria should be capable of being applied readily so as to produce a reasonably clear answer. Parties proposing to enter into a marriage relationship need to know whether their marriage will be valid. Other people need to know whether a marriage was valid. Marriage has legal consequences in many directions: for instance, housing and residential security of tenure, social security benefits, citizenship and immigration, taxation, pensions, inheritance, life insurance policies, criminal law (bigamy). There must be an adequate degree of certainty. Otherwise, as the majority of the Court of Appeal observed, the applicability of the law to an individual suffering from gender identity disorder would be in a state of complete confusion: see [2002] 2 Fam 150, 177, para 104.

43 Your Lordships’ House is not in a position to decide where the demarcation line could sensibly or reasonably be drawn. Where this line should be drawn is far from self-evident. The antipodean decisions of *Attorney General v Otahuhu Family Court* [1995] 1 NZLR 603 and *In re Kevin (Validity of Marriage of Transsexual)* [2001] Fam CA 1074 and Appeal No EA 97/2001 have not identified any clear, persuasive principle in this regard. Nor has the dissenting judgment of Thorpe LJ in the present case. Nor has the decision of the European Court of Human Rights in *Goodwin v United Kingdom* 35 EHRR 447. Nor is there uniformity among the 13 member states of the European Union which afford legal recognition

to a transsexual person's acquired gender. The preconditions for recognition vary considerably. A

44 Further, the House is not in a position to give guidance on what other preconditions should be satisfied before legal recognition is given to a transsexual person's acquired gender. Some member states of the European Union insist on the applicant being single or on existing marriages being dissolved. Some insist on the applicant being sterile. Questions arise about the practical mechanisms and procedures for obtaining recognition of acquired gender, and about the problem of people who "revert" to their original gender after a period in their new gender role. B

45 Secondly, the recognition of gender reassignment for the purposes of marriage is part of a wider problem which should be considered as a whole and not dealt with in a piecemeal fashion. There should be a clear, coherent policy. The decision regarding recognition of gender reassignment for the purpose of marriage cannot sensibly be made in isolation from a decision on the like problem in other areas where a distinction is drawn between people on the basis of gender. These areas include education, child care, occupational qualifications, criminal law (gender-specific offences), prison regulations, sport, the needs of decency, and birth certificates. Birth certificates, indeed, are one of the matters of most concern to transsexual people, because birth certificates are frequently required as proof of identity or age or place of birth. When, and in what circumstances, should these certificates be capable of being reissued in a revised form which does not disclose that the person has undergone gender reassignment? C
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46 Thirdly, even in the context of marriage, the present question raises wider issues. Marriage is an institution, or relationship, deeply embedded in the religious and social culture of this country. It is deeply embedded as a relationship between two persons of the opposite sex. There was a time when the reproductive functions of male and female were regarded as the primary *raison d'être* of marriage. The Church of England Book of Common Prayer of 1662 declared that the first cause for which matrimony was ordained was the "procreation of children". For centuries this was proclaimed at innumerable marriage services. For a long time now the emphasis has been different. Various expressed, there is much more emphasis now on the "mutual society, help and comfort that the one ought to have of the other". E
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47 Against this background there are those who urge that the special relationship of marriage should not now be confined to persons of the opposite sex. It should be possible for persons of the same sex to marry. This, it is said, is the appropriate way to resolve problems such as those confronting Mrs Bellinger. G

48 It hardly needs saying that this approach would involve a fundamental change in the traditional concept of marriage. Here again, this raises a question which ought to be considered as part of an overall review of the most appropriate way to deal with the difficulties confronting transsexual people. H

49 For these reasons I would not make a declaration that the marriage celebrated between Mr and Mrs Bellinger in 1981 was valid. A change in the law as sought by Mrs Bellinger must be a matter for deliberation and decision by Parliament when the forthcoming Bill is introduced.

A *Declaration of incompatibility*

50 Mrs Bellinger advanced a further, alternative claim for a declaration that in so far as section 11(c) of the Matrimonial Causes Act 1973 makes no provision for the recognition of gender reassignment it is incompatible with articles 8 and 12 of the Convention. Her claim is advanced on the footing that, although she and Mr Bellinger celebrated their marriage long before the Human Rights Act 1998 came into force, and although the *Goodwin* decision 35 EHRR 447 dealt with the human rights position as at the date of the judgment (July 2002), the non-recognition of their ability to marry continues to have adverse practical effects. The statute continues to prevent them marrying each other.

51 Mr Sales advanced several arguments on why such a declaration should not be made. There is, he submitted, no present incompatibility between the statute and the Convention. The European Court of Human Rights, in its decision in *Goodwin*, envisaged that the government should have a reasonable period in which to amend domestic law on a principled and coherent basis. The court said it “will be for the United Kingdom Government *in due course* to implement such measures as it considers appropriate to fulfil its obligations”: see 35 EHRR 447, 483, para 120 (emphasis added).

52 I cannot accept this submission. It may be that, echoing the language of the European Court of Human Rights in *Marckx v Belgium* (1979) 2 EHRR 330, 353, para 58, the principle of legal certainty dispenses the United Kingdom government from re-opening legal acts or situations which antedate the judgment in *Goodwin*. But that is not the present case. In the present case section 11(c) of the Matrimonial Causes Act 1973 remains a continuing obstacle to Mr and Mrs Bellinger marrying each other.

53 It may also be that there are circumstances where maintaining an offending law in operation for a reasonable period pending enactment of corrective legislation is justifiable. An individual may not then be able, during the transitional period, to complain that his rights have been violated. The admissibility decision of the court in *Walden v Liechtenstein* (Application No 33916/96) (unreported) 16 March 2000 is an example of this pragmatic approach to the practicalities of government. But the question now under consideration is different. It is more general. The question is whether non-recognition of gender reassignment for the purposes of marriage is compatible with articles 8 and 12. The answer to this question is clear: it is not compatible. The European Court of Human Rights so found in July 2002 in *Goodwin*, and the Government has so accepted. What was held to be incompatible in July 2002 has not now, for the purposes of section 4, become compatible. The government’s announcement of forthcoming legislation has not had that effect, nor could it. That would make no sense.

54 Then Mr Sales submitted that a declaration of incompatibility would serve no useful purpose. A declaration of incompatibility triggers the ministerial powers to amend the offending legislation under the “fast track” procedures set out in section 10 and Schedule 2 of the Human Rights Act 1998. But the minister’s powers have already been triggered in the present case under section 10(1)(b), by reason of the decisions of the European Court of Human Rights in the *Goodwin* case and the associated case of *I v United Kingdom* (Application No 25680/94) (unreported) 11 July 2002. Further, the Government has already announced its intention to bring

forward primary legislation on this subject. For this reason also, counsel submitted, making a declaration of incompatibility would serve no useful purpose.

55 I am not persuaded by these submissions. If a provision of primary legislation is shown to be incompatible with a Convention right the court, in the exercise of its discretion, may make a declaration of incompatibility under section 4 of the Human Rights Act 1998. In exercising this discretion the court will have regard to all the circumstances. In the present case the government has not sought to question the decision of the European Court of Human Rights in *Goodwin* 35 EHRR 447. Indeed, it is committed to giving effect to that decision. Nevertheless, when proceedings are already before the House, it is desirable that in a case of such sensitivity this House, as the court of final appeal in this country, should formally record that the present state of statute law is incompatible with the Convention. I would therefore make a declaration of incompatibility as sought. I would otherwise dismiss this appeal.

LORD HOPE OF CRAIGHEAD

56 My Lords, my noble and learned friend, Lord Nicholls of Birkenhead, has explained the nature of the condition from which Mrs Bellinger has been suffering from as long as she can remember and the profound changes which she has undergone, both physically and socially, to give effect to her wish to live her life as a woman rather than as a man. Her courage and that of Mr Bellinger, who has supported her constantly throughout their marriage, deserve our respect and admiration. If there was a legitimate way of solving their problem and making the declaration which Mrs Bellinger seeks, I would of course wish to take it. But I agree with my noble and learned friend that the expressions “male” and “female” in section 11(c) of the Matrimonial Causes Act 1973 are not capable of being given the extended meaning that would be needed to accommodate her case, and that we have no option but to dismiss this appeal.

57 The essence of the problem, as I see it, lies in the impossibility of changing completely the sex which individuals acquire when they are born. A great deal can be done to remove the physical features of the sex from which the transsexual wishes to escape and to reproduce those of the sex which he or she wishes to acquire. The body can be altered to produce all the characteristics that the individual needs to feel comfortable, and there are no steps that cannot be taken to adopt a way of life that will enable him or her to enter into a satisfactory and loving heterosexual relationship. But medical science is unable, in its present state, to complete the process. It cannot turn a man into a woman or turn a woman into a man. That is not what the treatment seeks to do after all, although it is described as gender reassignment surgery. It is not just that the chromosomes that are present at birth are incapable of being changed. The surgery, however extensive and elaborate, cannot supply all the equipment that would be needed for the patient to play the part which the sex to which he or she wishes to belong normally plays in having children. At best, what is provided is no more than an imitation of the more obvious parts of that equipment. Although it is often described as a sex change, the process is inevitably incomplete. A complete change of sex is, strictly speaking, unachievable.

- A 58 It is tempting to regard the fact that a complete sex change is unachievable as a mere technicality when this is compared with everything else that can be achieved in the case of post-operative transsexuals. But the law of marriage exists in order to define the circumstances in which the public status that follows from a valid marriage may be acquired. There is much to be said for the view that the words “male” and “female” should each be given a single, clear meaning that can be applied uniformly in all cases. That was achieved by the decision in *Corbett v Corbett (orse Ashley)* [1971] P 83, which predated the re-enactment of section 1(c) of the Nullity of Marriage Act 1971 in section 11(c) of the 1973 Act. Any enlargement of the meaning of those words to accommodate the problems faced by transsexuals would raise questions of fact and degree which are avoided by the use of the words chosen by Parliament.
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- C 59 I do not overlook the fact that Mrs Bellinger’s consultant urologist, Michael Royle, declared in a letter dated 5 January 1999 that she underwent gender reassignment surgery on 21 February 1981 and that “she is physically female”. But it seems to me that this is an incomplete statement of the facts. The wording of section 11(c) demands that they be subjected to a more rigorous assessment. In *Secretary, Department of Social Security v SRA* (1993) 118 ALR 467 it was held that the respondent, who was a pre-operative male to female transsexual, did not fall within the ordinary meaning of the word “female” as her anatomical sex and her psychological sex had not been harmonised. One of the medical reports referred to by Lockhart J in the Federal Court of Australia, at p 477, explained very clearly what the surgery seeks to achieve, and what it cannot do:
- D
- E “Genetically, and anatomically she is a ‘male’, however, she dresses and behaves as a woman. She considers herself as a woman. It is not for me to decide what the court or the Department of Social Security chooses to consider someone—but I do not think of, and treat [the respondent] as a woman. The fact that she has not had surgery to me is irrelevant. The aim of the surgery is to make somebody feel more comfortable with their body, not to ‘turn them into a woman’. The surgery does not supply the patient with a uterus, nor with ovaries. It is purely and simply an attempt to allow the person’s body to approximate to how they feel within themselves.”
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- G 60 Lockhart J said in the *SRA* case, at p 480, that the common understanding of the words “woman” and “female” and the phrase “opposite sex”, which were ordinary English words, was a question of fact and that the crucial question was whether different conclusions were reasonably possible as to whether the facts or circumstances fell within their ordinary meaning. In *In re Kevin (Validity of Marriage of Transsexual)* [2001] Fam CA 1074 Chisholm J held that the ordinary contemporary meaning of the word “man” according to its Australian usage included post-operative female to male transsexuals, and that no good reasons had been shown why the ordinary meaning of the word should not apply in the context of marriage law: paragraph 327. He went on to say that there was no formulaic solution for determining the sex of an individual for this purpose, that all relevant factors had to be considered including the person’s biological and physical characteristics at birth, the person’s life experiences, the extent to which the person has functioned in society as a man or woman, any hormonal, surgical
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or other medical sex reassignment treatments the person has undergone and the consequences of such treatment and that it was clear from the Australian authorities that post-operative transsexuals will normally be members of their reassigned sex: paras 328–329. He held that a marriage which “Kevin” had entered into with “Jennifer” on 21 August 1999 was a valid marriage under Australian law.

61 In *In re Kevin (Validity of Marriage of Transsexual)* (unreported) Appeal No EA 97/2001, 21 February 2003, the Full Court of the Family Court of Australia, after a comprehensive review of the authorities including the decision of the Court of Appeal in this case (see [2002] Fam 150), agreed with the approach of Chisholm J. The essence of that decision is to be found in the following paragraphs:

“110. The definition of ‘marriage’ is essentially connected with the term ‘man’. In these circumstances, for the reasons stated by the trial judge as amplified by our reasons that appear subsequently, we take the view that the words ‘marriage’ and ‘man’ are not technical terms and should be given their ordinary contemporary meaning in the context of the Marriage Act.

“111. In our view, it thus becomes a question of fact as to what the contemporary, everyday meanings of the words ‘marriage’ and ‘man’ are respectively.

“112. It is then a question of law for this court to determine whether, on the facts found by the trial judge, it was open to him to reach the conclusion that he did, namely that at the relevant time, Kevin was a man and that the marriage was therefore valid. As it was in *SRA* (supra) so, too, it is that the answer to that question is ‘*at the heart of the present case*’.”

62 I need hardly say that I entirely agree with the Australian judges that the words “male” and “female” in section 11(c) of the 1973 Act, which is the provision with which we are faced in this case, are not technical terms and that they must be given their ordinary, everyday meaning in the English language. But no evidence was placed before us to suggest that in contemporary usage in this country, on whichever date one might wish to select—23 May 1973 when the 1973 Act was enacted, 2 May 1981 when Mr and Mrs Bellinger entered into their marriage ceremony or the date of this judgment, these words can be taken to include post-operative transsexual persons. The definition of “male” in the *New Shorter Oxford English Dictionary* (1993) tells us that its primary meaning when used as an adjective is “of, pertaining to, or designating the sex which can beget offspring”. No mention is made anywhere in the extended definition of the word of transsexual persons. The word “transsexual” is defined as “having the physical characteristics of one sex but a strong and persistent desire to belong to the other”. I see no escape from the conclusion that these definitions, with which the decision in *Corbett v Corbett (orse Ashley)* [1971] P 83 and the views of the majority in the Court of Appeal in this case are consistent, are both complete and accurate. The fact is that the ordinary meaning of the word “male” is incapable, without more, of accommodating the transsexual person within its scope. The Australian cases show that a distinction has to be drawn, even according to the contemporary usage of the word in Australia, between pre-operative and post-operative transsexuals. Distinctions of that kind raise questions of fact and degree

A which are absent from the ordinary meaning of the word “male” in this country. Any attempt to enlarge its meaning would be bound to lead to difficulty, as there is no single agreed criterion by which it could be determined whether or not a transsexual was sufficiently “male” for the purpose of entering into a valid marriage ceremony.

B 63 In *Goodwin v United Kingdom* 35 EHRR 447, 474, paras 82–83 the European Court of Human Rights noted that it remains the case, as the court held in *Sheffield and Horsham v United Kingdom* 27 EHRR 163, that a transsexual cannot acquire all the biological characteristics of the assigned sex. It went on to say that it was not apparent in the light of increasingly sophisticated surgery and hormonal techniques that the chromosomal element, which is the principal unchanging biological aspect of gender identity, must inevitably take on decisive significance for the purpose of legal attribution of gender identity for post-operative transsexuals. So it was not persuaded that the state of medical science or scientific knowledge provided any determining argument as regards the legal recognition of transsexuals on grounds of social and legal policy. But this approach is not at all inconsistent with the view which I would take of the facts. The question which the court was asking itself was not whether the applicant, who was of the male sex when she was born, was now female. Post-operative transsexuals were assumed to fall into a distinct category. The question was whether it was a breach of their Convention rights for legal recognition to be denied to their new sexual identity.

E 64 Of course, it is not given to every man or every woman to have, or to want to have, children. But the ability to reproduce one’s own kind lies at the heart of all creation, and the single characteristic which invariably distinguishes the adult male from the adult female throughout the animal kingdom is the part which each sex plays in the act of reproduction. When Parliament used the words “male” and “female” in section 11(c) of the 1973 Act it must be taken to have used those words in the sense which they normally have when they are used to describe a person’s sex, even though they are plainly capable of including men and women who happen to be infertile or are past the age of child bearing. I think that section 5(4)(e) of the Marriage (Scotland) Act 1977, which provides there is a legal impediment to a marriage in Scots law where the parties “are of the same sex”, has to be read and understood in the same way. I do not see how, on the ordinary methods of interpretation, the words “male” and “female” in section 11(c) of the 1973 Act can be interpreted as including female to male and male to female transsexuals.

G 65 What then are we to make, in this case, of the decision in *Goodwin v United Kingdom* 35 EHRR 447? If it could be said that the use of the words “male” and “female” in section 11(c) of the 1973 Act was ambiguous, it would have been possible to have regard to that decision in seeking to resolve the ambiguity. But, for the reasons which I have given, I do not think that there is any such ambiguity. Then there is section 3(1) of the Human Rights Act 1998, which places a duty on the courts to read and give effect to legislation in a way that is compatible with the Convention rights if it is possible to do so. But we are being asked in this case to make a declaration about the validity of a marriage ceremony which was entered into on 2 May 1981, and section 3(1) of the 1998 Act is not retrospective: *R v Lambert* [2002] 2 AC 545; *R v Kansal (No 2)* [2002] 2 AC 69; *R v Lyons* [2003] 1 AC

976, 996, per Lord Hoffmann, and 1002, para 63, per Lord Hutton. The interpretative obligation which section 3(1) provides is not available. A

66 But I do not think that it would be right to leave the issue there. If, as I would hold, the 1981 ceremony cannot be held to be a valid marriage ceremony, that is not an end of the matter. It would be open to Mrs Bellinger to try again some other day. It must be emphasised that this is not what she wants to do, as she regards herself as having been happily married since 1981. But we have been asked to say whether the provisions of section 11(c) are incompatible with her Convention rights and, if we find that they are incompatible, to make a declaration of incompatibility. I agree that it is proper that we should undertake this exercise, although neither of these steps can have any effect on the validity or otherwise of the 1981 ceremony. B

67 We cannot proceed to the making of a declaration of incompatibility under section 4(2) of the Human Rights Act 1998 without examining the question which section 3(1) of the Act treats as the logically prior question, which is whether the legislation can be read and given effect in a way which is compatible with the Convention rights. As Lord Steyn put it in *R v A (No 2)* [2002] 1 AC 45, 68D–E, para 44, a declaration of incompatibility is a measure of last resort. But the word “must” which section 3(1) uses is qualified by the phrase “so far as it is possible to do so”. As I said in *R v Lambert* [2002] 2 AC 545, 585B–D, para 79, the obligation, powerful though it is, is not to be performed without regard to its limitations. The obligation applies to the interpretation of legislation, which is the judges’ function. It does not give them power to legislate: see also *In re S (Minors) (Care Order: Implementation of Care Plan)* [2002] 2 AC 291, 313B–D, paras 38–39, per Lord Nicholls of Birkenhead. C D

68 If the only problem of interpretation had been one of timing, on the view that section 11(c) regards “male” and “female” as something that cannot be changed after birth whereas other provisions in the same section such as section 11(b) relate to the position at the time the marriage is entered into, I would have been prepared to read the words “at the time of the marriage” in to section 11(c) so as to give that provision a meaning which was compatible with the article 12 Convention right. If the only obstacle was that the parties’ sex at the time when they were born had been assumed wrongly to be immutable, it could be overcome by disregarding the niceties of language and finding a compatible construction by reading these words in. But that would only have solved the problem for the future if it could indeed be said that Mrs Bellinger had completely changed her sex since birth and that she was now female. That, for the reasons I have sought to explain, is not a possible view of the facts. E F

69 Her problem would be solved if it were possible for a transsexual to marry a person of the same sex, which is indeed what the European Court of Human Rights has now held should be the position in *Goodwin* 35 EHRR 447. The court noted in para 100 of its judgment that article 9 of the Charter of Fundamental Rights of the European Union had departed “no doubt deliberately” from the wording of article 12 of the Convention in removing the reference to “men and women of marriageable age”. Article 9 of the Charter states simply that “the right to marry” shall be guaranteed. The note to article 9 says that it neither prohibits nor imposes the granting of the status of marriage to unions between people of the same sex. It appears that the European Court saw that article as opening up the G H

- A possibility of transsexuals marrying persons of the opposite sex to their post-operative acquired gender, as it rendered arguments about whether they were in fact of the opposite sex irrelevant. By this route, which bypasses the physical problems which are inherent in the notion of a complete sex change, legal recognition can be given to the acquired gender of post-operative transsexuals. But it is quite impossible to hold that section 11(c) of the 1973 Act treats the sex of the parties to a marriage ceremony as irrelevant, as it makes express provision to the contrary. In any event, problems of great complexity would be involved if recognition were to be given to same sex marriages. They must be left to Parliament. I do not think that your Lordships can solve the problem judicially by means of the interpretative obligation in section 3(1) of the 1998 Act.
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- 70 So I too would dismiss the appeal. But I too would make a declaration that section 11(c) of the Matrimonial Causes Act 1973 is incompatible with Mrs Bellinger's right to respect for her private life under article 8 and with her right to marry under article 12 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.
- C

LORD HOBHOUSE OF WOODBOROUGH

- D 71 My Lords, I agree with my noble and learned friends, Lord Nicholls of Birkenhead and Lord Hope of Craighead, that the appeal should be dismissed but that a declaration of incompatibility should now be made under section 4 of the Human Rights Act 1998.

- 72 The parties went through a ceremony of civil marriage before a registrar of marriages under the Marriage Act 1949 on 2 May 1981. At that date the Act which governed the legal validity of a purported marriage under English law was section 11 of the Matrimonial Causes Act 1973: "A marriage celebrated after 31 July 1971 shall be void on the following grounds only, that is to say . . . (c) that the parties are not respectively male and female . . ." The appellant gave her name to the Registrar of Marriages as Elizabeth Ann Wilkinson describing herself as a "spinster". Like your Lordships I will use the words "she" or "her" in relation to the appellant without begging the question in issue whether she was in truth female at the time she married Mr Bellinger in 1981.
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- 73 At that date and, indeed, until the judgment of the European Court of Human Rights in the case of *Goodwin v United Kingdom* 35 EHRR 447, it was the authoritative view that a refusal by domestic law to recognise "transsexual" marriages (a term to which I will have to revert) did not contravene article 12 of the Convention. The judgment in *Goodwin* expressly recognised that this had been the result of the earlier cases of *Rees v United Kingdom* 9 EHRR 56, *Cossey v United Kingdom* 13 EHRR 622, and *Sheffield and Horsham v United Kingdom* 27 EHRR 163: see paragraphs 73-75 and 97-104 of the judgment. Until the delivery of the *Goodwin* judgment the appellant would have had no basis for any attack upon the propriety of section 11 of the 1973 Act.
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- H 74 The judgment in *Goodwin* is, if I may say so, thoughtful and appreciates the complexity of the problems created for many aspects of the law by a novel recognition of the concept of a voluntary *change* of gender. The new approach may reflect new social attitudes to questions of sexuality but the more specific changes in society and the law which should follow

from the recognition of the new attitudes are much more difficult to evaluate and provide for. For example, in the present context, to what extent do you change the fundamental concept of marriage? What new criteria do you apply? Once you make this change, how do you, in a non-discriminatory way, deal with mere cohabitantes or with homosexuals of the same gender? The judgment refers in paragraph 91 and the preceding paragraphs to the report of the UK Interdepartmental Working Group on Transsexual People (April 2000) and the very substantial difficulties which it identified but also pointed out that they were not considered to be insuperable. The court also observed in paragraph 103 that “though there is widespread acceptance of the marriage of transsexuals, fewer countries permit the marriage of transsexuals in their assigned gender than recognise the change of gender itself”. However the court concluded that there had been a breach of, *inter alia*, article 12 because, although the member states must be given a reasonable opportunity to decide how to revise their national legislation and make the appropriate changes, there came a time when the United Kingdom’s continued failure to do so amounted to a denial of the right to marry protected by article 12: see paragraphs 52, 53, 102–104, and 120.

75 The present case concerns a “transsexual”, that is to say, someone who wishes to change her existing gender and assume the opposite gender. This case is not concerned with gender mis-assignment nor with mixed or “intersex” gender. The appellant was born a male with all the characteristics of a male. She was correctly assigned the male gender at birth and in her birth certificate. In 1967, when 21, she married a woman. (She did not disclose this fact to the registrar in 1981.) But the marriage was childless and did not last; they were divorced in 1975. She assumed the female gender dressing and living as a woman. In February 1981, following hormone treatment from a specialist, she underwent gender reassignment surgery as described by my noble and learned friend, Lord Nicholls. This was irreversible in the sense that thereafter she could never be fully restored so as to be an anatomically complete male.

76 Gender reassignment is an established medical procedure in various stages involving both diagnoses by the specialist and informed choices being made by the patient. There was uncontested expert evidence given about this at the trial. Conveniently, it is also summarised in the judgment in *Goodwin* 35 EHRR 447. The condition of dissatisfaction with one’s sexuality at a level justifying medical intervention is a medically recognised mental disorder (DSM-IV). It reflects a pathological degree of dissatisfaction with one’s existing gender. The specialist has to study the patient over a period of time and confirm the diagnosis and ascertain that the patient is definitely willing to take the next steps. Firstly the patient must become used to living as a member of the opposite sex. Then the patient will be given courses of hormone treatment to change his/her hormonal make-up to that of the preferred sex. This reinforces the social changes already undertaken. Finally various degrees of gender reassignment surgery are undertaken. It is not until this last stage that the changes may become anatomically irreversible. At any previous stage the patient may change his/her mind and decide that he/she does not want to make the change or not go any further. In the present case the appellant was steadfast in her intentions and went as far as she could, given the considerable limitations of gender reassignment. But the question of transsexualism includes

- A definitional questions of how far the person must go in order to qualify as a transsexual. Is merely assuming the life and clothing of a woman enough or must it include irreversible gender reassignment? Or something in between? There are cogent arguments against adopting any specific criterion. A further question which arises is referred to in paragraph 50 of the *Goodwin* judgment 35 EHRR 447, noting: “Many people revert to their biological sex after living for some time in the opposite sex and some alternate between the two sexes throughout their lives.” All this underlines the novelty of the idea of gender by choice and how great a departure it represents from the pre-*Goodwin* human rights law and the previous understanding of what the words “respectively male and female” meant. Similar fundamental novelties and changes in the use of language, culturally controversial, are involved in giving effect to the European Court of Human Rights’s interpretation of the word “marry” in article 12.

77 The appellant’s primary claim was for a declaration under section 55 of the Family Law Act 1986 that her marriage to Mr Bellinger in 1981 was “at its inception a valid marriage”. For the reasons given by my noble and learned friends and for the additional reasons I have given and those to be given by my noble and learned friend, Lord Rodger of Earlsferry, the claim must fail and the appeal be dismissed. The 1981 wedding was not valid.

78 But that still leaves the question whether the House should make a declaration of incompatibility under section 4 of the Human Rights Act 1998. The threshold question is whether, by applying section 3, it is possible, as a matter of interpretation, to “read down” section 11 (c) of the 1973 Act so as to include additional words such as “or two people of the same sex one of whom has changed his/her sex to that of the opposite sex”. This would in my view not be an exercise in interpretation however robust. It would be a legislative exercise of amendment making a legislative choice as to what precise amendment was appropriate. Counsel for the Lord Chancellor on behalf of the Government did not argue otherwise. Counsel also did not argue that *Goodwin* was wrongly decided nor that the UK was not under a treaty obligation to comply with it. But, effectively repeating arguments made unsuccessfully in Strasbourg, submitted that the House should not exercise its discretion under section 4 having regard to the difficulty of deciding upon new policies and drafting new legislation. These difficulties exist but much time has elapsed; the Working Group reported in April 2000; the Court of Appeal commented as strongly as it was proper for them to do so at the lack of progress in July 2001 and the European Court of Human Rights has made its decision in *Goodwin* on the basis that the permitted time for compliance has expired. The argument for further time is now itself incompatible with the rights conferred by the Convention.

79 But counsel also argued that, in view of his concession that *Goodwin* bound the United Kingdom, any declaration would be academic and its purpose was merely to confer a power to expedite legislation under section 10. These arguments must be rejected. The appellant and Mr Bellinger in exercise of their rights under article 12 would wish to enter into a valid marriage as soon as the UK legislation enables them to do so. Others may wish to do the same. The Government cannot yet give any assurance about the introduction of compliant legislation. There will be political costs in both the drafting and enactment of new legislation and the

legislative time it will occupy. The incompatibility having been established, A
the declaration under section 4 should be made.

LORD SCOTT OF FOSCOTE

80 My Lords, I have had the great advantage of reading in advance the
opinions on this case of my noble and learned friends, Lord Nicholls of
Birkenhead and Lord Hope of Craighead. I find myself in complete and
admiring agreement with their analysis of the issue arising in the case and B
with their conclusions on that issue. I cannot improve on what they have
said or add anything useful. I would dismiss the appeal for the reasons they
have given and make the proposed declaration of incompatibility.

LORD RODGER OF EARLSFERRY

81 My Lords, I have had the privilege of considering the speeches of my
noble and learned friends, Lord Nicholls of Birkenhead, Lord Hope of
Craighead and Lord Hobhouse of Woodborough, in draft. I agree with them C
and, for the reasons they give, I too would make the declaration of
incompatibility which they propose but would otherwise dismiss the appeal.
I add a point about the language of the relevant legislation.

82 The submissions for Mrs Bellinger presuppose that, in relation to
marriage, English law envisages that a person's gender can alter. The form of
section 11(c) of the Matrimonial Causes Act 1973 indicates that this is not so. D

83 Section 11(c) is a re-enactment of section 1(c) of the Nullity of
Marriage Act 1971 which was passed shortly after the decision in *Corbett v*
Corbett (or se Ashley) [1971] P 83. Section 11(c) contains one in a series of
grounds of nullity. By section 11(b) a marriage is void if "at the time of the
marriage either party was already lawfully married". The reference to the
situation at the time of the marriage is necessary because a person may have E
been lawfully married at an earlier time and may be lawfully married at a
later time. The situation is one that can change. For purposes of nullity the
critical consideration is what the situation was "at the time of the marriage"
in question. Similarly, section 11(d) provides that a polygamous marriage
entered into outside England and Wales is void if "either party was at the
time of the marriage domiciled in England and Wales". Again, when dealing
with domicile which can change, Parliament uses the past tense and specifies F
the time of the marriage. Section 11(c) is different in both respects: a
marriage is void if "the parties are not respectively male and female". Both
the present tense and the omission of any reference to the time of the
marriage indicate that, in relation to the validity of marriage, Parliament
regards gender as fixed and immutable.

Appeal dismissed.

Declaration that section 11(c) of the
1973 Act is incompatible with the
petitioner's right to respect for her
private life and with her right to
marry.

The Lord Chancellor to pay half the
petitioner's costs before the House
of Lords.

Solicitors: Law for All, Brentford; Treasury Solicitor.

***219 Billy Graham Evangelistic Association v Scottish Event Campus Ltd**



No Substantial Judicial Treatment

Court

Sheriff Court (Glasgow and Strathkelvin) (Glasgow)

Judgment Date

24 October 2022

Report Citation

2022 S.L.T. (Sh Ct) 219

Sheriffdom of Glasgow and Strathkelvin at Glasgow

Sheriff J N McCormick

24 October 2022

Contract—Termination—Religious charitable organisation hiring exhibition and conference venue for evangelical outreach event—Venue owner terminating agreement—Whether discrimination by service provider on basis of protected characteristic of religion or belief—Whether protected characteristic should have “nothing to do” with impugned decision or merely “no significant influence” on it—Equality Act 2010 (c.15).

Statute—Interpretation—Discrimination—Shifting burden of proof—Whether protected characteristic should have “nothing to do” with impugned decision or merely “no significant influence” on it—Equality Act 2010 (c.15), ss.29 and 136.

Statute—Interpretation—Discrimination—Remedies—Sheriff only permitted to consider awarding damages after considering other disposals—Equality Act 2010 (c.15), s.119(6).

The Equality Act 2010 provides *inter alia* :

“13.— (1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

29.— (1) A person (a “service-provider”) concerned with the provision of a service to the public or a section of the public (for payment or not) must not discriminate against a person requiring the service by not providing the person with the service.

136 .— (1) This section applies to any proceedings relating to a contravention of this Act .

(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.

(3) But subsection (2) does not apply if A shows that A did not contravene the provision.”

A religious charitable organisation raised an action against the owner of an exhibition and conference venue following the latter’s termination of a contract between the parties for the hire of the venue for a Christian evangelical outreach event. The pursuer claimed that the defender had discriminated against it on the basis of the protected characteristic of religion or belief, for the purposes of the Equality Act 2010 , and sought declarator to that effect, as well as damages and an order for specific implement to compel performance of the contract. The defender’s principal shareholder (Glasgow City Council) had asked the defender to cancel the agreement, highlighting concerns about the potential for the proposed speaker at the event to make homophobic and Islamophobic comments, and about the city’s reputation as being friendly to people from the LGBTQ+ and Muslim communities. Following a meeting of the defender’s board, the defender wrote to the pursuer terminating the agreement based on the pursuer’s alleged material breach by reference to the defender’s terms of business, which set out the pursuer’s obligations not to act, or omit to act, in any way reasonably likely to bring the defender into disrepute. At proof, the defender maintained that the decision to terminate the agreement arose solely out of security concerns, namely, that protests might take place both inside and outside the venue.

Held, (1) that there was no requirement to identify an appropriate comparator; it was accepted that the defender was a service provider in terms of s.29 and “must not discriminate against a person requiring the service by not providing the person with the service” (paras 17–26); (2) that in terms of s.136 , the pursuer had to prove facts from which the court could decide, in the absence of any other explanation, that the defender contravened the ***220** provision concerned; that done, the burden shifted to the defender to show that the decision had “nothing to do with” a protected characteristic; if the defender was unable to discharge that burden, the court had to hold that the contravention occurred (paras 27–39, 44, 45); (3) that two of the four concerns highlighted by the defender at the board meeting were redolent of a “business case” defence; if commercial considerations such as those highlighted related to the objections by others to the religious or philosophical beliefs of the speaker and/or the pursuer, then that was a breach of the Act , as in law there was no “business case” defence (paras 16, 174–179); (4) that the defender’s decision to cancel the event was taken, at least in part and, had it been necessary for the court

to determine the issue, in substantial part, on the basis of the religious or philosophical belief of the pursuer and the speaker (paras 189–196); (5) that the letter terminating the agreement made no reference to issues of security, disorder or protest as influencing the decision to terminate: the tenor of the letter reflected that the defender was responding (for commercial reasons) to the concerns raised by others to the event taking place at all; the true reasons for the decision were (a) the defender’s view of the religious and philosophical beliefs of the pursuer and of the speaker and (b) the pressure brought to bear on the defender by its principal shareholder and others including commercial considerations concerning the response by others to the intended religious and philosophical message to be conveyed by the pursuer and the speaker (paras 197–222); (6) that the court would grant declarator that the defender had discriminated against the pursuer because of a protected characteristic, namely, religion or philosophical belief, in terms of s.10 (paras 225, 226); (7) that in terms of an order for specific implement, although an appropriate remedy in the present case would be to order a rescheduling of the event, the practicalities in overseeing such an exercise with warring litigants and involving third parties, including the public, were simply too great (paras 231–237); (8) that it would not be appropriate to order an apology, pursuant to the Apologies (Scotland) Act 2016, as there was no crave for such a remedy, and in any case it would be forced, of little value and insincere (paras 240–245); (9) that in terms of damages, the pursuer was a limited company, and it had no feelings to hurt in terms of s.119(4); the proposed event was a free unticketed event open to the public, thus there could be no loss of profit or loss of revenue stream; it was not accepted that the defender was a public authority within the meaning of s.6 of the Human Rights Act 1998; the cases cited in support of a claim for vindictory damages by the pursuer involved actions against states, and the cases relied on by the pursuer where awards had been made to religious bodies in recognition of the loss to their “adherents” and to political organisations which reflected non-pecuniary losses to their membership were of no relevance, as the pursuer did not have a membership, a congregation nor adherents as such (paras 247–252); (10) that the actual losses incurred by the pursuer as a consequence of the termination of the agreement totalled £97,325.32, accordingly, the court would award damages to that extent (paras 267–284, 287); and decree *granted*.

Royal Mail Group Ltd v Efobi [2021] UKSC 33; [2021] 1 W.L.R. 3863, followed, *Nagarajan v London Regional Transport* [2000] 1 A.C. 501, *Page v NHS Trust Development Authority* [2021] EWCA Civ 255; [2021] I.C.R. 941 and *JP Morgan Europe Ltd v Chweidan* [2011] EWCA Civ 648; [2012] I.C.R. 268, considered.

Observed, that the structure of the 2010 Act, and in particular s.119, was such as to encourage compliance by considering damages only after other remedies had been considered: to an errant defender intent on flouting the terms of the 2010 Act there was, in Scotland, little disincentive where the defender was prepared to accept a reputational hit and reimburse a corporate pursuer for losses sustained, indeed, a defender might think that there was a business case to do so, as the expense of reimbursement to one customer might be outweighed by the prospect of future trade with others; that might be the unintended consequence of the present decision, where the pursuer was a charity (para.285).

Opinion, that the court would have awarded £50,000 in respect of vindictory damages and/or just satisfaction and/or detriment, had it been persuaded that such an award was competent (paras 254–259).

Action

(Reported 2021 S.L.T. (Sh Ct) 185)

Billy Graham Evangelistic Association raised an action against Scottish Event Campus Ltd seeking an order for specific implement, failing which contractual damages, a declaration that the defender *221 had discriminated against it on the basis of a protected characteristic, and damages in terms of s.119 of the Equality Act 2010 .

On 16 February 2021, following debate, the sheriff excluded certain of the averments from probation and allowed a proof before answer (reported 2021 S.L.T. (Sh Ct) 185).

The case proceeded to proof before the sheriff (N J McCormick).

Findings in Fact

The sheriff made the following findings in fact:

- (1) The pursuer is a private company limited by guarantee (company number: 567778).
- (2) The pursuer is a charity registered with the Charity Commission for England and Wales having charity number 233381. The pursuer is a religious charity having its registered office at Victoria House, Victoria Road, Buckhurst Hill, Essex, IG9 5EX.
- (3) The objects of the pursuer within the United Kingdom include supporting and extending the worldwide evangelistic mission of the Billy Graham Evangelistic Association based in the United States of America.
- (4) The defender is a private limited company incorporated in Scotland having company number SC082081. The defender has its registered office at the Scottish Event Campus, Glasgow, G3 8YW. This court has jurisdiction.
- (5) Over 90% of the shares in the defender are owned by Glasgow City Council (GCC), City Chambers, Glasgow, G2 1DU.

(6) On or around 31 July 2019 the pursuer and the defender entered into a contract (the “agreement”) which included the pursuer hiring the SSE Hydro Arena and the SSE Hydro Box Office for the period from 08.00 on 30 May 2020 until 02.00 on 31 May 2020.

(7) The scheduled event was to be known as the “Franklin Graham Event”. The Franklin Graham Event (“the event”) scheduled for 30 May 2020 was the first date in a UK tour being organised by the pursuer at various venues within the United Kingdom.

(8) The pursuer had also booked venues at the Utilita Arena, Newcastle; Fly DSA Arena, Sheffield; Marshall Arena, Milton Keynes; the M&S Bank Arena, Liverpool; the ICC Wales, Cardiff and The Arena Birmingham, Birmingham. The tour was to commence on 30 May 2020 at Glasgow concluding on 17 June 2022 in Birmingham.

(9) Other venues cancelled the pursuer’s booking. As at the proof four had rescheduled.

(10) The Glasgow venue could accommodate over 12,000 people. The hire cost of the venue was to be £50,000. The pursuer paid a deposit of £6,000 the refund of which has been offered but thus far declined.

(11) Preparations for the event included the pursuer engaging staff, hiring equipment, hosting pre-event receptions and prayer meetings, the sunk costs of which were wasted as a consequence of the cancellation.

(12) Although the event scheduled for 30 May 2020 is described in the agreement as a “private” event it was known to and agreed by the defender (from email chain dated 22 to 30 July 2019 between Sue Verlaque and Ray Critchley and between Sue Verlaque and David Orridge dated 18 November 2019) that the event would be a free, non-ticketed event. Members of the public would attend and be allowed entry free of charge. The defender would use a dummy bar code scanning system to count/control numbers on the day.

(13) The pursuer utilised and had intended to use various platforms to promote the event including social media, the pursuer’s website, flyers, advertisements on buses and the holding of pre-event prayer meetings/launch events/receptions.

(14) The tour was an evangelistic outreach event to profess and promote religion or philosophical belief. The religion and philosophical belief to be professed was Christianity derived from an interpretation of the bible. The intended audience was the general public, irrespective of any religious belief or none and irrespective of sexuality.

(15) The principal or keynote speaker at the event was to be Franklin Graham a contentious American evangelist, son of the late Billy Graham (also an American evangelist). Franklin Graham is associated with the pursuer.

(16) In November 2019 the defender became aware of opposition to the event. Between November 2019 and January 2020 this opposition took various forms including in the mainstream press, on social media, a petition and email. These objections were drawn to the attention of Peter Duthie, the defender's Chief Executive Officer.

(17) The pursuer had also become aware of growing opposition to the UK tour. On 27 January 2020 Franklin Graham posted a letter addressed to *222 the "LGBTQ" community which began: "It is said by some that I am coming to the UK to bring hateful speech to your community. This is just not true".

(18) Within the same Facebook post Mr Graham invited "everyone in the LGBTQ community" to the event. He concluded "You are absolutely welcome".

(19) The decision to terminate was one within the remit of the Chief Executive Officer, Mr Peter Duthie. The decision to terminate the agreement was taken by Mr Peter Duthie on or about 28 January 2020 but not implemented until he had secured support from the defender's board of directors on 29 January and from its principal shareholder.

(20) Preparations to terminate the contract were made on 28 January 2020. On 28 January 2020 Kirsten McAlonan, Head of Public Relations for the defender wrote to Colin Edgar, Head of Communications at Glasgow City Council, stating "We have made a decision not to go ahead with this". She suggested a draft wording for a press release and advised that Peter Duthie intended to raise the matter at a board meeting the following day.

(21) The implementation of the decision was delayed until the following day, 29 January 2020, when the views of the board could be ascertained and a written request to cancel had been received from Glasgow City Council.

(22) On 29 January 2020 the board convened. The then board consisted of Peter Duthie, the Chief Executive Officer, William Whitehorn, Chairman, William McFadyen, Morag McNeill, John Watson, Pauline Lafferty and those nominated by Glasgow City Council, Susan Aitken, George Gillespie and Frank McAveety (Carole Forrest did not attend the meeting). At that meeting the view of Glasgow City Council was conveyed to all present in unambiguous terms that the event should be cancelled.

(23) At the board meeting discussions included the nature of the proposed event. In particular, the supposed religious and philosophical opinions of Franklin Graham were discussed and considered as was the reaction by others to those religious and philosophical beliefs. The minutes disclose, for example, that "we have to be careful of being judge and jury if the law hasn't been broken"; "there was a scale on the message that was being preached which is darker than seen before"; "the nature around the event is darker", "contractually we may be in breach" and "it's about "doing the right thing" notwithstanding the contractual position". (sic) Standing the defender's position at proof, there was no basis for such concerns.

(24) Such concerns stemmed not from the pursuer but from those who mischaracterised the event, its purpose and what would be said.

(25) Commercial considerations were also discussed at the board meeting in light of the religious and philosophical views of the pursuer and of Franklin Graham as interpreted by the defender. Mr Duthie could foresee a scenario where artists would refuse to play at the defender's venue as a result of the event. In addition, he had received concerns from the venue's principal sponsor which did not want its name associated with it.

(26) Security concerns relating to the event were also discussed at the board meeting.

(27) No vote or decision was taken at the board meeting on 29 January 2020. There was no need. Susan Aitken addressed the board on the view of Glasgow City Council that the event should not go ahead.

(28) Glasgow City Council had made its position clear to the meeting. Those Directors not nominated by Glasgow City Council were consulted for their views. They agreed that the event should be cancelled. Their views were confirmed by emails after the meeting and after a letter dated 29 January 2020 from Glasgow City council had been received.

(29) In its letter dated 29 January 2020 Glasgow City Council wrote to the defender as its "majority shareholder" requesting that the event be cancelled. In Mr Duthie's view, when his major shareholder expresses concern, he listens. The letter expressed concern for what might be said at the event. The letter made no reference to security concerns.

(30) No security concerns were raised with the pursuer. No security concerns were canvassed with the Police. No view was sought from G4S security at the venue (until after the event was cancelled).

(31) Although discussions at the board meeting on 29 January 2020 had included security issues, those were not the sole or the main reason for the event being cancelled four months prior to the event.

(32) The event was cancelled because of (a) the religious or philosophical beliefs of the pursuer and Franklin Graham as viewed by the defender and (b) the reaction by others to the religious or philosophical beliefs professed by the pursuer and/or Franklin Graham. Those objectors had *223 included the defender's principal shareholder, its sponsor, objectors on social media, some press, an MSP and persons representing contrasting religious views.

(33) By email dated 29 January 2020 sent at 16.10, Peter Duthie wrote to the chairman enclosing the letter from GCC and advising that the event be cancelled "in the best interests of the business".

(34) Despite the defender now claiming that the decision was taken solely on the basis of public safety that reason was not conveyed to the pursuer (or to the public). By letter dated 29 January 2020 the defender terminated its agreement with the pursuer. The letter made reference to the pursuer's obligations not to act, or not to omit to act, in any way reasonably likely to bring the defender into disrepute. No mention was made of protest or security concerns.

(35) The termination letter dated 29 January 2020 stated that the basis of the decision involved "adverse publicity" which the defender had "reviewed with our partners and stakeholders". The letter concludes: "This is not capable of remedy" (clause 5.1.2 of the agreement had provided for "a reasonable time" to cure any breach capable of remedy). The reasons proffered to justify the termination differ from those advanced at proof.

(36) Subsequent press releases made no mention of security concerns.

(37) By terminating the agreement the defender directly discriminated against the pursuer in that it treated the pursuer less favourably than it would have treated others. The defender had hosted other religious events but here it terminated its agreement because of a protected characteristic, namely, the religious or philosophical beliefs of the pursuer and Franklin Graham. It acted under pressure from others.

(38) The defender has evidenced an intention not to reschedule the event.

(39) The pursuer should have realised that the event would not be rescheduled by 30 June 2020 at the latest.

(40) The decision to terminate the agreement resulted in pecuniary losses to the pursuer totalling £97,325.32 to 30 June 2020 comprising the refund of the deposit (£6,000); costs of a prayer meeting and an event launch and cost of catering for a reception on 5 December 2019 ((£6,650, £3,000.70 and £1,448); cost of parking (£850); rent of staff apartment (£6,600); staff salaries, National Insurance and pension contributions (£63,123.50) and events at "DoubleTree by Hilton" (£9,400) and St George's Tron (£253.12). These costs were reasonably incurred by the pursuer in anticipation of the event taking place. They were costs wasted by the wrongful cancellation.

Findings in fact and law

The sheriff made the following findings in fact and law:

The pursuer having proved, on balance of probabilities, facts from which the court could decide, in the absence of any other explanation, that the defender contravened sections 10 and 29 of the Equality Act 2010 and the defender, having failed to prove, on balance of probabilities, that

its decision had nothing to do with religion or philosophical belief, the court grants decree in favour of the pursuer as it must.

Cases referred to

Anwar v Secretary of State for Business, Energy and Industrial Strategy [2019] CSIH 43; 2020 S.C. 95; (sub nom *Anwar v Advocate General*) 2019 S.L.T. 915.

Bahl v Law Society [2004] EWCA Civ 1070; [2004] I.R.L.R. 799; (2004) 154 N.L.J. 1292.

Billy Graham Evangelistic Association v Scottish Event Campus Ltd, 2021 S.L.T. (Sh Ct) 185 .

City of Glasgow Council v Zafar, 1998 S.C. (H.L.) 27; 1998 S.L.T. 135; [1998] I.C.R. 120.

Dicle for the Democratic Party (DEP) of Turkey v Turkey, ECtHR 10 December 2002, Application No.25141/94.

EAD Solicitors LLP v Abrams [2015] B.C.C. 882; [2016] I.C.R. 380; [2015] I.R.L.R. 978.

Efobi v Royal Mail Group Ltd [2021] UKSC 33; [2021] 1 W.L.R. 3863; [2022] 1 All E.R. 401 .

Holy Synod of the Bulgarian Orthodox Church (Metropolitan Inokentiy) v Bulgaria (2011) 52 E.H.R.R. SE1.

Igen Ltd v Wong [2005] EWCA Civ 142; [2005] 3 All E.R. 812; [2005] I.C.R. 931 .

James v Eastleigh Borough Council [1990] 2 A.C. 751; [1990] 3 W.L.R. 55; [1990] 2 All E.R. 607 .

JP Morgan Europe Ltd v Chweidan [2011] EWCA Civ 648; [2012] I.C.R. 268; [2011] I.R.L.R. 673 .

Kuznetsov v Russia (2009) 49 E.H.R.R. 15 .

Laing v Manchester City Council [2006] I.C.R. 1519; [2006] I.R.L.R. 748.

Lancashire Festival of Hope v Blackpool Borough Council, Manchester County Court, 1 April 2021, unreported. *224

Metropolitan Church of Bessarabia v Moldova (2002) 35 E.H.R.R. 13.

Moscow Branch of the Salvation Army v Russia (2007) 44 E.H.R.R. 46 .

Nagarajan v London Regional Transport [2000] 1 A.C. 501; [1999] 3 W.L.R. 425; [1999] 4 All E.R. 65 .

Ozdep v Turkey (2001) 31 E.H.R.R. 27.

Page v NHS Trust Development Authority [2021] EWCA Civ 255; [2021] I.C.R. 941; [2021] I.R.L.R. 391.

Papageorgiou v Greece (2020) 70 E.H.R.R. 36.

Proprietor of Ashdown House School v JKL [2019] UKUT 259 (AAC); [2019] E.L.R. 530.

Savez Crkava "Rijec Zivota" v Croatia (2012) 54 E.H.R.R. 36.

Serif v Greece (2001) 31 E.H.R.R. 20.

Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] UKHL 11; [2003] 2 All E.R. 26; [2003] I.C.R. 337.

Simetra Global Assets Ltd v Ikon Finance Ltd [2019] EWCA Civ 1413; [2019] 4 W.L.R. 112 .

Varnava v Turkey (2010) 50 E.H.R.R. 21.

Legislation referred to

Act of Sederunt (Sheriff Court Ordinary Cause Rules) 1993/1956 .

Apologies (Scotland) Act 2016 (asp 5).

Equality Act 2010 (c.15).

Human Rights Act 1998 (c.42).

Race Relations Act 1976 (c.74).

On 24 October 2022 the sheriff *granted* decree.
THE SHERIFF (J N McCORMICK).—

Structure of note:

[1]. The structure of this note will be as follows:

Preface – paragraphs [2] – [5]

Background – paragraphs [6] – [7]

Agreed facts and general narrative – paragraphs [8] – [11]

Statutory framework – paragraphs [12] – [16]

Is a comparator required? – paragraphs [17] – [26]

Which is correct: should a protected characteristic within the 2010 Act have “nothing to do” with the decision or merely “no significant influence” on the decision to terminate the agreement? - paragraphs [27] – [40]

Burden of proof – paragraphs [41] – [50]

Summary of the evidence – paragraphs [51] – [173]

Decision – paragraphs [174] – [222]

Remedies (declarator, specific implement, apology, damages) – paragraphs [223]-[283]

Closing observations – paragraphs [285] – [286]

Disposal – paragraphs [287] – [288]

Appendix

Submissions on behalf of the pursuer – paragraphs P1 – P11.5

Submissions on behalf of the defender – paragraphs D1 – D177

Preface.

[2]. Mindful that this judgment may be quoted out of context I commence by stating the obvious: the Equality Act 2010 applies to all, equally. It is an Act designed to protect cornerstone rights and freedoms within a pluralist society. It applies to the LGBTQ+ community as it does to those of religion (including Christianity) and none. It follows that in relation to a protected characteristic (here: religion or philosophical belief) no section of society can discriminate against those with whom he, she or they disagree. The court was told, in terms, that it is no part of the defender’s case that the activities of the pursuer were unlawful. The event on 30 May 2020 was a Christian evangelical outreach event. Whether others agree with, disagree with or even, as was submitted on behalf of the pursuer, find abhorrent the opinions of the pursuer or Franklin Graham is not relevant for the purposes of this decision. This applies even where, as I heard evidence, members within the Christian community may not agree with the pursuer. The court does not adjudicate on the validity of religious or philosophical beliefs.

[3]. It was said during the hearing that nobody has the right not to be offended by the opinions of others. This is somewhat glib as there are also curbs on free speech. However, standing the lawful purposes of the planned evangelical event in this case, curbs on free speech (for example, “hate speech”) are not issues which I require to explore.

[4]. I have edited the names of a Member of the Scottish Parliament (MSP) and two Ministers of the Church of Scotland. I do so primarily because although their lobbying/writings featured in the case, they were not witnesses. In addition, the (on *225 occasion, polemical) terms of what they were reported to have written and their mischaracterisation of the event was neither supported by the facts nor by either party to the case.

[5]. A theme among those seeking cancellation of the event included prefacing their remarks with a professed belief in free speech while denying that right to others and denying third parties their choice to attend.

Background

[6]. This case was raised at the commercial court in Glasgow. The case had earlier proceeded to debate on 21 December 2020 (*Billy Graham Evangelistic Association v Scottish Event Campus Ltd 2021 SLT (Sh Ct) 185*). The case then proceeded to proof on whether the defender had breached the provisions of the Equality Act 2010 and, if so, on the appropriate remedy. Many issues and remedies have not been litigated previously in Scotland. I have found some wanting. The remedies here do not match the wrong.

[7]. The proof took place on 13 to 16 December 2021 and from 5 to 7 April 2022. The proof was spirited at times. Parties had agreed a joint minute. All but one of the witnesses had sworn affidavits as his or her evidence in chief. A hearing on submissions took place on 5 July 2022. Prior to the hearing on submissions parties had exchanged and lodged extensive submissions. Standing the breadth and depth of those submissions and to ensure that those qualities are not diluted by summarising them, I incorporate the submissions as an appendix to this decision.

Agreed facts and general narrative

[8]. The pursuer is a company limited by guarantee and is a registered charity. Importantly, the pursuer is a religious charitable organisation which, as the name suggests, is evangelical in purpose. A UK tour was organised for 2020.

[9]. In terms of booking form dated 31 July 2019 the pursuer hired premises at the SEC Hydro Arena from 0800 hours on 30 May 2020 to 0200 hours on 31 May 2020 for an event to be known as the “Franklin Graham Event”.

[10]. On 29 January 2020 the Chief Executive of Glasgow City Council wrote to the defender as follows:

“I write regarding the SEC’s proposed hosting of an event featuring Franklin Graham.

On behalf of the council, as the majority shareholder of SEC Ltd, I have to ask you to cancel this booking for the following reasons.

Firstly, as you may be aware, there is potential for Mr Graham to make homophobic and islamophobic comments during his public speaking engagements. Among other concerns, this could raise issues for the council in terms of its duty under the Equality Act 2010 to eliminate discrimination, harassment, and victimisation and to foster good relations between different groups.

Secondly, I have a concern for the city’s reputation. Glasgow is well known as a city which is friendly to all people, but particularly including people from the LGBTQ and Muslim communities. I do not want to send a message to those communities that the council is prepared to welcome any person who has the potential to make such comments.”

[11]. Glasgow City Council owns over 90% of the shareholding of the defender. Following both a board meeting and the receipt of the above letter on 29 January 2020 the defender wrote to the pursuer on the same day in the following terms:

“Regrettably, the Board of Scottish Event Campus Limited (“SEC”) have determined that the Hire Agreement is hereby terminated with immediate effect under clause 5.1.2 of SEC’s Terms of Business. This is by reference to your material breach of the Hire Agreement pursuant to clause 8.1.6 of SEC’s Terms of Business, which sets out your obligations not to act, or not to omit to act, in any way reasonably likely to bring SEC into disrepute.

This is on the basis of the recent adverse publicity surrounding your tour, which we have reviewed with our partners and stakeholders, and who

are of the view that this brings both SEC and potentially, Glasgow, as a city, into disrepute. This is not capable of remedy.” *226

Statutory framework:

Part 3: Equality Act 2010

[12]. The principle which the court must apply is commendably brief and found within section 13(1) of the Equality Act 2010 :

“A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.”

[13]. In this case the protected characteristic founded upon by the pursuer is religion or belief. Section 10 of the 2010 Act reads:

“10 Religion or belief

(1) Religion means any religion and a reference to religion includes a reference to a lack of religion.

(2) Belief means any religious or philosophical belief and a reference to belief includes a reference to a lack of belief.

(3) In relation to the protected characteristic of religion or belief— (a) a reference to a person who has a particular protected characteristic is a reference to a person of a particular religion or belief; (b) a reference to persons who share a protected characteristic is a reference to persons who are of the same religion or belief.”

[14]. The defender is a service provider. Section 29(1) of the 2010 Act reads as follows:

“A person (a “service-provider”) concerned with the provision of a service to the public or a section of the public (for payment or not) must not discriminate against a person requiring the service by not providing the person with the service.”

[15]. Although the Act refers to “a person” it is accepted that the pursuer, a company limited by guarantee, is protected from discrimination as it possesses a protected characteristic (*EAD Solicitors LLP v Abrams* [2015] BCC 882 at paragraph 14). The pursuer is therefore protected by the Act .

[16]. Note that there is no “business case” defence (that to treat another less favourably might be excused on the basis that, for example, it might affect future trade, embarrass customers, encourage industrial action or avoid offence). See, for example: *James v Eastleigh Borough Council* [1990] 2 AC 751 .

Is a comparator required?

[17]. The defender submits (paragraphs D94 and D95) that in terms of section 23 of the 2010 Act a suitable comparator requires to be identified and criticises the pursuer for having “led no evidence that an appropriate comparator would have been treated differently”. The first issue which I will address is whether a comparator is required?

[18]. Section 23 reads:

“23 Comparison by reference to circumstances

(1) On a comparison of cases for the purposes of section 13 , 14 , or 19 there must be no material difference between the circumstances relating to each case.

(2) The circumstances relating to a case include a person’s abilities if — (a) on a comparison for the purposes of section 13 , the protected characteristic is disability; (b) on a comparison for the purposes of section 14 , one of the protected characteristics in the combination is disability.”

[19]. In relation to section 23 , I refer to the defender’s submission at paragraph D95:

“The defender submits that individuals and entities who receive adverse publicity are not a suitable comparator in this case. A suitable comparator would be an individual or entity whose event gave rise to concerns about public disorder, safety and reputational risk and which was due to take place in Glasgow within a similar timeframe as the pursuer (given the particular volatilities present in Glasgow at that time).”

[20]. There will be many circumstances where a suitable comparator can readily be identified. Take, for example, an hotelier refusing an available room to a same sex couple. However, there are many circumstances where a product or a service may be sufficiently distinct that no appropriate comparator could realistically be identified. In my opinion that is the situation which pertains here.

[21]. The pursuer is a registered charity, evangelical in the promotion of Christian beliefs based on an interpretation of the bible – it may not *227 be an interpretation which all Christians ascribe to, but that is a separate matter.

[22]. Constructing a comparator would defeat the purpose of the Equality Act 2010 by placing an impossible hurdle on a pursuer. The essence of discrimination is that it can be obvious or it can be latent. As I understand the pursuer’s case, here it is suggested that a reason for the cancellation involved a breach of a protected characteristic under the 2010 Act (disguised with excuses which may have had a bearing on, but were not the true reason for, the decision).

[23]. In *Page v NHS Trust Development Authority (CA) [2021] EWCA Civ 255* Lord Underhill, at paragraph 79, in relation to the construct of a hypothetical comparator commented:

“There is nothing in this point. It is trite law that it is *not* necessary in every case to construct a hypothetical comparator, and that doing so is often a less straightforward route to the right result than making a finding as to the reason why the respondent did the act complained of: see the very well-known passage at paras 8 – 13 of the speech of Lord Nicholls of Birkenhead in *Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] ICR 337.”

[24]. *Page* echoed a point made by Elias LJ in *JP Morgan Europe Ltd v Chweidan* [2011] *EWCA Civ 648* where he said at paragraph 5:

“In many cases it is not necessary for a tribunal to identify or construct a particular comparator (whether actual or hypothetical) and to ask whether the claimant would have been treated less favourably than that comparator. The tribunal can short-circuit that step by focusing on the reason for the treatment”. (My emphasis)

[25]. In short, a pursuer is not required to provide or construct a comparator and, although in many cases a comparator may be available, to construct a hypothetical comparator would be a distraction from the real issue. That is not something I propose to do.

[26]. Here it is accepted that the defender is a service provider in terms of section 29 of the 2010 Act and “must not discriminate against a person requiring the service by not providing the person with the service”. No comparator is required.

Which is correct: should a protected characteristic within the 2010 Act have “nothing to do” with the decision or merely “no significant influence” on the decision to terminate the agreement?

[27]. I address these two competing submissions. Is it correct - as the defender contends: *Nagarajan v London Regional Transport [2000] 1 AC 501* – that, for a pursuer to succeed, a breach of a protected characteristic must have had a “significant influence” on the decision? In *Nagarajan v London Regional Transport* the court considered discrimination on racial grounds in terms of section 1(1)(a) of the Race Relations Act 1976 . In *Nagarajan* Lord Nicholls of Birkenhead observed, at page 512H:

“Decisions are frequently reached for more than one reason. Discrimination may be on racial grounds even though it is not the sole ground for the decision...If racial grounds or protected acts had a significant influence on the outcome, discrimination is made out”.

Again, at page 513, Lord Nicholls opined:

“If racial grounds or protected acts had a significant influence on the outcome, discrimination is made out. Read in context, that was the industrial tribunal’s finding in the present case.” (My emphasis)

[28]. If a breach of a protected characteristic has a “significant influence” on a decision, the question becomes: what is a “significant influence”? That question was answered in *Igen Ltd v Wong [2005] EWCA Civ 142* at paragraph 37 where the words “significant influence” were interpreted as: “a ‘significant’ influence is an influence which is more than trivial” and in *JP Morgan Europe Ltd v Chweidan [2011] EWCA CIV 648* where Elias LJ said at paragraph 5:

“This means that a reason for the less favourable treatment – not necessarily the only reason but one which is significant in the sense of more than trivial – must be the claimant’s disability.”

[29]. Therefore a significant reason is a reason which is more than a trivial reason. *228

[30]. On the other hand the pursuer contends that a protected characteristic must have nothing (at all) to do with the decision (not merely no “significant influence” on that decision).

[31]. To resolve these issues, I begin with reference to section 136(2) of the 2010 Act :

“If there are facts from which the court could decide, in the absence of any other explanation , that a person (A) contravened the provision concerned, the court must hold that the contravention occurred”.(My emphasis)

[32]. In *Efobi v Royal Mail Group Ltd [2021] UKSC 33* the Supreme Court examined section 136(2) of the 2010 Act when considering an allegation of discrimination made by a postman of Nigerian ethnic origin.

[33]. I quote Lord Leggatt at paragraph 28:

“28 The aspect of section 136(2) which is the focus of this appeal is not the only respect in which the opportunity was taken to alter the wording

of the old provisions so as more clearly to reflect the way in which they had been interpreted by the courts. The old provisions referred to “an adequate explanation” (or “a reasonable alternative explanation”). Those phrases were also apt to mislead in that they could have given the impression that the explanation had to be one which showed that the employer had acted for a reason which satisfied some objective standard of reasonableness or acceptability. It was, however, established that it did not matter if the employer had acted for an unfair or discreditable reason provided that the reason had nothing to do with the protected characteristic : see e g *Glasgow City Council v Zafar* [1998] ICR 120 , 124; *Law Society v Bahl* [2004] IRLR 799 ; *Laing v Manchester City Council* [2006] ICR 1519 , para 51.” (My emphasis)

[34]. I have also examined the cases referred to by Lord Leggatt at paragraph 28 which he quotes with approval. In, for example, *Laing v Manchester City Council and Another* [2006] ICR 1519 , a case under section 54A of the Race Relations Act 1976 , Elias J, President of the Employment Appeal Tribunal wrote, at paragraph 51:

“We note in particular three features of this section. First, the onus is on the complainant to prove facts from which a finding of discrimination, absent an explanation, could be found. Second, by contrast, once the complainant lays that factual foundation, the burden shifts to the employer to give an explanation. The latter suggests that the employer must seek to rebut the inference of discrimination by showing why he has acted as he has. That explanation must be adequate, which as the courts have frequently had cause to say does not mean that it should be reasonable or sensible but simply that it must be sufficient to satisfy the tribunal that the reason had nothing to do with race: see *Glasgow City Council v Zafar* [1998] ICR 120 and *Bahi v The Law Society* [2004] IRLR 799 .” (My emphasis)

[35]. The case referred to by the defender, *Nagarajan* , was decided in 2000 and referred to the Race Relations Act 1976 . While I accept the Dean’s submission that *Nagarajan* may not have been overruled explicitly, there is a subtle but important difference between whether a

defender has, on the balance of probabilities, to prove either (a) that a protected characteristic had no significant (ie no more than a trivial) influence on the outcome or (b) that a protected characteristic had nothing to do with the decision.

[36]. In oral submission the Dean accepted that in this particular case if a breach were established, there would be “no material difference” in the result. Here it is conceded that, if established, a breach could not be described as trivial.

[37]. As an aside, and because I raised the point with the parties in advance of the hearing on submissions, within its rubric, the editor summarised the effect of *Efobi* as “The burden moved to the employer at the second stage to explain the reason(s) for the alleged discriminatory treatment and satisfy the tribunal that the protected characteristic had played no part in those reasons;”. The rubric is of course not part of the decision but an interpretation of it. Although I had canvassed with parties concerns that the wording of the rubric (“played no part”) went too far in its analysis of *Efobi*, I am persuaded that it is accurate. *229

[38]. *Efobi* is a Supreme Court decision. It was decided in 2021 and its reasoning involves the 2010 Act. It is clear, in point and I propose to follow it.

[39]. Therefore, although, for the factual reasons that I will set out, I consider that both tests have been met; I prefer the opinion of Lord Leggatt in *Efobi* at page 801C, namely, that (assuming the first part of the test - section 136(2) of the 2010 Act - is met) the defender here has to show that the reason for the decision had “nothing to do with” a protected characteristic (here: religion or philosophical belief) of the pursuer. That is the test which I will apply.

[40]. If the above analysis of the law is correct, this has a practical effect on my findings-in-fact and note. The issue is succinct. I say this because, if a protected characteristic had nothing to do with the decision the burden on the defender should be readily discharged. That would be an end to the case. The opposite also applies. Where, as here, there are minutes, emails, affidavits and oral testimony to evidence that it cannot be said that the protected characteristic had “nothing to do with” the decision, a court can focus its findings-in-fact and its summary of the evidence accordingly. That is because the court “must” then find in favour of a pursuer. This brings me to the burden of proof.

Burden of Proof (and inferences capable of being drawn when that burden passes to a defender)

[41]. It is important to understand where the burden of proof lies. This is contained in section 136 of the 2010 Act :

“136 Burden of proof

(1) This section applies to any proceedings relating to a contravention of this Act .

(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.

(3) But subsection (2) does not apply if A shows that A did not contravene the provision.

(4) The reference to a contravention of this Act includes a reference to a breach of an equality clause or rule.”

[42]. Referring again to *Efobi* the Supreme Court examined section 136(2) of the 2010 Act , I quote Lord Leggatt at paragraph 15:

“15 The rationale for placing the burden on the employer at the second stage is that the relevant information about the reasons for treating the claimant less favourably than a comparator is, in its nature, in the employer’s hands. A claimant can seek to draw inferences from outward conduct but cannot give any direct evidence about the employer’s subjective motivation – not least since, as Lord Browne-Wilkinson observed in *Glasgow City Council v Zafar* [1998] ICR 120 , 124: “those

who discriminate...do not in general advertise their prejudices; indeed they may not even be aware of them.”” (My emphasis)

[43]. In *JP Morgan Europe Ltd v Chweidan* [2011] EWCA CIV 648 Elias LJ said at paragraph 6:

“In practice a Tribunal is unlikely to find unambiguous evidence of direct discrimination. It is often a matter of inference from the primary facts found. The burden of proof operates so that if the employee can establish a *prima facie* case, i.e. if the employee raises evidence which, absent explanation, would be enough to justify a tribunal concluding that a reason for the treatment was the unlawfully protected reason, then the burden shifts to the employer to show that in fact the reason for the treatment is innocent, in the sense of being a non-discriminatory reason”. (My emphasis)

[44]. In terms of section 136(3) of the 2010 Act the burden does not shift to a defender unless a pursuer succeeds in showing, on balance of probabilities, that a court “could” decide that a contravention had occurred (section 136(2) quoted above). Only then does the burden of proof tip against a defender. Of course, it follows that if a pursuer is unable to show that the court “could” conclude that a contravention has occurred, then that is an end to the case.

[45]. Drawing the above together, here the pursuer has to prove facts from which the court could decide, in the absence of any other explanation, that the defender contravened the provision concerned. That done, the burden shifts to the defender to show that the decision had nothing to do with a protected characteristic. If the defender is unable to discharge that burden, the court *must* hold that the contravention occurred. *230

[46]. At paragraph P8.42 of the pursuer’s submission it is said that the defender formed the view that the pursuer is associated with Franklin Graham and that Frank Graham holds (or is at least

attributed as holding) certain religious beliefs which are regarded as controversial by certain sections of society. At the hearing on submissions, both points were conceded by the defender.

[47]. The third point is not conceded, namely, that because Franklin Graham held views which the defender judged (or that others found) objectionable, the defender no longer wished to provide the services which it was contractually bound to supply to the pursuer.

[48]. As I understand it, the defender's position may be summarised as follows: if the concerns in relation to public disorder were genuinely held and the decision to cancel the event taken solely on those grounds, the result – cancellation – of those concerns would have been the same irrespective of the nature of the proposed event, as all events (in relation to public disorder issues) are treated the same. Therefore, there would be no unlawful discrimination. The Dean referred to the example of a genuine terrorist threat at the venue. That, he said, may lead to an event being cancelled even at the last minute.

[49]. I agree with the Dean's proposition in principle, namely, that issues of public safety might cause an event to be cancelled. A terrorist threat may well result in a benign exhibition or a contentious political rally being cancelled. A defender could readily show that that decision had nothing to do with a protected characteristic. However, we are not in that territory here.

[50]. I pause to mention four matters. Firstly, that the fear for public safety must be one genuinely and responsibly held, not an excuse. Secondly, in the above example, the reason for cancellation by the venue would have had nothing to do with a protected characteristic. The decision to cancel would have been taken *solely* because of the threat, irrespective of the type of event planned (therefore no breach/discrimination). Thirdly, in the context of a transient public order issue (a terrorist threat), an event might be postponed rather than cancelled, or its character changed so as to provide for such a threat. Fourthly, here, concerns regarding possible protest occurred four months prior to the event date. They could not be described as immediate.

Summary of the evidence

[51]. Parties had agreed (a) a joint minute and (b) that the evidence in chief from all but one witness would be given in affidavit form. In all the court heard evidence from fifteen witnesses. The shorthand writer's notes were extended.

[52]. As case law informs, it is important to consider not only what was said in evidence but also what was written contemporaneously to the decision making process; the internal communications, the communication between the parties, the chronology involved in the process and any reasonable inferences to be drawn. People rarely admit to discriminatory motives. Against that, the court should be careful not to over interpret legitimate actions.

[53]. In relation to the significance of contemporaneous documentation, I refer to *Simetra Global Assets Ltd & Anor v Ikon Finance Ltd & Ors* [2019] 4 WLR 112 , where, at para [48] Males LJ said:

“In this regard I would say something about the importance of contemporary documents as a means of getting at the truth, not only of what was going on, but also as to the motivation and state of mind of those concerned. That applies to documents passing between the parties, but with even greater force to a party’s internal documents including emails and instant messaging. Those tend to be the documents where a witness’s guard is down and their true thoughts are plain to see. Indeed, it has become a commonplace of judgments in commercial cases where there is often extensive disclosure to emphasise the importance of the contemporary documents. Although this cannot be regarded as a rule of law , those documents are generally regarded as far more reliable than the oral evidence of witnesses , still less their demeanour while giving evidence.” (my emphasis)

[54]. Here it is apparent that the email correspondence discloses when the decision was taken (28 January 2020), by whom (Peter Duthie) but also that the implementation of decision was subject to approval by the board as indeed happened the following day.

[55]. Accordingly, when I summarise the evidence in relation to the case I do so with the following ***231** issue in mind, namely, that the chronology as I have narrated it is not seriously in dispute – but the reasons/motives are, which is why I focus on those aspects.

[56]. Unusually I have peppered the summary of the evidence with quotations from the evidence. I do so to convey not only what was said but so that the reader might see why I have interpreted the evidence as I have.

[57]. In relation to the witnesses for the pursuer, I found them credible and, apart from Simon Herbert, reliable. Indeed much of their evidence was not in dispute standing the position of the defender at proof. In relation to Mr Herbert he was not as grounded in the figures relating to the losses as he might have been. For example he could not explain why Value Added Tax (VAT) had been included in certain invoices for outlays but not others (for similar outlays) nor why claims for mobile phones extended to long after the scheduled date for the event.

[58]. In so far as the witnesses for the defender are concerned, again, I found each credible but unreliable in many respects. As will be seen, at proof there remained a divergence of views as to who made the decision to terminate the agreement and when. There was a tendency to talk up the security issue while ignoring the wealth of evidence concerning the true reasons – the supposed views of Franklin Graham, what would or might be said at the event, pressure from the major shareholder and the reactions of others, including existing and future commercial considerations - which were clearly to the fore when one considers the internal emails, the board minutes, the views of Glasgow City Council expressed at the meeting and by letter on 29 January 2020 and concerns regarding securing the COP26 contract as described in evidence before me. In addition, the board and Mr Duthie were unaware that, for example, although the agreement had referred to a “private” event; the defender had earlier agreed that the event would be an unticketed free event open to the public – email chains dated 22 July 2019 and 19 November 2019 between Sue Verlaque and Ray Critchley and 18 November 2019 between Sue Verlaque and David Orridge. Neither Mr Duthie nor the board were aware on 29 January 2020 that transcripts and videos of prior similar events had been offered to the defender but declined in 2019. These aspects therefore rendered some evidence from the board members irrelevant or unreliable.

[The sheriff summarised the evidence from 15 witnesses and continued:]

Decision

[174]. I will apply the law to the facts. It is accepted that the event was a lawful evangelical outreach event. I therefore begin with a discrete issue which alone, in my opinion, constitutes a breach of the Equality Act 2010 . It is this.

[175]. In Mr Duthie's affidavit at paragraph 18 he said that he spoke at the board meeting on 29 January 2020. He focused on four key concerns. The second of those was: "The LGBTQ+ community has strong representation within the international artistic community; I could foresee a scenario where artists would say they would not play our venue."

[176]. Additionally, the fourth reason was also redolent of a business case defence: "Our principal sponsor, SSE, had also raised some concerns with us: they felt the event was not compatible with their values and did not want their name associated with it".

[177]. Briefly put, if it is correct that the event was evangelistic, based on religion or philosophical belief, then it follows that the decision to cancel was a breach of the Equality Act 2010 in that the event was cancelled as a commercial response to the views of objectors.

[178]. In law there is no business case defence.

[179]. Accordingly, on this basis alone the defender breached the terms of section 29(2) of the Equality Act 2010 by terminating the provision of the service to the pursuer. I accept that this may not have been the only reason but if commercial considerations such as those outlined at paragraph 18 of Mr Duthie's affidavit related to the objections by others to the religious or philosophical beliefs of Franklin Graham and/or the pursuer, then that is a breach of the Act. These are, within his affidavit, two of the four reasons he says were provided to the board on 29 January 2020.

[180]. Moving on, also within paragraph 18 of Mr Duthie's affidavit Mr Duthie comments: "When your major shareholder expresses concern, you *232 listen". I now examine the influence which Glasgow City Council had on the decision.

[181]. Specifically the letter dated 29 January 2020 from the Chief Executive of Glasgow City Council is telling. It was written "as the majority shareholder of SEC Ltd" asking to have the booking cancelled. The reasons are instructive. The letter reads as follows:

“I write regarding the SEC’s proposed hosting of an event featuring Franklin Graham.

On behalf of the council, as the majority shareholder of SEC Ltd, I have to ask you to cancel this booking for the following reasons.

Firstly, as you may be aware, there is potential for Mr Graham to make homophobic and islamophobic comments during his public speaking engagements. Among other concerns, this could raise issues for the council in terms of its duty under the Equality Act 2010 to eliminate discrimination, harassment, and victimisation and to foster good relations between different groups.

Secondly, I have a concern for the city’s reputation. Glasgow is well known as a city which is friendly to all people, but particularly including people from the LGBTQ and Muslim communities. I do not want to send a message to those communities that the council is prepared to welcome any person who has the potential to make such comments.

I am available to discuss at any time.” (sic)

[182]. The concern is expressed that there is the potential for Mr Graham to make homophobic and Islamophobic comments. I found no evidence to that effect. During the proof there was the occasional reference to suggestions that Franklin Graham may have uttered comments interpreted as homophobic or Islamophobic years, sometimes decades, beforehand but before me it was conceded that this event was not to be a platform for such views.

[183]. At proof it was accepted that the purpose of the event scheduled for 30 May 2020 was a religious evangelical event at which Mr Franklin Graham would speak. It was accepted that he did not intend to engage in hate speech. Neither the board nor, it seems, Mr Duthie had been aware that transcripts (and videos) of prior speeches had earlier been offered to the defender, but declined, and would have been available to allay concerns in that regard.

[184]. The second paragraph of the letter from Glasgow City Council raises a concern for the city's reputation as a city which is friendly to all people "but particularly including people from the LGBTQ+ and Muslim communities". It goes on to say that "I do not want to send a message to those communities..."

[185]. In short, pressure was put on the defender by its majority shareholder to cancel the booking as it may offend others. The effect of writing in such terms was not to protect one group from another but to prefer one opinion over another. For the defender to cancel on the basis of considerations within the letter would again be to breach a protected characteristic. The letter dated 29 January 2020 from Glasgow City Council was received after the board meeting but before the termination letter was issued by the defender.

[186]. Also on 29 January 2020 a Member of the Scottish Parliament (MSP) wrote to the defender requesting that the event be cancelled reportedly saying:

"The idea of allowing the SEC to be used as a platform for such a toxic and dangerous agenda seems so utterly at odds with the values of a civilised society that I was extremely surprised to learn that this booking had been accepted".

The same MSP had been vocal on social media.

[187]. It is no part of the defender's case and I heard no evidence to suggest that Franklin Graham had intended to pursue a toxic or dangerous agenda at the event. On the contrary, it is not disputed that the event would have been an evangelical outreach event for up to twelve thousand people. That is not to say that his opinions are not offensive to some whether in Glasgow or elsewhere. However, the pursuer's right to engage a speaker at the evangelical event – in furtherance of a religious or philosophical belief – is protected by law.

[188]. On a more general note, the concern of Glasgow City Council for people from the LGBTQ+ and Muslim communities may be understandable. Their rights have been hard won (indeed, arguably they have much further to go in their practical application). However, that

misses ***233** the point. The lawful opinions of others based here on religious or philosophical belief (whether mainstream or not) are not to be preferred one over another. All are protected.

[189]. I now turn to consider the minutes of the meeting of the defender's directors held on 29 January 2020. An excerpt of the minute was produced which commences with the Chief Executive (Peter Duthie) providing the background to the event which "had led to a high level of negative comments about Franklin Graham but also about the venue and its decision to accept the booking". It is observed that Glasgow City Council as the major shareholder will come under pressure on the event.

[190]. The minutes record directors stating that "it's about 'doing the right thing' notwithstanding the contractual position"; that Glasgow City Council "may formally request that SEC does not hold the event" as indeed happened (see above); that "there was a scale on the message that was being preached which is darker than seen before" yet there was no enquiry made from the pursuer as to what that message was to be.

[191]. Objections to the event had been raised by petition, on social media, by Church of Scotland Ministers and by an MSP which, taken together, may have caused the board to think that the message was "darker than seen before". If so, that is no longer the defender's position.

[192]. The minutes also refer to issues of protest and disorder. No mention is made of reaching out to the pursuer either to allay or diffuse – or perhaps confirm - such concerns or to suggest provision (searches/ticketing/fewer numbers/security/assurances as to what might be said, etc.,) for them. Such provision might have been unworkable but they were not considered and the pursuer was not consulted.

[193]. If anyone suggested contacting the pursuer to seek assurances then that is not reflected in the minutes. Indeed quite the contrary. Within the parties' agreement there is provision for a breach to be remedied (clause 5.1.2) but in the termination letter the defender blamed the pursuer for the breach (while making no mention whatever to security issues) and concluded by saying that the pursuer's breach was not capable of remedy.

[194]. Overall I am left with the impression that the defender was searching for a reason to terminate the agreement. Franklin Graham's Facebook post on 27 January 2020 provided that excuse.

[195]. To summarise, I accept that the minutes include a discussion on important issues such as protest and security. But the minutes also focus on an alleged "darker" message which it was said might be conveyed by Mr Graham. However, it is now accepted that the actual message to be conveyed at the event was based on religion or philosophical belief falling within the terms of section 10(2) of the 2010 Act .

[196]. Drawing the above strands together, I am satisfied that the decision to cancel the event was taken (at least in part and, had it been necessary for me to determine the issue, in substantial part) on the basis of the religious or philosophical belief of the pursuer and Mr Franklin Graham. But that is not an end to the matter.

[197]. If, as is argued, the event was terminated solely because of public disorder, that should have been disclosed to the pursuer. It was not. I was provided with no colourable reason why not.

[198]. I therefore turn to consider the termination letter sent by the defender to the pursuer dated 29 January 2020 (the same day as, but after, both the board meeting and the letter from Glasgow City Council had arrived). The letter reads as follows:

"We refer to the Hire Agreement (Reference F1038).

Regrettably, the Board of Scottish Event Campus Limited ("SEC") have determined that the Hire Agreement is hereby terminated with immediate effect under clause 5.1.2 of SEC's Terms of Business. This is by reference to your material breach of the Hire Agreement pursuant to clause 8.1.6 of SEC's Terms of Business, which sets out your obligations not to act, or not to omit to act, in any way reasonably likely to bring SEC into disrepute.

This is on the basis of the recent adverse publicity surrounding your tour, which we have reviewed with our partners and stakeholders, and who

are of the view that this brings both SEC and potentially, Glasgow, as a city, into disrepute. This is not capable of remedy. *234

We shall make arrangements to refund any deposit paid by you within a period of 14 days.”

[199]. At proof the defender maintained that the decision to terminate the contract arose solely out of security concerns, namely, that protests might take place both inside and outside the venue - I have addressed such matters at paragraphs [45] to [50] above. The obvious omission from the termination letter is any reference to issues of security, disorder or protest as influencing the decision.

[200]. Instead the letter says that the pursuer has breached its obligations “not to act, or not to omit to act, in any way reasonably likely to bring SEC into disrepute.” There was no attempt at proof to maintain the line that the pursuer had brought the defender into disrepute.

[201]. In the penultimate paragraph of the letter the reason given for the decision is on the basis of “adverse publicity”.

[202]. To conclude on this topic, there is no mention in the letter of either (a) concerns about security or protest at the venue or (b) a concern at what might be said from the podium by Franklin Graham – as was reflected in the minutes of the board meeting.

[203]. The tenor of the letter reflects that the defender is responding (for commercial reasons) to the concerns raised by others to the event taking place at all.

[204]. The conclusion that the adverse publicity/disrepute is “not capable of remedy” is a conclusion reached unilaterally by the defender some four months prior to the event and without discussion with the pursuer.

[205]. Of course, had the defender intimated that it was considering terminating the contract that might have resulted in litigation. However, the decision to terminate the contract itself resulted in this litigation.

[206]. On a more general note, much was made of when and by whom the decision was taken. Even at proof there was a difference of opinion as is reflected in my summary of the evidence above. I am satisfied that Mr Duthie took the decision to terminate the contract. However, he did so with the support of the principal shareholder and with the support of the board as is reflected in the termination letter (which refers to a board decision). The court is primarily considering the basis for the decision. The decision to terminate the agreement was taken as a commercial response by the defender to the objections by others to the religious or philosophical beliefs of the pursuer and Franklin Graham.

[207]. In my opinion this decision to terminate was taken by Mr Duthie on 28 January 2020. I follow the chronology evidenced in the paperwork. In particular, I refer to an email by Kirsten McAlonan, Head of Public Relations for the defender, dated 28 January 2020 addressed to Colin Edgar, Head of Communications and Strategic Partnerships at Glasgow City Council. The day before the board meeting Kirsty McAlonan wrote: “Probably not surprisingly given the press today we have made a decision not to go ahead with this because of the issues surrounding this escalating” and “Just wanted to give you the heads up” and “Will let you know when we can release but I think Peter would like to bring this up with the Board”.

[208]. Mr Duthie was at a loss to explain the email dated 28 January from Kirsten McAlonan.

[209]. In my judgment Mr Duthie had made his mind up on or about 28 January 2020 subject to the support of the board. He had advised Kirsten McAlonan accordingly the day before the board meeting. She says in her email that the decision had been made and she was letting her counterpart at Glasgow City Council know in advance of that decision being made public. However she was also aware that Mr Duthie proposed to raise the matter with the board which he did. Accordingly, Mr Duthie’s decision was taken on 28 but implemented on 29 January 2020 having secured both the support of the board and the principal shareholder.

[210]. Here I refer to the opinion of Judge Claire Evans in *Lancashire Festival of Hope v Blackpool Borough Council* dated 1 April 2021 FOOMA 124, Manchester County Court where she opines, at paragraph 133:

“133. The suggestion that removal on the grounds of the offence caused to the public by the association of the Claimant with Franklin Graham and his religious beliefs would not be ‘because of’ the religious beliefs but rather because of a response to public opinion or *235 concern seems to me to be a distinction that cannot properly be drawn having regard to the intention behind the Equality Act of eliminating discrimination.”

And at paragraphs 134 and 135 she observes:

“134. There is no defence of justification to direct discrimination. The issues arising from the desire to avoid offence to certain sectors of the community are or may be relevant to the HRA claims, where there is a balancing exercise to be undertaken, but they seem to me not to be relevant to the EA claim in this particular case.

135. The complaints arose from the objections of members of the public to the religious beliefs. The removal came about because of those complaints. I find it also came about because the Defendants allied themselves on the issue of the religious beliefs with the complainants, and against the Claimant and others holding them.” (my emphasis)

[211]. The effect of the decision to terminate the agreement was that the defender preferred the opinions of the objectors to those of the pursuer and by terminating the agreement, silenced them.

[212]. That is not to say that there were no concerns in relation to disorder and protest. There were. However, tellingly no concerns (security, protest or otherwise) were raised with the pursuer either before or after the termination letter.

[213]. Here I will also refer to an email dated 6 February 2020 - after the contract was terminated - from Peter Duthie to Carole Forrest, Director of Governance and Solicitor to the Council, in which he provides suggested responses both from the defender and Glasgow City Council. The email reads:

“In order to allow you to respond (as you suggest, one response might be best) the following statements have been agreed.

From SEC:

‘The booking for this event was processed in the same way we would for any religious concert of this nature and as a business we remain impartial to the individual beliefs of both our clients and visitors. However, we are aware of the recent adverse publicity surrounding this tour and have reviewed this with our partners and stakeholders. Following a request from our principal shareholder the matter has been considered and a decision made that we should not host this event.’

From GCC:

‘The council was concerned the event would have a detrimental impact on community relations, due to the consistently inflammatory nature of comments made by Franklin Graham. The council expressed that view to the SEC. However, the decision to cancel or continue with the event was one for the venue.’

I hope this helps.”

[214]. A number of matters arise from this email. Firstly, even after the termination letter was issued on 29 January 2020, there is no reference in either of these proposed public responses to concerns surrounding public disorder. Secondly, the suggested response from the SEC refers to a “request from our principal shareholder” whereas the suggested response from Glasgow

City Council refers to the “consistently inflammatory nature of comments made by Franklin Graham” but also that the decision was “one for the venue”. It appears that each attributes the decision to the other yet no mention is made of the reason for termination which the defender now founds on.

[215]. Finally, I return to consider the terms and effect of the Facebook post by Franklin Graham dated 28 January 2020. This, it is said, crystallised the defender’s concerns over public disorder and protest. I reproduce it in full:

“A letter to the LGBTQ community in the UK –

It is said by some that I am coming to the UK to bring hateful speech to your community. This is just not true. I am coming to share the Gospel, which is the Good News that God loves the people of the UK, and that Jesus Christ came to this earth to save us from our sins.

The rub, I think, comes in whether God defines homosexuality as sin. The answer is yes. But God goes even further than that, to say that we are all sinners – myself included. The Bible says that every human being is guilty of sin and in need of forgiveness and cleansing. The penalty of sin is spiritual death – separation from God for eternity.

That’s why Jesus Christ came. He became sin for us. He didn’t come to condemn the world, He came to save the world by giving His life *236 on the Cross as a sacrifice for our sins. And if we’re willing to accept Him by faith and turn away from our sins, He will forgive us and give us new life – eternal life – in Him.

My message to all people is that they can be forgiven and they can have a right relationship with God. That’s Good News. That is the hope people on every continent around the world are searching for. In the UK as well as in the United States, we have religious freedom and freedom of speech. I’m not coming to the UK to speak against anybody, I’m coming to speak for everybody. The Gospel is inclusive. I’m not coming out of hate, I’m coming out of love.

I invite everyone in the LGBTQ community to come and hear for yourselves the Gospel messages that I will be bringing from God's Word, the Bible. You are absolutely welcome."

[216]. The court must be cautious about what can be read into the above message as I did not hear evidence from its author. That said, it appears that Franklin Graham was aware of concerns and sought to diffuse those. It is also apparent that he is rooting his response in religious or philosophical beliefs (irrespective of how others might view those).

[217]. It is the final paragraph which the defender founds upon. At proof Mr Duthie explained that he had become concerned at the decision to "invite everyone" in the LGBTQ+ community to the event. The defender was concerned that protests may then take place outside and/or inside the venue, this being a free unticketed event. I can understand those concerns.

[218]. However, the event had always been planned to be free and unticketed. Had the event been ticketed, there would have been little to prevent protestors obtaining tickets (whether or not those tickets were free) and entering the hall.

[219]. On a plain reading of the post, it is an attempt to recognise and to diffuse angst, not to create it. Whether that was a realistic prospect I cannot say. However, the response by the defender was not to question the pursuer as to the wisdom of the final paragraph but unilaterally to cancel the event on 29 January 2020, some four months prior to the scheduled date, 30 May 2020 (all while failing to disclose what is now claimed to be the true reason).

[220]. I heard evidence that the defender had hosted other religious events - the implication being that the defender does not vet them. That may be true in general terms but this court is dealing with this event.

[221]. At the hearing on submissions Mr O'Neill invited me to imply the word "unfortunately" as a synonym for the word "candidly" where the defender refers to the evidence of its witnesses

in its written submissions (including at D65, D68, D87 and D90). There is some force in that submission.

[222]. Overall I conclude that the true reasons for the decision were (a) the defender's view of the religious and philosophical beliefs of the pursuer and of Franklin Graham and (b) the pressure brought to bear on the defender by its principal shareholder and others including commercial considerations concerning the response by others to the intended religious and philosophical message to be conveyed by the pursuer and Franklin Graham. Concerns over the Facebook post by Franklin Graham on 27 January 2020 provided an excuse to terminate the agreement but that was not the sole reason nor the principal one. It is now suggested that the sole reason for terminating the contract was security. I do not agree. It was not the sole reason. I accept that concerns about security were discussed at board level but that reason, such as it was, went undisclosed to all except board members.

Remedies – declarator, specific implement, apology, damages.

[223]. The remedies available to this court are the same as those available in the Court of Session and are to be found within section 119 of the 2010 Act which, in so far as relevant, reads as follows:

“119 Remedies

(1) This section applies if the sheriff finds that there has been a contravention of a provision referred to in section 114(1) .

(3) The sheriff has power to make any order which could be made by the Court of Session – (a) in proceedings for reparation; (b) on a petition for judicial review.

(4) An award of damages may include compensation for injured feelings (whether or not it includes compensation on any other basis).

(5) Subsection (6) applies if the sheriff – (a) finds that a contravention of a provision *237 referred to in section 114(1) is established by virtue of section 19 , but (b) is satisfied that the provision, criterion or practice was not applied with the intention of discriminating against the claimant or pursuer.

(6) The sheriff must not make an award of damages unless it first considers whether to make any other disposal.”

[224]. I may only consider damages after I have considered other disposals (section 119(6)).

Declarator

[225]. In this case the pursuer seeks declarator that the defender, a service provider, has discriminated against the pursuer by terminating the hire agreement dated 31 July 2019 in terms of which the pursuer hired premises at SEC Hydro Arena from 0800 hours on 30 May 2020 to 0200 hours on 31 May 2020 for an event to be known as the “Franklin Graham Event” and that the defender has refused to reschedule the event because of a protected characteristic, namely, religion or philosophical belief in terms of section 10 of the 2010 Act .

[226]. The Dean accepted that if a breach of a protected characteristic had been established, there could be no objection to a declaration. I agree. I have framed the declarator to reflect the terms craved.

Specific Implement – an order Ad Factum Praestandum

[227]. In its written submissions the defender argues that the contract ended on 27 March 2020 when the pursuer invoked the force majeure provision (covid). Therefore, as the contract ended then, no issue of rescheduling applies. I do not agree. The invocation of the force majeure provision was, as stated in that letter, the defender’s fall-back position. The remedies applicable as at the date of the wrongful act apply here. Furthermore, contrary to what the defender says (D118) I doubt if it was the pursuer’s intention to prove that the March decision was on the basis of a protected characteristic. Moving on, in relation to specific implement, the Dean’s submission, as I understood it, was that a court order for rescheduling would not be warranted for three reasons, (a) that the date for the event had passed, (b) that the defender had offered to negotiate an alternative date but on a different commercial basis and (c) the court could not rule on what factors might be in play at the time of the rescheduled event.

[228]. On the other hand Mr O'Neill submitted that the remedies available to the Sheriff in such matters are the same as those in the Court of Session. The Court of Session may make any order whether or not such an order is craved in a petition. That, in his submissions, was what he was inviting me to do.

[229]. I was also referred to section 119(3)(b) of the 2010 Act which confers upon the Sheriff the same powers as exist in the Court of Session.

[230]. This is a commercial case. I accept, as Mr O'Neill had proposed, that it is possible for me to issue a decision and assign a hearing in terms of Rule 40.14 of the Act of Sederunt (Sheriff Court Ordinary Cause Rules) 1993 No1956 (S.233) so as to allow parties to liaise in relation to the management of a rescheduled event.

[231]. I also accept that an appropriate remedy in this case would be to order a rescheduling of the event.

[232]. In theory rescheduling should not pose a difficulty. Comparatively speaking, the identification of a date would be a minor issue. However, from the point of view of a court ordering, directing and supervising a rescheduling, such a task would, from any perspective, be fraught with hazard (leaving aside such an order being made in the teeth of the defender's opposition).

[233]. I say this because, assuming that a suitable date could be found, the court could not properly manage/regulate issues such as ticketing (or not) for over 12,000 people: whether and to what extent security personnel should be engaged, by whom and at what cost (with or without police involvement); what, where, when and to whom advertising should take place (leaving aside whether pre-event functions would be required at the venue to promote/organise the rescheduled event as had originally occurred). I doubt if I could confidently leave such matters to the discretion of parties. All of this had previously been agreed.

[234]. Furthermore a court-ordered rescheduling might attract those intent on embarrassing the court and perpetrating the very mischief of suggested *238 protest in an effort to vindicate the defender's original (but wrongful) decision.

[235]. It was said at the earlier debate ([2021] SLT 803 at page 208L) and repeated in the oral submissions at proof that the defender is willing to consider rescheduling an event for the pursuer but on different commercial terms. It is clear that the event, if any, which the defender is prepared to countenance would be very different to that which it had originally contracted to hold.

[236]. In court the defender complained that the pursuer had not asked for a rescheduled event but that is manifestly not the case. Throughout these proceedings and during the questioning of the defender's witnesses, the pursuer repeatedly asked whether the defender would host another event. Indeed, a rescheduling is the primary purpose of this litigation. It has been achieved elsewhere. The pursuer has repeatedly sought, within the confines of this litigation, to reschedule the event.

[237]. However, because of the practical and logistical difficulties involved, I am of the opinion that the court could not responsibly order and oversee a rescheduling. I have reached that conclusion even allowing for the potentially severe consequences to a defaulting party were court orders to be ignored. The practicalities in overseeing such an exercise with warring litigants and involving third parties, including the public, are simply too great. I have not reached this decision lightly. I am mindful of the opinion of Lord Drummond Young in *Anwar v Secretary of State for Business, Energy and Industrial Strategy* 2020 SC 95 at paragraph 52, including, that:

“if a legal right exists a remedy must be devised to permit its enforcement; otherwise the right is ineffectual. This extends not merely to the existence of a notional remedy but to ensuring that the remedy produces practical results.”

That case had also involved the Equality Act 2010 (The Lord President Carloway dissenting).

[238]. Here the defender is entrenched. Objectors, including the defender's major shareholder (Mr Duthie: "When your major shareholder expresses concern, you listen") are appeased. Welcome voices are heard. Others silenced. The Equality Act 2010 is frustrated. Other venues have rescheduled. Not here. No reason was given, merely a dismissive attitude displayed (Mr Duthie: "That is a matter for them" – the other venues).

Apology

[239]. From paragraph P10.30 – P10.36 of the pursuer's submissions the pursuer argues that the court should order an apology.

[240]. Section 3 of the Apologies (Scotland) Act 2016 defines an apology:

"An apology means any statement made by or on behalf of a person which indicates that the person is sorry about, or regrets, an act, omission or outcome and includes any part of the statement which contains an undertaking to look at the circumstances giving rise to the act, omission or outcome with a view to preventing a recurrence".

[241]. On reading the Apologies (Scotland) Act 2016 one is left with the impression that its purpose is to encourage an apology so as to avoid litigation. We are beyond that. I observe that I was not referred to a Court of Session case where a defender had been ordered to apologise.

[242]. The Dean's objection to the remedy arose from its lateness as well as noting that there has been no case where such an order has been made. There is no crave for such a remedy and the wording has not been addressed (though I accept that that might depend on the nature of the breach established).

[243]. However the usual principles of fair notice should apply. Here there is no crave for an apology, simply an aspiration within written submissions that the court should make an order for an apology in terms unspecified.

[244]. I refer to the opinion of Judge West dated 20 August 2019 (albeit in relation to a different provision of the Equality Act 2010) which encapsulates considerations relevant to a tribunal/court considering an apology. At paragraph 256 in *Proprietor of Ashdown House School v (1) JKL; (2) MNP [2019] UKUT 259 (AAC)* Judge West opines:

“256. In reaching this conclusion I consider that it is appropriate to set out guidance for future Tribunals in the following sub-paragraphs: *239

(a) the Tribunal does have the power to make an order for an apology (as to the width of the jurisdiction conferred on the Tribunal by paragraph 5 of Schedule 17 of the 2010 [Equality] Act, see above in relation to Ground 1)

(b) an apology may have a wider purpose than merely preventing further discrimination against the child in question. To the extent that an apology is an assurance as to future conduct, an order that there be an apology gives teeth to a declaration of unlawful discrimination

(c) there can be value in an apology: apologies are very important to many people and may provide solace for the emotional or psychological harm caused by unlawful conduct. An apology might reduce the mental distress, hurt and indignity associated with a permanent exclusion. It might also assist with recovery, forgiveness and reconciliation. An order that there be an apology can be regarded as part of the vindication of the claimant

(d) a tribunal should consider whether the apology should more appropriately be made to the child or to his parents. In the case of very young children the latter may be more appropriate for obvious reasons

(e) an order to make an apology may well be appropriate when there is already an acceptance that there has been discrimination or unlawful conduct or where there is an acceptance and an acknowledgment of the tribunal's findings on responsibility

(f) however, the fact that there has been a contested hearing and that the respondent has strenuously disputed that there has been any discrimination or unlawful conduct is not decisive against ordering an apology

(g) nevertheless, particularly where there has been a dispute or a contested hearing, the tribunal should always consider whether it is appropriate to make an order and bear in mind that it may create resentment on one side and an illusion on the other, do nothing for future relations and may make them even worse

(h) before ordering an apology, a tribunal should always satisfy itself that it will be of some true value

(i) a tribunal should always be aware that there may be problems of supervision if it accepts responsibility for overseeing the terms of the apology which can result in drawn out arguments over wording.”

[245]. To conclude on this remedy, leaving aside the issue of fair notice, I do not consider it an appropriate remedy here (over and above the declaration which I will make) for the reservations expressed in paragraphs (e) to (i) above. It would be forced, of little value and insincere.

Damages

[246]. Having first considered other disposals, I now turn to deal with the issue of damages in terms of sections 119(3) , (4) and (6) .

[247]. I am bound by legislation as enacted. There is no reference in the Equality Act 2010 to vindictory damages or to just satisfaction. I refer to section 119(3) and (4) :

“(3) The sheriff has power to make any order which could be made by the Court of Session— (a) in proceedings for reparation; (b) on a petition for judicial review.

(4) An award of damages may include compensation for injured feelings (whether or not it includes compensation on any other basis).”

[248]. This is not an action for reparation. The pursuer is a limited company. It has no feelings to hurt in terms of section 119(4) . The proposed event was a free unticketed event open to the public. It is no part of the pursuer’s case that this was a fundraising event. Self-evidently there can be no loss of profit or loss of revenue stream.

[249]. It is not accepted that the defender is a public authority within the meaning of the Human Rights Act 1998, section 6 . Nor is it accepted that the defender is a hybrid public authority. The defender is a limited company distinct from its principal shareholder. It is not wholly owned by the state. It provides services to the public but not on behalf of the state. The cases cited in support of a claim for vindictory damages by the pursuer involve actions against states: *Kuznetsov v Russia* (2009) 49 EHRR 15 , *Metropolitan Church of Bessarabia v Moldova* (2002) 35 EHRR 13 , *Savez Crkava “Rijec Zivota” v Croatia* (2012) 54 EHRR 36 , *Moscow Branch of the Salvation Army v Russia* (2007) 44 EHRR 46 , *240 *Serif v Greece* (2001) 31 EHRR 20 , *Papageorgiou v Greece* (2020) 70 EHRR 36 , *Varnava v Turkey* (16064/90) and *Ozdep v Turkey* (2001) 31 EHRR 27 .

[250]. This is not a defamation action where awards might be made for financial harm as the pursuer does not trade for profit. Accordingly the pursuer’s submissions in regard to the tarnish to its reputation (which may be true) are in law not relevant. Unlike certain jurisdictions the law of Scotland does not recognise exemplary, punitive or aggravated damages. Although a sheriff has the same powers as a judge in the Court of Session that power does not extend to the creation of a remedy where one does not exist.

[251]. At paragraphs P10.49 to P10.56 of the pursuer’s submissions, the pursuer refers to cases where awards have been made to religious bodies (*Orthodox Church (Metropolitan Inokentiy) and Others: re just satisfaction* (2011) 52 EHRR SE1) in recognition of the loss to their “adherents” and to political organisations which reflect non pecuniary losses to their membership (*Dicle for the Democratic Party (DEP) of Turkey v Turkey* [2002] ECtHR 25141/94 (Fourth Section, 10 December 2002)).

[252]. In my opinion this has no relevance here. The pursuer does not have a membership, a congregation nor “adherents” as such. It is not a church. It is a Christian evangelical organisation reaching out to the public in general – those of faith and of none. It cannot be said that the pursuer is acting on behalf of a membership or a congregation. I accept that it had anticipated that members of the public might attend and that they have been denied that choice, but I cannot agree that that gives the pursuer a right to claim damages (however expressed) on behalf of an unknown number of unnamed persons who might have chosen to attend, still less that any sum awarded might benefit them.

[253]. Having regard to the terms of section 119(3) and (4) and having regard to the underlying purpose of the legislation as well as the European jurisprudence referred to by the pursuer, I am of the opinion that the word “damages” within section 119 does not extend beyond pecuniary loss to a recognition that the pursuer has suffered detriment by reason of not being able to hold (and having no real prospect of rescheduling) the event.

[254]. However, if this case is taken further and I am wrong in relation to vindictory damages and/or just satisfaction and/or detriment, it might be helpful if I gave some indication of my view on quantification having heard the evidence at first instance. What I have to say has perhaps more relevance to vindictory awards than to just satisfaction.

[255]. The range of awards quoted by the pursuer are case specific, depend on the gravity of the issue before the court and on the particular view of the court.

[256]. The defender terminated the contract in breach of a protected characteristic under the Equality Act 2010 and (it seems) has no real intention of rescheduling the event. Other events of the UK tour planned for 2020 have been rescheduled. The defender has provided no reason why this event could not be rescheduled other than proposing that fresh commercial terms would have to be negotiated. That sounded like a euphemism for “it will never happen”.

[257]. Had it been competent to do so, I would have assessed an appropriate award at £50,000. This is not a fine. It is not payable to the state. It would represent damages over and above quantifiable pecuniary losses to reflect the loss (in its widest sense) of the opportunity to host a

large evangelical event and the defender's ongoing refusal to reschedule. I would have assessed this award in the following broad manner.

[258]. The defender is a substantial institution having an international profile. In law it is a separate legal entity from its majority shareholder, Glasgow City Council, but which (as its largest shareholder) evidently holds considerable sway over its decisions. The defender bowed to that and to other pressures. Secondly, the venue was assessed as being the most appropriate venue for the pursuer's purposes in Scotland. I accept that it would not be easy to find an alternative. Thirdly, this was not a fringe event. In evidence witnesses for the defender described the event as "small". That may be true in purely commercial terms but I would view the event from the perspective of the hirer not the host.

[259]. The pursuer is a UK based organisation but it too has an international profile. The pursuer had sought a venue with the capacity of over 12,000 **241* people. Pro rata therefore the sum which I suggest appears conservative. That said, I have not included an allowance for the fact that twelve thousand people were denied their choice/opportunity to attend. Fourthly, the cost to hire the venue was £50,000 being the sum by which the defender would have been enriched had the event proceeded (here I have not allowed for the pursuer having re-let the hall on the one hand nor the intervention of covid on the other). Taking these factors in the round so to speak, the figure of £50,000 would seem an appropriate award of damages to reflect the initial and ongoing breach. Had I been persuaded that it was competent, that is the award I would have made.

[260]. I now deal with actual losses incurred by the defender.

[261]. The defender maintained in oral submission that no damages should be awarded. This is because the event would not have taken place as a consequence of the covid outbreak. I see nothing in this point.

[262]. It is of course correct that the event would not have taken place because of covid. However, the decision to cancel the event preceded covid. The "wrong" from which damages arise was caused by the defender's discrimination in cancelling the event (not covid) and, although it is true that the event would not have taken place, in my opinion the defender cannot avoid the consequences of its unlawful act. To do so would shift liability for the costs incurred by cancelling the event back to the pursuer. As at 29 January 2020 parties were not aware that covid might intervene. Covid is a factor when assessing an end date for such liability. However I

take no account of the intervention by covid when assessing liability. That is because of the clear purpose of the 2010 Act – to discourage discrimination - notwithstanding that contractually the pursuer did not accept the termination letter dated 29 January 2020. The issues and the remedies are distinct.

[263]. Before dealing with the quantification of loss I wish to address three issues. Firstly, the Dean questioned those items paid directly by the American parent organisation rather than by the pursuer. As I understood his argument, his position was that those payments should form no part of this claim. Those were losses incurred by an organisation which is not party to this action. I see the force in that submission as I think did Mr O'Neill who appeared to concede the point in his re-examination of Mr Herbert. I will therefore not allow the sum of £9,034.00 in respect of the "Artist" fee nor the sums of £2,700 and £810 representing the cost of hotel accommodation and the deposit. The situation may have been different had these sums been paid by the pursuer and subsequently reimbursed by the American Association.

[264]. Secondly, items were included in the total losses claimed for which there was no basis (a voluntary donation, a table purchased in October 2020, cost for a dismissal meeting). I was surprised that such items featured at all.

[265]. Thirdly, the Dean suggested that if I found the defender liable for losses, such losses should end on 29 January when the agreement was terminated. I do not agree. The pursuer did not accept the termination and instead it raised these proceedings in the hope that the event might proceed. Covid intervened. A second letter (27 March 2020) was sent to the pursuer founding on the force majeure clause. In my opinion by the end of June 2020 at the latest it should have been apparent to the pursuer that the event would not proceed or be rescheduled because (a) the contract had been cancelled by the defender in January, failing which March 2020, (b) the date for the event (30 May 2020) had passed, (c) this litigation was being defended and (d) irrespective of the outcome of this litigation, the event was unlikely to be rescheduled in the then foreseeable future because of covid. The pursuer has claimed for losses far beyond June 2020, into 2021. In Scotland damages are compensatory not penal.

[266]. As to the quantification of damages Simon Herbert, the third witness for the pursuer, spoke to the documentation in support of the claim for pecuniary loss.

[267]. Taking the items in turn, a deposit of £6,000 was paid but the defender has sought to return and the pursuer has refused to accept. I have included this in the assessment of the losses for the sake of completeness but I record that the defender has offered to return this sum.

[268]. The next item related to a prayer meeting/launch event which went ahead in November 2019. It was suggested to Mr Herbert that that money would have been lost in any case *242 as the event could not have taken place because of covid. Mr Herbert accepted that covid had intervened but that was after the contract had been cancelled. I agree. The cost was £6,650.

[269]. In relation to office rent, this is claimed at £8,000. Mr Herbert explained that although the entry referred to “Office Rent” these were funds (\$15,757.01USD) not paid by the pursuer but transferred by the American Association to Amaris Hospitality in the UK (£11,972.50). I have addressed this above. Moreover Mr Herbert said that he would have to reconcile this sum as he agreed with the proposition that “Amaris Hospitality” did not appear to be an organisation which rented out office space (and the supporting documentation, which referred to hotel suites in May 2020, did not equate to the figure claimed). Again, I have excluded these sums.

[270]. By contract dated 16 August 2019 the pursuer had agreed to rent two car park spaces in Glasgow at the cost of £85 per month. The sum claimed by the defender amounted to £3,460 being some forty months. The Dean questioned whether there were other vouchers available to support the total of £3,460 under this heading. I will allow from 1 September 2019 to 1 June 2020 – 10 months @ £85 per month being £850.

[271]. In relation to “Production – Prayer/Launch/CLWC” this amounted to £3,001 being a rounded up figure of £3,000.70 in respect of which an invoice dated 8 October 2019 had been produced from FE LIVE which related to audio visual and sound systems for the prayer launch. I will also allow the cost of that event being £6,650 and catering £1,448.

[272]. In relation to the “Staff Apartment Rent” this figure showed as £11,000. It was put to Mr Herbert that the lease had commenced in January 2020 but that the contract for the venue was cancelled at the end of January 2020 yet the claim is for ten months’ rent at £1,100 per month. Mr Herbert’s position was that the property was retained until it became absolutely clear that the

event would not go ahead or be rescheduled. I will allow the rent for six months from January 2020 – June 2020 @ £1,100 per month being £6,600.

[273]. The pursuer claimed the cost of catering for an event on 5 December 2019. The Dean suggested as that event had gone ahead and the catering had been consumed. Therefore there had been no loss. The cost catering amounted to £1,448. Again, I will allow this. It was a legitimate sunk cost incurred in good faith in advance of the May event. It is obtuse to say that such costs were not wasted. The pursuer would not have incurred such expense had it anticipated that the event might not go ahead.

[274]. The Dean took Mr Herbert through a number of documents in relation to an organisation entitled “Samaritan’s Purse” and the relationship between that organisation and the pursuer. Mr Herbert explained that both charities worked closely with each other. They were not in partnership as such but had the same management team. Expenses were divided between organisations and, in this case, further divided in relation to the costs allocated to a particular event. In his affidavit Mr Herbert had explained that he was the Financial Director and Company Secretary of both the pursuer and its sister organisation Samaritan’s Purse International.

[275]. In particular, in relation to the item entitled “local staff salaries/benefits” (£126,330), the pursuer had received invoices from Samaritan’s Purse in relation to a breakdown between the organisations of shared management costs. As was observed by the Dean some of the invoices had included VAT whereas others do not. Mr Herbert was at a loss to explain why that should be. The invoices for staff salaries covered the period from July 2019 to January 2021. Again I will allow this item to June 2020.

[276]. Production 5/6(X) is an extract of the salaries from the pursuer’s journals broken down per venue per month. On this basis the sum of £59,054.58 is due representing wages and national insurance contributions to the end of June 2020. In addition, the raw data at production 5/4 details the pension contributions which amount to £4,068.92 to June 2020. There are contra-entries in the figures which makes the precise figure difficult to reconcile but I am satisfied that at least this sum is due. This therefore totals: £63,123.50. Where figures are unclear I have erred in favour of the defender. It is for the pursuer to satisfy me of the extent of its losses.

[277]. Taking the figures from the productions mentioned in the preceding paragraph avoids the criticism aimed at certain invoices from Samaritan’s *243 Purse which had referred to

salary “charges”, some of which had included VAT (for reasons which were not explained) and where the breakdown between salaries, NI contributions and pensions allocated to Glasgow was opaque.

[278]. The Dean criticised the inclusion of an invoice dated 15 October 2019 from “DoubleTree by Hilton” amounting to £9,400 for the rent of a ballroom and the supply of an evening buffet for 400 people. This event had gone ahead as had an event at the St George’s Tron Church for £253.12. These costs were legitimately incurred in preparation for and in the expectation that the event would proceed. They were wasted costs as a result of the cancellation. In context the word “damages” extends to such wasted costs. I will allow both.

[279]. In relation to the cost of mobile phone and broadband the Dean suggested to Mr Herbert that these costs would apply for the whole tour not simply for the Glasgow event and that, for example, the invoices run to the end of 2020 (the last one was due in January 2021) relating to an event scheduled for May 2020 being almost one year after the event was cancelled. A similar point being made in relation to the cost of broadband cancelled in February 2021. Mr Herbert said that the pursuer had still been anticipating an event in Glasgow. Again I would have allowed to June 2020 but I find that, from the available evidence, it is not possible for me to determine/reconcile costings to June 2020 or the correct figures in relation to telephone/fax, broadband and supplies/refreshments/other event costs and miscellaneous costs. I am unimpressed that invoices are claimed for such an extended period.

[280]. Take, for example, an entry which details the cost of a desk and chair. The entry is dated 21 October 2020, long after the event had been cancelled.

[281]. By invoice dated 30 September 2019 the pursuer included an entry for £73.20 relating to an unfair dismissal meeting held in Glasgow. Mr Herbert again conceded that that was not part of the losses incurred. I will not allow that.

[282]. A voucher dated 4 March 2020 had been produced in relation to the production of the St John’s Gospel in Polish, Romanian, Czech and Slovak languages. The cost amounted to £30. The Dean questioned whether this cost was truly “wasted” as the bibles would be available for distribution elsewhere. Mr Herbert conceded that point. I will not allow the £30.

[283]. Similarly in relation to a donation to a church charity on 14 November 2019 of £400, the Dean put it to Mr Herbert that a voluntary donation to charity was not a legitimate loss. Mr Herbert's position was that the payment was in the nature of an honorarium or a gift. Mr Herbert conceded that it was not something the pursuer was obliged to pay. I agree. I will not allow that.

[284]. The damages (expense and wasted cost) total £97,325.32 as a consequence of the cancellation. As indicated, I have determined this sum on the material referred to during the proof while excluding costs where the information before the court does not permit proper reconciliation and those costs which Mr Herbert accepted were paid by a third party or were not attributable to the defender's alleged wrongful termination of the agreement and I have restricted the defender's liability to the end of June 2020.

Closing observations

[285]. The structure of the Equality Act 2010 and, in particular, section 119 in relation to remedies is such as to encourage compliance by considering damages only after other remedies have been considered. If my analysis of the law and of the remedies is correct, to an errant defender intent on flouting the terms of the Equality Act 2010 there is, in Scotland, little disincentive where a defender is prepared to accept a reputational hit and reimburse a corporate pursuer for losses sustained. Indeed, a defender might think that there is a business case to do just that. The expense of reimbursement to one customer may be outweighed by the prospect of future trade with others. That may be the unintended consequence of this decision where, as here, a pursuer is a charity. Here the remedy does not fit the wrong especially where, as I have concluded, an order for rescheduling is unworkable. Courts in other jurisdictions may have greater latitude in encouraging compliance.

[286]. Before closing, I will allude to the following as there was reference to this during the proof: whether, by encouraging the defender to cancel the event, Glasgow City Council was in breach of Section 149 of the Equality Act 2010 (relating to obligations on public authorities) is a **244* question beyond the scope of this decision. That said, it might be helpful if, in light of this decision, the majority shareholder exercised its influence to support a rescheduling. Beyond that, I express no opinion.

Disposal

[287]. For the reasons outlined above I will find in favour of the pursuer as I must in light of the evidence. I will make the declaration craved but include the relevant dates and, having considered other remedies, I shall award damages to the extent of £97,325.32.

[288]. I have assigned a hearing on expenses to take place on 18 January 2023 at 10am. If it assists parties I shall arrange for that hearing to take place by telephone or Webex. If parties can agree expenses the commercial clerk should be advised and I will discharge the hearing administratively.

Representation

Counsel for Pursuer, A O'Neill, KC, D Welsh ; Solicitors, Balfour & Manson LLP
Counsel for Defender, Dean of Faculty (R Dunlop, KC), J McGregor, KC, V Arnott ; Solicitors, CMS LLP.

[Parties' written submissions as appended to the original judgment can be found at https://www.scotcourts.gov.uk/docs/default-source/cos-general-docs/pdf-docs-for-opinions/2022scglw33.pdf?sfvrsn=1f0f942a_1] *245

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

FIRST SECTION

CASE OF WIESER v. AUSTRIA

(Application no. 2293/03)

JUDGMENT

STRASBOURG

22 February 2007

FINAL

22/05/2007

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Wieser v. Austria,

The European Court of Human Rights (First Section), sitting as a Chamber composed of:

Mr C.L. ROZAKIS, *President*,

Mr L. LOUCAIDES,

Mr A. KOVLER,

Mrs E. STEINER,

Mr K. HAJIYEV,

Mr D. SPIELMANN,

Mr S.E. JEBENS, *judges*,

and Mr S. NIELSEN, *Section Registrar*,

Having deliberated in private on 1 February 2007,

Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in an application (no. 2293/03) against the Republic of Austria lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by an Austrian national, Mr Ewald Wieser (“the applicant”), on 14 July 2001.

2. The applicant was represented by Mrs Julia Hagen and Mr Martin Künz, lawyers practising in Dornbirn. The Austrian Government (“the Government”) were represented by their Agent, Mr F. Trauttmansdorff, Head of the International Law Department at the Federal Ministry for Foreign Affairs.

3. The applicant alleged that he had been subjected to treatment contrary to Article 3 of the Convention.

4. By a decision of 11 April 2006 the Court declared the application admissible.

5. Neither the applicant nor the Government each filed further written observations (Rule 59 § 1)

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

6. The applicant was born in 1958 and lives in Dornbirn.

7. Upon criminal information laid by the applicant's wife, the Feldkirch Regional Court, on 9 February 1998, issued an arrest warrant against the

applicant and a search warrant of his house. The applicant was suspected of having bodily assaulted and raped his wife, of having threatened her with a firearm, of having sexually assaulted his minor stepdaughter and of being in possession of child pornographic videos. The arrest warrant pointed out that there were reasons to assume that the applicant would react with “massive resistance” upon his arrest and would “try to escape prosecution”.

8. On 9 February 1998 at around 23.45 hours six police officers of the special task force (*Sondereinsatzgruppe*) of the Altsch gendarmerie entered the applicant's house. The officers were equipped with bullet-proof vests and shields. Further, they wore masks.

9. The applicant submits that before the police entered his house, he had observed two suspicious persons, namely two of the officers, lingering around his parking. He had, therefore, armed himself with a kitchen knife. However, when the police entered his house he immediately dropped the knife and held his hands up.

10. The police officers forced the applicant to the ground and handcuffed him.

11. The applicant submits that he had recognised the police officers on their emblems and had declared at once that he would not do anything and collaborate with the police. An officer allegedly replied to him that he would better do so otherwise he would be “picked off”.

12. The applicant was subsequently laid on a table where he was stripped naked, searched for arms and dressed again. According to the applicant he was blindfolded during this time. Upon the shock of his arrest the applicant had urinated in his clothes. The police officers, despite the applicant's repeated requests, refused to let him change his clothes.

13. The applicant submits that he was then again forced to the ground where he remained for about 15 minutes while some of the police officers searched his house. According to the applicant he was lying face down while a police officer pressed his knee on the back of his neck. This police officer allegedly told the applicant: “Don't move, otherwise you are dead.” He further submits that it was only when he was lifted up that, without giving any further reasons, he was told that he was arrested.

14. The applicant was subsequently taken to the Altsch police station where he was questioned until about 3.40 a.m. when he was released and taken back to his house.

15. During all of the time of his arrest and detention the applicant remained handcuffed. Upon his request, however, the handcuffs were covered with a garment when leaving the house and were later attached in his front instead behind his back.

16. On 10 February 1998 the applicant was again heard by the gendarmerie. On 11 February 1998 he prepared a note for the file in which he described the events at issue. He made, however, no reference to the fact that he had been blindfolded while stripped.

17. The criminal proceedings against the applicant were discontinued on 25 June 1998.

18. Meanwhile, on 3 March 1998, the applicant complained to the Vorarlberg Independent Administrative Panel (*Unabhängiger Verwaltungssenat*) that the treatment he had suffered during his arrest and at the police station amounted to inhuman and degrading treatment contrary to Article 3 of the Convention. He referred to his stripping by the police officers, the forcing to the ground while an officer pressed his knee against the back of his neck, the threats by the officers and the refusal to let him change his wet clothes. He finally complained that his handcuffing had not been necessary as he had been cooperative and had not shown any sign of resistance during all of the time.

19. The Independent Administrative Panel held two hearings on 8 and 28 July 1998. It questioned the applicant, the director of the Vorarlberg Public Security Authority (*Sicherheitsdirektor*), the police officer who had headed the mission, another police officer who had assisted the applicant's arrest and the police officer who had questioned the applicant at the Altschach police station. The police officers submitted that the applicant's wife had informed them that the applicant was violent, regularly consumed alcohol, was in possession of a fire-arm and had attended training for hand-to-hand combat for several years. He had allegedly received his wife several times with a weapon in his hand when she was entering the house. The applicant's wife had warned the police that the applicant "was up to do anything".

20. The two officers who had participated in the applicant's arrest confirmed that the applicant had been strip-searched. One officer explained that this had been done for their and the applicant's safety and in order to find the weapon. The applicant had been informed about the arrest and search warrant before being undressed. After the strip search the applicant had been seated on a sofa. The other officer stated that after the strip search the applicant had been laid and held on the floor. He denied, however, that somebody had approached the applicant's neck with his knee. Both officers confirmed that the applicant had not shown any sign of resistance and denied that the applicant had been threatened to "be picked off". The officer who had heard the applicant at the police station submitted that he had not lessened the applicant's handcuffs because during some of the time he had been alone with the applicant at the police station.

21. On 6 November 1998 the Independent Administrative Panel rejected the applicant's complaints. It found that the police officers had acted on the basis of an arrest warrant and had not exceeded the instructions of the investigating judge. The handcuffing of the applicant had been a necessary accompanying measure to the applicant's arrest because of the applicant's assumed resistance and escape. Against this background also the stripping of the applicant could not be regarded as excessive, especially as the applicant was suspected to be in the possession of weapons. The applicant's

further complaints about the threatening, the holding down by pressing a knee against the back of his neck and the refusal to let him change his wet clothes were, even assuming that the applicant's allegations were true, of no relevance for the proceedings at issue as they concerned merely the way of proceeding during an authorised arrest and were attributable to the court. A review of lawfulness did not fall within the Independent Administrative Panel's competence.

22. On 22 February 1999 the Constitutional Court declined to deal with the applicant's complaint.

23. The applicant filed a complaint with the Administrative Court in which he repeated his submissions made before the Independent Administrative Panel. He further complained about the fact that the intervening officers had been masked.

24. On 21 December 2000 the Administrative Court partly granted the applicant's complaint. It quashed the Independent Administrative Panel's decision insofar as the refusal of the police officers to let the applicant change his clothes was concerned and remitted the case back to the Panel for further examination.

25. The Administrative Court dismissed the remainder of the applicant's complaint. It noted that the police officers had been confronted with a person suspected of severe crimes who was allegedly in possession of a firearm and was trained in hand-to-hand combat and who, furthermore, was holding a knife when meeting them. The handcuffing and complete stripping of the applicant and the alleged fixation and threatening by the police officers did not, therefore, exceed the instructions of the investigating judge. The court did not consider the applicant's detention for some four hours and his handcuffing during this period of time as excessive either. It noted in the latter regard that, despite the applicant's calm and cooperative behaviour, there was reason to believe that the applicant once liberated from his handcuffs would try to escape or use force. The Administrative Court finally noted that the applicant had not raised the complaint that the officers had been masked before the Independent Administrative Panel. This complaint was, however, inadmissible in any way as it did not concern an act of direct administrative authority and coercion (*Ausübung unmittelbarer verwaltungsbehördlicher Befehls- und Zwangsgewalt*).

26. On 3 May 2001 the Vorarlberg Independent Administrative Panel found that the police officers' refusal to let the applicant change his wet clothes had not been covered by the instructions of the investigating judge who had ordered the applicant's arrest and constituted inhuman or degrading treatment in breach of Article 3 of the Convention. The applicant subsequently received compensation in the amount of approximately 2,400 euros.

II. RELEVANT DOMESTIC LAW AND PRACTICE

27. Sections 139 to 149 of the Code of Criminal Procedure (*Strafprozeßordnung*) concern the search of premises and persons and the seizure of objects.

28. Section 139 § 2 stipulates that a search of a person and his clothes is *inter alia* admissible when this person is suspected of a crime.

29. According to section 140 §§ 1 and 2, a search should in general only be carried out after the person concerned has been heard, and only if the person or objects searched are not voluntarily rendered and if the reasons leading to the search have not been eliminated. It is not required to hear persons of bad reputation, or to have such a hearing where there is danger in delay.

30. Section 140 § 3 states, as a rule, that a search may only be carried out on the basis of a reasoned search warrant issued by a judge.

31. Section 142 § 1 stipulates that when searches of premises and persons are carried out any disturbance and harassment of the person concerned which is not strictly necessary has to be avoided. Searches have to be carried out in respect of the rules of decency.

By virtue of section 67a § 1 of the General Administrative Procedure Act (*Allgemeines Verwaltungs-verfahrensgesetz*), Independent Administrative Panels have jurisdiction, *inter alia*, to examine complaints from persons alleging a violation of their rights resulting from act of direct administrative compulsion (*Ausübung unmittelbarer verwaltungsbehördlicher Befehls- und Zwangsgewalt*). According to relevant jurisprudence and doctrine acts of administrative organs which are based on a court order are not attributable to the administrative authorities, but to the courts. Such an act is, however, attributable to the administrative authorities when the judicial order has been manifestly exceeded.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION

32. The applicant complained that his arrest had been carried out by six police officers who entered his house with firearms pulled out. The police officers had been masked so that the individual police officer could not be identified as author of a particular action. Furthermore, a police officer had threatened him to “pick him off”. He had been laid on a table and stripped, and then forced to the ground where he remained for some 15 minutes while one of the officers pressed his knee on the back of his neck and some other

officers searched his house. Finally, he had remained handcuffed during all the time of his arrest and subsequent detention despite his calm and cooperative attitude. He submitted that this treatment amounted to inhuman and degrading treatment contrary to Article 3 of the Convention which reads as follows:

“No one shall be subjected to torture or to inhuman or degrading treatment or punishment.”

A. The parties' submissions

33. The Government endorsed the domestic authorities' findings that in the light of the specific circumstances of the case the impugned measures were proportionate. They stressed that *ex ante* there was reason to assume that the applicant was a very dangerous person who was furthermore experienced in hand-to-hand combat. Moreover, the applicant had confronted the intervening police officers while holding a knife. The statement of a participating officer before the Independent Administrative Panel indicated that the applicant had been informed about the reasons of the police intervention at its very beginning. As regards the alleged blindfolding during the strip search, the Government pointed out that the applicant had alluded to his blindfolding for the first time in his complaint with the Independent Administrative Panel but had not mentioned it as a reason for his complaint. Therefore neither the Independent Administrative Panel nor the Administrative Court had to dwell on this issue. In any event, the strip search had lasted only for some minutes so that an eventual blindfolding happened during a very short time. Nor could it be established that a police officer had actually pressed his knee against the applicant's neck while he was lying on the ground. Furthermore, the applicant had admitted that he could – albeit with difficulty – watch the police officers during the search of his house which indicates that no pressure had been placed on his neck. In the view of the background of the intervention and its relatively short duration it could be assumed that the police officers proceeded with utmost care until they could be sure that the applicant would not attempt an act of violence or try to escape. They made efforts not to tear the applicant's clothes during the strip search, did not cause any disorder in the applicant's flat and brought him back home after his release. As regards the applicant's complaint about the handcuffing, the Government pointed out that the handcuffs were covered when he was taken to the police car. In the light of the massive reproaches against the applicant, his interrogation lasting three hours did not appear excessive either. The Government concluded that the intervention did not reach the minimum threshold of Article 3 of the Convention.

34. The applicant contested the Government's submissions. He argued that the fact that he was blindfolded while being strip-searched was part of his complaint before the Independent Administrative Panel which, in any event, had to establish the relevant facts *ex officio*. The applicant further contested that the police intervention could be regarded as proportionate. He pointed out that he had remained calm and cooperative since the very beginning of the police intervention and had not offered any resistance. Even if the intervening officers had to assume in the beginning that they had to face a dangerous and violent person, they could convince themselves swiftly of the contrary as he was overwhelmed without any difficulties. In the view of his calm behaviour, the quantitative superiority of the police officers and the fact that he was obviously unarmed his being handcuffed during four hours was excessive. This was even more humiliating for him as during all this time he had to remain in his stained clothes. Furthermore, it is not discernable why it was necessary to undress him completely: in order to search for firearms simple patting would have been sufficient. Stripping by six police officers after being laid on a table was clearly humiliating. The applicant finally complains about the fact that the Austrian authorities did not even deal with his allegations that he had been threatened to be “picked off”.

B. The Court's assessment

35. The Court reiterates that ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3 of the Convention. The assessment of the minimum level of severity is relative; it depends on all the circumstances of the case, such as the duration of the treatment, its physical and mental effects and, in some cases, the sex, age and health of the victim (see as a recent authority *Wainwright v. the United Kingdom*, no. 12350/04, § 41, 26 September 2006, with further references).

36. Treatment has been held by the Court to be “inhuman” because, *inter alia*, it was premeditated, was applied for hours at a stretch and caused either actual bodily injury or intense physical and mental suffering (see *Labita v. Italy* [GC], no. 26772/95, § 120, ECHR 2000-IV). Treatment has been considered “degrading” when it was such as to arouse in its victims feelings of fear, anguish and inferiority capable of humiliating and debasing them and possibly breaking their physical or moral resistance (see *Hurtado v. Switzerland*, Commission's report of 8 July 1993, Series A no. 280, p. 14, § 67), or when it was such as to drive the victim to act against his will or conscience (see, for example, *Denmark, Norway, Sweden and the Netherlands v. Greece* (“the Greek case”), nos. 3321/67 *et al.*, Commission's report of 5 November 1969, Yearbook 12, p. 186; *Keenan v. the United Kingdom*, no. 27229/95, § 110, ECHR 2001-III). Furthermore, in considering whether treatment is “degrading” within the meaning of

Article 3, one of the factors which the Court will take into account is the question whether its object was to humiliate and debase the person concerned, although the absence of any such purpose cannot conclusively rule out a finding of violation of Article 3 (see *Raninen v. Finland*, judgment of 16 December 1997, *Reports of Judgments and Decisions* 1997-VIII, pp. 2821-22, § 55; *Peers v. Greece*, no. 28524/95, §§ 68 and 74, ECHR 2001-III; *Price*, cited above, § 24). In order for a punishment or treatment associated with it to be “inhuman” or “degrading”, the suffering or humiliation involved must in any event go beyond that inevitable element of suffering or humiliation connected with a given form of legitimate treatment or punishment (see *Labita*, cited above, § 120).

37. Turning to the particular circumstances of the present case, the Court observes that the police, as a result of the suspicion against the applicant and further information given by his wife, had reason to believe that they were preparing the arrest of a person who was violent, dangerous, and, furthermore, in possession of a firearm and trained in hand-to-hand combat. In this context, the Court finds that the intervention of six specially equipped, masked, police officers does not in itself raise an issue under Article 3 of the Convention. Furthermore, the Court does not find that in the light of these circumstances the applicant's handcuffing during all the time of his arrest – some four hours – which did not entail public exposure and had not caused any physical injuries or long-term effects on the applicant's mental state attained the threshold of Article 3 (see *mutatis mutandis Raninen v. Finland*, cited above, §§ 56-59).

38. The Court notes that the applicant further submitted that in the course of the intervention he was threatened to be “picked off” and forced to the ground where he remained lying face down while a police officer pressed his knee on the back during some 15 minutes. However, these facts were disputed by the police officers in the domestic proceedings and neither the domestic courts nor the Government made any conclusive statement on that issue. There being no further information before the Court, the question of whether the applicant had in fact been subjected to the described treatment remains a matter for speculation and assumption. Accordingly, the Court cannot establish, beyond reasonable doubt, that the impugned treatment allegedly contrary to Article 3 of the Convention had actually taken place (see *mutatis mutandis Ireland v. the United Kingdom*, judgment of 18 January 1978, Series A no. 25, pp. 64-65, § 161). Furthermore, the Court finds that the domestic authorities by questioning the police officers in the domestic proceedings carried out sufficient investigation in this matter and, therefore, no issue arises under the procedural aspect of Article 3 either (see *mutatis mutandis Boicenco v. Moldova*, no. 41088/05, §§ 120-27, 11 July 2006).

39. The applicant next complained about the fact that he was strip searched. The Court notes that it has already had occasion to apply the principles of Article 3 of the Convention set out above in the context of strip and intimate body searches. A search carried out in an appropriate manner with due respect for human dignity and for a legitimate purpose (see *mutatis mutandis*, *Yankov v. Bulgaria*, no. 39084/97, §§166-67, ECHR 2003-XII where there was no valid reason established for the shaving of the applicant prisoner's head) may be compatible with Article 3. However, where the manner in which a search is carried out has debasing elements which significantly aggravate the inevitable humiliation of the procedure, Article 3 has been engaged: for example, where a prisoner was obliged to strip in the presence of a female officer, his sexual organs and food touched with bare hands (*Valašinas v. Lithuania*, no. 44558/98, § 117, ECHR 2001-VIII) and where a search was conducted before four guards who derided and verbally abused the prisoner (*Iwańczuk v. Poland*, no. 25196/94, § 59, 15 November 2001). Similarly, where the search has no established connection with the preservation of prison security and prevention of crime or disorder, issues may arise (see, for example, *Iwańczuk*, cited above, §§ 58-59 where the search of the applicant, a remand prisoner detained on charges of non-violent crimes, was conducted on him when he wished to exercise his right to vote; *Van der Ven v. the Netherlands*, no. 50901/99, §§ 61-62, ECHR 2003-II, where the strip-searching was systematic and long term without convincing security needs). Finally, in a case concerning the strip search of visitors to a prisoner which had a legitimate aim but had been carried out in breach of the relevant regulations, the Court found that this treatment did not reach the minimum level of severity prohibited by Article 3 but was in breach of the requirements under Article 8 § 2 of the Convention (see *Wainwright v. the United Kingdom*, no. 12350/04, 20 September 2006).

40. In the present case, the Court notes first that the applicant in the present case was not simply ordered to undress, but was undressed by the police officers while being in a particular helpless situation. Even disregarding the applicant's further allegation that he was blindfolded during this time which was not established by the domestic courts, the Court finds that this procedure amounted to such an invasive and potentially debasing measure that it should not have been applied without a compelling reason. However, no such argument has been adduced to show that the strip search was necessary and justified for security reasons. The Court notes in this regard that the applicant, who was already handcuffed was searched for arms and not for drugs or other small objects which might not be discerned by a simple body search and without undressing the applicant completely.

41. Having regard to the foregoing, the Court considers that in the particular circumstances of the present case the strip search of the applicant during the police intervention at his home constituted an unjustified

treatment of sufficient severity to be characterised as “degrading” within the meaning of Article 3 of the Convention.

42. It follows that there has been a violation of Article 3 of the Convention.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

43. Article 41 of the Convention provides:

“If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party.”

A. Damage

44. The applicant claimed 3,600 euros (EUR) under the head of non-pecuniary damage.

45. The Government argued that when assessing the amount of compensation the Court should have regard to the facts that strip searches may be necessary to prevent crime and that the police officers' refusal to let the applicant change his wet clothes had already been taken into account by the Administrative Court.

46. The Court considers that the applicant must have suffered feelings of distress which cannot be compensated solely by the finding of a violation. Having regard to the awards made in other strip search cases, the Court awards 3,000 EUR, including any tax chargeable, to the applicant.

B. Costs and expenses

47. The applicant claimed reimbursement of the costs of the domestic proceedings in the amount of 96,698 Austrian Schillings (ATS, i.e. 7,027.38 EUR) and of the costs of the Convention proceedings in the amount of 2,985.26 EUR. Both amounts include value-added tax (VAT).

48. The Government argued that the amount claimed for the Convention proceedings was excessive according to the Austrian Autonomous Remuneration Guidelines for Lawyers. They did not comment on the costs of the domestic proceedings.

49. As to the costs of the domestic proceedings, the Court finds that they were actually and necessarily incurred and reasonable as to the quantum. It, therefore, awards the full amount claimed namely 7,027.38 EUR. This amount includes VAT. The costs of the Convention proceedings were also necessarily incurred. Having regard to the sums awarded in comparable cases, the Court finds that they are also reasonable as to the quantum. It

therefore awards the full amount claimed, namely 2,985.26 EUR inclusive VAT.

50. Consequently a total amount of 10,012.64 EUR, inclusive of VAT, is awarded under the head of costs and expenses.

C. Default interest

51. The Court considers it appropriate that the default interest should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT

1. *Holds* by four votes to three that there has been a violation of Article 3 of the Convention in respect of the applicant's strip search;
2. *Holds* by four votes to three
 - (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts:
 - (i) EUR 3,000 (three thousand euros) in respect of non-pecuniary damage;
 - (ii) EUR 10,012.64 (ten thousand and twelve euros sixty-four cents) in respect of costs and expenses;
 - (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount[s] at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;
3. *Dismisses* unanimously the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 22 February 2007, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Søren NIELSEN
Registrar

Christos ROZAKIS
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the following dissenting opinions are annexed to this judgment:

- (a) dissenting opinion of Mr Loucaides;
- (b) dissenting opinion of Mr Jebens joined by Mr Hajiyeu.

C.L.R.
S.N.

DISSENTING OPINION OF JUDGE LOUCAIDES

I disagree with the majority as regards their finding that Article 3 of the Convention was violated in the present case.

The majority concluded that the applicant's strip search constituted unjustified treatment of sufficient severity to be characterised as “degrading” within the meaning of Article 3 of the Convention. The majority found that this search amounted “to such an invasive and potentially debasing measure that it should not have been applied without a compelling reason.” They went on to state that no argument was adduced to show that the strip search was necessary and justified for security reasons. In this regard they noted that “the applicant was searched for arms and not for drugs or other small objects which might not be discerned by a simple body search and without undressing the applicant completely”.

In my opinion the strip search in the circumstances of the present case did not amount to a degrading or debasing measure, taking into account the context in which it was carried out and especially in light of the following:

a) The criminal information against the applicant showed that he was a violent person who had used a firearm in threatening his wife. There was also evidence that he regularly consumed alcohol and had attended training for hand-to-hand combat for several years and that he “was up to do anything”. The competent court issued an arrest warrant against the applicant and a search warrant of his house. In these circumstances the police were justified in handcuffing the applicant upon their entry into his house. Only male policemen were present in carrying out the strip search of the applicant and none of them behaved in any improper way.

b) The aim of the strip search was not to humiliate or debase the applicant but to carry out a thorough search for security reasons. The majority assessed the situation and found that “the strip search was [not] necessary and justified for security reasons”. I do not think that the Court can substitute its own judgment for that of the police in a situation like the present one, in order to judge whether a particular manner of search was or was not an appropriate way of implementing a search warrant. The police are entitled to exercise their own discretion and apply their own judgement as to the best way of carrying out such search, guided by their knowledge and experience and in the light of the particular circumstances before them. The Court should only interfere in cases where the police have acted illegally or arbitrarily. To accept the contrary would, in my opinion, amount to an unnecessary obstruction to the performance of the duties and responsibilities of the police in protecting the rights of others. I do not think that there is any element of illegality or arbitrariness in this case. The police

were entitled to handcuff the applicant and carry out a thorough search. After handcuffing he could not undress himself. The strip search was not carried out for any motive or purpose other than security reasons on the basis of the available information concerning the applicant and, in particular, his criminal behaviour.

On the basis of the above, I cannot agree with the majority that the applicant was subjected to any inhuman or degrading treatment contrary to Article 3 of the Convention.

**DISSENTING OPINION OF JUDGE JEBENS
JOINED BY JUDGE HAJIYEV**

I disagree with the majority in their finding of a violation of Article 3 in the present case. In my view, the police officers' treatment of the applicant did at no point amount to torture or inhuman or degrading treatment or punishment.

It is important to notice the background of the case: The Feldkirch Regional Court issued an arrest warrant against the applicant and a search warrant of his house because he was suspected of bodily assault, rape and threats with a firearm, all of it directed against his wife. The arrest warrant pointed out that there was reason to expect “massive resistance” upon arrest and attempts to “escape prosecution”. According to information given by his wife, the applicant was trained in hand-to-hand combat, and “up to anything”. The latter characterization was probably based on the fact that he had on several occasions approached his wife with weapon in hand. Last, but not least, the applicant was, according to his wife, in possession of a firearm.

In my opinion, there was nothing that could give reason for the police to question the truth of the information provided by the applicant's wife. On the contrary, the fact that the police officers were met by the applicant with a knife in his hand when they entered his house, must have had the effect of strengthening the veracity of his wife's information, in addition to being a reminder of the seriousness of the situation.

The majority have deemed it unnecessary by the police to strip the applicant naked in order to search for a weapon, and have argued that frisking him would have been sufficient. I disagree to this view, because it is, in my opinion, not based on a realistic assessment of the risks involved in police actions like the present one.

First of all, having been informed that the applicant was in possession of a firearm, it was necessary for the police officers to make a bodily search of him. Even without such information, this would have been necessary, in order to check for other objects, like for instance a knife. Second, the search had to be carried out in an effective and secure way, in addition to causing as little harm as possible. Bearing in mind that the applicant was reported to be trained in hand-to-hand combat and “up to anything”, he might easily have acted violently, even though he was handcuffed. Thus, frisking him would have been a clearly inadequate measure. A strip search therefore remained as the only realistic option. However, being handcuffed, which was obviously necessary in the present circumstances, it is hard to imagine how the applicant could have been able to undress himself. The strip search therefore had to be carried out by the police.

One of the police officers stated before the Independent Administrative Panel that the strip search was applied “for their and the applicant's safety and in order to find the weapon”. I see no reason to question the truth of this statement. However, in addition to explaining why this method was used, it clearly indicates that using the ordinary method of body search might have caused the applicant (and the police) injuries, if he had resisted the search. This was a possibility that could in my opinion by no means be excluded.

It is furthermore important to note that the strip search was carried out by police officers who were all male persons. No physical or verbal abuse of the applicant was applied. Finally, the strip search seems to have been carried out within few minutes. The applicant's human dignity and bodily integrity was therefore, in my opinion, respected, as far as possible in the circumstances.

Bearing in mind that the threshold of Article 3 in cases involving police treatment depends on the circumstances of the case, see *Wainwright v. the United Kingdom*, cited above; that a strip search which serves a legitimate purpose and is carried out with respect for human dignity is not in itself incompatible with the Convention, see *Yankow v. Bulgaria*, cited above, and that the effects of a legitimate treatment must exceed the inevitable element of suffering or humiliation if it is to create a violation of Article 3, see *Labita v. Italy*, cited above, I must conclude, on the basis of the factual elements which I have explained above, that there has been no violation in this case.

I would like to add that in cases like this, it is important to examine whether the police have acted without having had the necessary reasons for it, or performed in a way that has shown lack of respect of the arrested person's human dignity or caused him bodily harm. However, when deciding in such cases, one must also keep in mind the difficult role of the police in cases like this, and make a balanced evaluation. Protecting victims and taking care of people's security should not be unnecessarily hampered by the Court. In my opinion, the judgment in the present case might have just that effect.



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

FIRST SECTION

CASE OF BRANKO TOMAŠIĆ AND OTHERS v. CROATIA

(Application no. 46598/06)

JUDGMENT

STRASBOURG

15 January 2009

FINAL

15/04/2009

This judgment may be subject to editorial revision.

In the case of Branko Tomašić and Others v. Croatia,

The European Court of Human Rights (First Section), sitting as a Chamber composed of:

Christos Rozakis, *President*,

Nina Vajić,

Anatoly Kovler,

Elisabeth Steiner,

Dean Spielmann,

Giorgio Malinverni,

George Nicolaou, *judges*,

and Mr S. NIELSEN, *Section Registrar*,

Having deliberated in private on 11 December 2008,

Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in an application (no. 46598/06) against the Republic of Croatia lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by five Croatian nationals, Mr Branko Tomašić, Mrs Đurđa Tomašić, Mr Marko Tomašić, Mr Tomislav Tomašić and Miss Ana Tomašić (“the applicants”), on 30 October 2006.

2. The applicants were represented by Mrs I. Bojić, a lawyer practising in Zagreb. The Croatian Government (“the Government”) were represented by their Agent, Mrs Š. Stažnik.

3. On 7 May 2007 the Court decided to give notice of the application to the Government. Under the provisions of Article 29 § 3 of the Convention, it decided to examine the merits of the application at the same time as its admissibility.

THE FACTS**I. THE CIRCUMSTANCES OF THE CASE**

4. The applicants were born in 1956, 1963, 1985, 1995 and 2001 respectively and live in Čakovec. The first and second applicants are husband and wife and the third to fifth applicants are their children.

5. During 2004 M.T., the first and second applicants’ daughter and the third to fifth applicants’ sister, entered into a relationship with a certain M.M. They started living together with the applicants in their home. On 1

March 2005 they had a child, V.T. Soon afterwards M.M. had a series of disputes with the members of the household and often expressed verbal threats against M.T., which resulted in him moving out of the house in July 2005. On 4 January 2006 the Čakovec Social Welfare Centre (*Centar za socijalnu skrb Čakovec* – hereinafter “the Welfare Centre”) filed a report with the Međimurje Police Department (*Policajska uprava međimurska*) stating, *inter alia*, that on 2 January 2006 M.M. had come to the Centre and claimed that he had a bomb and would “throw it at his former wife [meaning M.T.] and child”.

6. On 5 January 2006 M.T. lodged a criminal complaint with the Čakovec State Attorney’s Office against M.M. She alleged that on a number of occasions since July 2005 M.M. had come to her parents’ house where she also lived with her daughter and had threatened to kill her and their daughter with a bomb unless she agreed to come back to him. He had also often made telephone calls and sent SMS messages to her by mobile phone repeating the same threats.

7. On 3 February 2006 M.M. was detained following the instigation of the criminal proceedings against him in the Čakovec Municipal Court (*Općinski sud u Čakovcu*) on 27 January 2006. A psychiatric opinion obtained during the proceedings stated that on 2 January 2006 M.M. had claimed before the employees of the Welfare Centre that he had a bomb and that his threats had been meant seriously. He had repeated the same claim on 19 January 2006 before police officers from the Međimurje Police Department. The relevant parts of the conclusions of the report read as follows:

“1. Defendant M.M. is a person suffering from a profound personality disorder etiologically linked to innate malfunctioning of the brain and the highly unfavourable pedagogical circumstances of his childhood. Dg: mixed personality disorder ...

2. In the context of the said personality disorder the defendant’s reaction to a problematic situation was an inadequate and pathological defence mechanism with inflated ideas and related activities. These inflated ideas do not amount to a mental illness.

3. I have not found elements of either permanent or temporary innate mental illness, diminished intellectual capacity or epilepsy which might be linked to the criminal offences with which the defendant is charged.

4. He is not addicted to alcohol, drugs or other substances ...

5. In view of what has been said under 1, 2 and 3 and in view of all the other information collected so far in connection with the criminal offences, I consider that his ability to wilfully control and understand the meaning and consequences of his act *tempore criminis* was diminished, but that [he was not] completely unaccountable.

6. There is a strong likelihood that he will repeat the same or similar criminal offences. In order to prevent this, I recommend that the court, apart from the other

measures, order compulsory psychiatric treatment with a predominantly psychotherapeutic approach with the aim of developing an ability to resolve difficult situations in life in a more constructive manner.”

8. On 15 March 2006 the Municipal Court found M.M. guilty of threatening M.T. on several occasions during the period between July and 30 December 2005 both in front of her family house and at the parking lot near the city graveyard when M.T. had been alone. He had shouted threats that he would kill her, himself and their child with a bomb; at the Welfare Centre on 2 January 2006 he had said that his threats had been meant seriously, that he actually had a bomb and that he would kill himself and the child with the bomb on the child’s first birthday on 1 March 2006. He was sentenced to five months’ imprisonment and a security measure of compulsory psychiatric treatment was ordered during his imprisonment and afterwards as necessary. In ordering the defendant’s compulsory psychiatric treatment the court relied entirely on the findings of the psychiatric report. The relevant part of the judgment read as follows:

“... throughout the whole period in question the defendant had been telling the victim that he would throw a bomb at himself and their child as well as her [the victim] if she happened to be around. These events came to a head on 30 December. The defendant did not refrain from mentioning a bomb either in front of the Welfare Centre’s employees or a policeman. Furthermore, he said in front of the policemen that he would blow himself and the child up with a bomb on the child’s first birthday. Therefore, there is no doubt that both the victim and the witnesses understood these threats as being meant seriously ... Thus, the victim’s fears for her own as well as her child’s safety were justified ...

...

... all conditions for ordering a security measure [of compulsory psychiatric treatment] have been fulfilled since the defendant committed a crime while his capacity for understanding was diminished and it is likely that he will repeat the same or similar offence. It is necessary to order compulsory psychiatric treatment during his prison term and after his release. The treatment shall take a predominantly psychotherapeutic approach, as recommended by the expert, in order to develop [the defendant’s] ability to address difficult situations in life in a more constructive manner.”

9. On 28 April 2006 the Čakovec County Court (*Županijski sud u Čakovcu*) reduced the security measure to the duration of M.M.’s prison sentence and upheld the remaining part of the judgment. The relevant part of the judgment reads as follows:

“... there is no doubt that frequent murder threats by ... a bomb should by any objective test have been understood as meant seriously and that [such threats] would cause a real sense of disquiet, fear and anxiety in an average person, in particular in a situation where the victim has known the perpetrator as an aggressive person out of control, as is the case with the victim in the present case.

There is also no doubt that ... the defendant's threats extended throughout a period of half a year during which the victim feared, owing to continued threats, not only for her own safety but also for the safety and wellbeing of her child which was not even a year old at the time. The victim was thus undoubtedly put in a difficult and unenviable position where she feared daily for her and her daughter's life, which was confirmed not only in her testimony but also the fact that she sought assistance from the competent authorities [such as] the police, the Social Welfare Centre and the State Attorney.

...

While examining ... the impugned judgment under Article 379 paragraph 1(2) of the Code of Criminal Procedure this appellate court has established that the first-instance court violated the statutory provisions to the detriment of the defendant when it ordered that a security measure of compulsory psychiatric treatment should continue after the defendant's release [from prison], which is contrary to Article 75 of the Criminal Code according to which compulsory psychiatric treatment may last as long as the reasons for its application exist but no longer than the prison term.

...

... this court does not agree with the defendant's argument that in his case the purpose of punishment would be achieved by a suspended sentence, especially in view of the fact that the defendant ... did not show any self-criticism as regards his acts or any feelings of remorse for what he had said ..."

10. M.M. served his sentence in Varaždin Prison and was released on 3 July 2006. On 15 August 2006 he shot M.T., her daughter V.T. and himself. Before the shooting he was spotted by M.T.'s neighbour carrying an automatic gun and leaving his bicycle in the adjacent woods. The neighbour immediately called the police. The police arrived at the scene twenty minutes later, just after the tragic event.

11. On 15 August 2006 the police interviewed M.T.'s neighbour I.S. who had seen M.M. approaching M.T.'s house immediately before the critical event. At the request of the police, on 17 August 2006 an investigating judge of the Varaždin County Court issued a search warrant of a flat and a vehicle belonging to a certain M.G. who was suspected of having procured weapons for M.M. The warrant was executed the same day, but no connection was established between M.G. and the weapons used by M.M.. The investigating judge has not taken any further steps in that case.

12. On 18 August 2006 the police submitted a report to the Čakovec County State Attorney's Office detailing the circumstances of the tragic event.

13. On 28 November 2006 the State Attorney's Office dismissed a criminal complaint against M.M. for murdering M.T. and V.T. on the ground that he was dead. It is unclear who lodged that complaint, but a copy of this decision was sent to the applicants. In a letter of the same day the State Attorney's Office asked the Medimurje Police Department to collect all information concerning psychiatric treatment of M.M. in Varaždin

Prison. The relevant part of a report drawn up on 13 December 2006 by the Varaždin prison authorities reads as follows:

“M.M. had been kept in detention on remand in Varaždin Prison from 3 February to 22 May 2006 when he was sent to serve his prison term ... which expired on 3 July 2006.

A psychiatric examination of M.M. carried out during his stay in detention showed that he suffered from a mixed personality disorder which derived from innate malfunctioning of the brain and the unfavourable pedagogical circumstances of his childhood. In the same opinion the expert psychiatrist recommended that compulsory psychiatric treatment be ordered with a predominantly psychotherapeutic approach with the aim [that M.M.] develop an ability to resolve difficult situations in life in a more constructive manner.

While M.M. served his prison term, intensive treatment consisting in frequent individual conversational sessions was envisaged, in accordance with the individual programme of serving a prison term. He rarely came for the sessions of his own accord and was therefore, in [order to satisfy] the need for treatment, requested to do so by the staff. ...

While in prison M.M. saw the prison doctor on five occasions, sometimes of his own accord, sometimes at the doctor's call. He did not insist on his psychiatric therapy and therefore his treatment was based, as recommended by the expert, on intensive psychotherapeutic treatment by the staff, the prison governor and the others who talked to him. He was a highly introverted person, so his true personality could not be detected in detention or prison conditions.”

14. On 11 December 2006 the Međimurje Police Department interviewed the Varaždin prison governor, P.L. The relevant part of a report on the interview drawn up on 2 December 2006 reads as follows:

“The above-mentioned is the governor of Varaždin Prison and he states that the late M.M. served his prison term in Varaždin Prison from 3 February to 3 July 2006 ...

While in prison M.M. underwent psychiatric treatment pursuant to the expert opinion and recommendation. The treatment was based on intensive psychotherapeutic treatment of M.M. consisting of conversational sessions between M.M. and the prison staff, himself [meaning the governor] and the prison doctor. During the treatment M.M. neither received nor asked for any pharmacotherapy. It was also established that M.M. was a very introverted person who did not wish to cooperate in the treatment.

During his stay in the prison M.M. saw the prison doctor on five occasions in connection with some other problems, that is to say, illnesses.

He further maintains that there are no internal regulations on the implementation of security measures and that all treatment is carried out in accordance with the Enforcement of Prison Sentences Act.”

15. According to the Government, since no oversights on the part of the persons in charge of the execution of the M.M.'s prison term and security

measure had been established, the investigation was concluded, although no formal decision to that effect has been adopted.

16. M.M.'s medical record from prison, submitted by the Government, does not indicate any psychiatric or psychotherapeutic treatment.

17. On 6 November 2006 the applicants submitted a proposal to the State Attorney for a settlement of their claim for non-pecuniary damages related to the deaths of M.T. and V.T. They alleged failures by the competent authorities to take adequate steps to protect the lives of M.T. and V.T. and inadequacy of the investigation into the circumstances of their deaths. They sought 1,105,000 Croatian kunas (HRK) in compensation and HRK 13,481 for costs. They received no reply. Under section 186(a) of the Civil Procedure Act, where such a request has been refused or no decision has been taken within three months of its submission the person concerned may file an action with the competent court. The applicants have not brought a civil action.

II. RELEVANT DOMESTIC LAW AND PRACTICE

18. Article 21 of the Constitution (*Ustav Republike Hrvatske*, Official Gazette nos. 56/1990, 135/1997, 8/1998, 113/2000, 124/2000 and 28/2001) reads as follows:

“Every human being has the right to life.

...”

19. The relevant part of the Constitutional Court Act (*Ustavni zakon o Ustavnom sudu*, Official Gazette no. 29/2002) reads as follows:

Section 38

“Everyone has the right to request the institution of proceedings to review the constitutionality of statutes ...”

Section 55

“(1) The Constitutional Court shall quash a statute or its provisions if it finds that they are incompatible with the Constitution ...”

20. The relevant part of Article 75 of the Criminal Code (*Kazneni zakon Republike Hrvatske*, Official Gazette nos. 110/1997, 28/1998, 50/2000, 129/2000, 51/2001, 11/2003 and 105/2004) reads as follows:

“The security measure of compulsory psychiatric treatment may be imposed only as regards a perpetrator who, at the time of committing a criminal offence, suffered from significantly diminished responsibility [and] where there is a risk that the factors giving rise to the state [of diminished responsibility] might incite the future commission of a further criminal offence.

The security measure of compulsory psychiatric treatment may be imposed, under the conditions set out in paragraph 1 of this Article, during the execution of a prison sentence, in lieu of a prison sentence or together with a suspended sentence.

Compulsory psychiatric treatment shall be imposed for as long as the grounds for its application exist, but [it shall not] in any case exceed the prison term ... Compulsory psychiatric treatment shall not under any circumstances exceed three years.

...”

21. The relevant provisions of the Code of Criminal Procedure (*Zakon o kaznenom postupku*, Official Gazette nos. 110/1997, 27/1998, 58/1999, 112/1999, 58/2002, 143/2002, 63/2002, 62/2003 and 115/2006) read as follows:

Article 174(2)

“In order to ... decide whether to request an investigation ... the State Attorney shall order the police to collect the necessary information and take other measures concerning the crime [at issue] with a view to identifying the perpetrator ...”

Article 177

“Where there is a suspicion that a criminal offence liable to public prosecution has been committed, the police shall take the necessary measures with a view to indentifying the perpetrator ... and collect all information of possible relevance for the conduct of the criminal proceedings...”

Article 187

“(1) An investigation shall be opened against a particular individual where there is a suspicion that he or she has committed a criminal offence.

(2) During the investigation evidence and information necessary for deciding whether an indictment is to be brought or the proceedings are to be discontinued shall be collected ...”

22. The relevant provisions of the Civil Obligations Act (*Zakon o obveznim odnosima*, Official Gazette no. 35/2005) read as follows:

Section 19

“(1) Every legal entity and every natural person has the right to respect for their personal integrity under the conditions prescribed by this Act.

(2) The right to respect for one’s personal integrity within the meaning of this Act includes the right to life, physical and mental health, good reputation and honour, the right to be respected, the right to respect for one’s name and privacy of personal and family life, freedom *et alia*.

...”

Section 1100

“(1) Where a court finds it justifiable, on account of the seriousness of an infringement of the right to respect for one’s personal integrity and the circumstances of a particular case, it shall award non-pecuniary damages, irrespective of compensation for pecuniary damage or where no such damage exists.

...”

Section 1101

“(1) In the case of death or particularly serious invalidity of a person the right to non-pecuniary damages shall vest in his or her close family members (spouse, children and parents).

(2) Such damages may be awarded to the siblings, grandparents, grandchildren and a common-law spouse where these persons and the deceased permanently shared the same household.

”

23. Section 13 of the State Administration Act (*Zakon o ustrojstvu državne uprave*, Official Gazette nos. 75/1993, 48/1999, 15/2000 and 59/2001) reads as follows:

“The Republic of Croatia shall compensate damage caused to a citizen, legal entity or other party by unlawful or wrongful conduct of a State administration body, a body of local self-government and administration ...”

24. The relevant part of section 186(a) of the Civil Procedure Act (*Zakon o parničnom postupku*, Official Gazette nos. 53/91, 91/92, 58/93, 112/99, 88/01 and 117/03) reads as follows:

“A person intending to bring a civil suit against the Republic of Croatia shall beforehand submit a request for a settlement with the competent State Attorney’s office.

...

Where the request has been refused or no decision has been taken within three months of its submission, the person concerned may file an action with the competent court.

...”

25. The relevant provisions of the Enforcement of Prison Sentences Act (*Zakon o izvršavanju kazne zatvora*, Official Gazette nos. 128/1999 and 190/2003) read as follows:

PURPOSE OF A PRISON TERM

Section 2

“The main purpose of a prison term, apart from humane treatment and respect for personal integrity of a person serving a prison term, ... is development of his or her capacity for life after release in accordance with the laws and general customs of society.”

PREPARATION FOR RELEASE AND ASSISTANCE AFTER THE RELEASE

Section 13

“During the enforcement of a prison sentence a penitentiary or prison shall, together with the institutions and other legal entities in charge of assistance after release, ensure preparation of a prisoner for his or her release [from prison].”

INDIVIDUAL PROGRAMME FOR THE ENFORCEMENT OF A PRISON TERM

Section 69

(1) The individual programme for the enforcement of a prison term (hereinafter “the enforcement programme”) consists of a combination of pedagogical, working, leisure, health, psychological and safety acts and measures aimed at organising the time spent during the prison term according to the character traits and needs of a prisoner and the type and possibilities of a particular penitentiary or prison. The enforcement programme shall be designed with a view to fulfilling the purposes of a prison term under section 7 of this Act.

(2) The enforcement programme shall be designed by a prison governor on the proposal of a penitentiary or a prison’s expert team ...

(3) The enforcement programme shall contain information on ... special procedures (... psychological and psychiatric assistance ... special security measures ...)

...”

HEALTH PROTECTION

Section 103

“(1) Inmates shall be provided with medical treatment and regular care for their physical and mental health...”

26. Section 22 of the State Attorney Act (*Zakon o državnom odvjetništvu*, Official Gazette 75/1995) reads as follows:

“(1) The State Attorney’s Office is entitled to compensation for the costs of representation before the courts and other competent bodies according to the regulations on lawyers’ fees.

(2) Funds obtained as the costs of representation are paid into the State’s budget.”

27. As regards civil proceedings for damages the Government submitted several decisions of the Supreme Court expressing its opinion on the responsibility of the State for damage caused by the administrative authorities.

The relevant parts of decision no. Rev 2203/1991-2 of 30 December 1991 read as follows:

“The employees of Open Penitentiary V.-P. and of L. State Prison caused the damage in question by their unlawful and wrongful conduct in allowing D.P. to escape from the penitentiary instead of preventing his escape by the use of force if necessary (sections 175 and 176, paragraph 140, of the Enforcement of Penal and Misdemeanours Sanctions Act, Official Gazette nos. 21/74 and 39/74).

Enforcement of a sentence, and in particular the enforcement of a prison term, fulfils the purpose of punishment defined by law which includes, *inter alia*, preventing a perpetrator from committing [a further] criminal offence by restricting his freedom of movement. In the circumstances of the present case the employees of the above-mentioned penitentiaries, for whose conduct the defendant [the State] is liable, failed to [prevent the escape] of a convict who repeated the same act of violence (in even more serious circumstances) as the criminal offence for which he had been convicted and placed in prison ... The fact that he committed a criminal offence of robbery and caused damage to the plaintiff and numerous other persons by acts of violence during his escape shows that he is a danger to society who should have been prevented from committing criminal offences by being kept in prison. The same transpires from his previous criminal record ...

Therefore, in the case at issue there is a legally relevant causal link between the unlawful and wrongful conduct of the defendant’s employees, the escape and the harmful act ... which all lead to the defendant’s liability.”

The relevant part of decision no. Rev 186/04-2 of 10 January 2006 reads as follows:

“Pursuant to section 13 of the State Administration Act (Official Gazette nos. 75/93, 48/99, 15/00 and 59/01) the Republic of Croatia is obliged to compensate damage resulting from unlawful or wrongful conduct of the State administration bodies, bodies of local self-government and administration ...

...

Conduct or an omission that is against a law or any other regulation amounts to an unlawful act ... if there exists an intent to cause damage to the rights or interests of third persons or acceptance of that outcome .”

28. The applicants submitted several decisions of the Supreme Court concerning the same issue.

The relevant part of decision no. Rev 713/1998 of 13 September 2000 reads as follows:

“Conduct or an omission that is against a law or any other regulation amounts to an unlawful act only if there exists an intent to cause damage to the rights and interests of a third person or acceptance of that outcome. The same is true in respect of conduct or a failure to act, contrary to the common or prescribed manner of acting, amounting to wrongful conduct.”

The relevant part of decision no. Rev 218/04-2 of 27 October 2004 reads as follows:

“The plaintiffs’ claim for damages against the Republic of Croatia is justified only where the statutory conditions have been fulfilled, namely, that the damage is a consequence of unlawful or wrongful conduct of a person or a body performing [civil] service. Unlawful conduct means acting against a law or any other regulation or an omission to apply a regulation with intent to cause harm to a third person or acceptance of that outcome. Wrongful conduct means an act or a failure to act that is contrary to the common or prescribed manner of acting and from which it can be concluded that there has been an intent to cause harm to the rights and interests of a third person or acceptance of that outcome.”

The relevant part of decision no. Rev 730/04-2 of 16 November 2005 reads as follows:

“... unlawful conduct means acting against the law or omitting to apply statutory provisions with intent to cause damage to a third person or acceptance of that outcome. Wrongful conduct means an act or a failure to act, contrary to the common or prescribed manner of acting ... The burden of proof is on the plaintiff. ... The plaintiff claiming damages is obliged to prove the existence of damage, a harmful act by the defendant (in this case unlawful or wrongful conduct of the State administration bodies within the meaning of section 13 of the State Administration Act) and a causal link between the harmful act and the actual damage.”

The relevant part of decision no. Rev 257/06-2 of 18 May 2006 reads as follows:

“The purpose of section 13 of the State Administration Act is [to make] the State liable for the damage caused by consciously acting against the law with intent to cause damage to another.”

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 2 OF THE CONVENTION

29. The applicants made a twofold complaint under Article 2 of the Convention. They contended firstly that the State had failed to comply with their positive obligations in order to prevent the deaths of M.T. and V.T. and secondly that the State had failed to conduct a thorough investigation

into the possible responsibility of their agents for the deaths of M.T. and V.T.

Article 2 of the Convention reads as follows:

“1. Everyone’s right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.

2. Deprivation of life shall not be regarded as inflicted in contravention of this article when it results from the use of force which is no more than absolutely necessary:

- (a) in defence of any person from unlawful violence;
- (b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;
- (c) in action lawfully taken for the purpose of quelling a riot or insurrection.”

A. Admissibility

The parties’ submissions

30. The Government argued that the applicants had several remedies at their disposal which they had failed to exhaust. Firstly, they had failed to lodge a criminal complaint against any person they held responsible for the deaths of M.T. and V.T., which would have enabled them to propose evidence and investigating measures to be taken. Had they done so, the competent State Attorney’s Office would have issued a reasoned decision on their complaint. Even if such a complaint had been dismissed, the applicants could have then continued the criminal prosecution of their own motion.

31. Secondly, the applicants could have brought a civil action for compensation against the State under sections 1100 and 1101 of the Civil Obligations Act and under the Convention, which was directly applicable in Croatia.

32. Lastly, the fact that the State’s liability existed only where a causal link between a harmful act and the actual damage was proven was a universally accepted principle of liability for damages that was not specific to the Croatian legal system.

33. The applicants contended that under domestic law the third to fifth applicants had no right to seek compensation for the death of V.T. A civil action for compensation from the State, which was a possibility open to all the applicants in respect of the death of M.T. and to the first and second applicants in respect of the death of V.T., would have had no prospect of success. That was because the requirements established by the Supreme

Court, namely, that the acts of the responsible authorities had to be unlawful and that they had to have acted with intent to cause damage to third persons or at least acceptance of that outcome would have been impossible to prove. Furthermore, if they had lost they would have had to bear the costs of representation of the State in the proceedings by a State Attorney's Office, which was entitled to the fees set out in the Scale of Lawyers' Fees. According to the standards of the Supreme Court's case-law, the applicants could have claimed about HRK 800,000 in compensation. As the costs of representation of the State were to be assessed according to the value of the claim, they would have amounted to about HRK 80,000. Thus they would have exceeded the applicants' joint annual income, which was about HRK 14,000 since the only member of their family living in the same household who had an income was the first applicant. In view of the fact that their possible claim had no prospect of success, the risk of having to bear the State Attorney's fees, from which they had no right of exemption, was very high. Bearing these costs would have financially ruined them, which was why they had not lodged a civil action against the State.

34. As to the Government's objection that they should have lodged a criminal complaint against the persons they considered responsible for the deaths of their close relatives, the applicants argued that all information known to them had also been known to the relevant State authorities and that in those circumstances it had been incumbent on the authorities to take appropriate steps to investigate the deaths of M.T. and V.T.

The Court's assessment

35. The Court points out that the purpose of Article 35 is to afford the Contracting States the opportunity of preventing or putting right the violations alleged against them before those allegations are submitted to the Convention institutions. Consequently, States are dispensed from answering for their acts before an international body before they have had an opportunity to put matters right through their own legal system. The rule of exhaustion of domestic remedies referred to in Article 35 of the Convention requires that normal recourse should be had by an applicant only to remedies that relate to the breaches alleged and at the same time are available and sufficient. The existence of such remedies must be sufficiently certain not only in theory but also in practice, failing which they will lack the requisite accessibility and effectiveness; it falls to the respondent State to establish that these various conditions are satisfied (see *Selmouni v. France* [GC], no. 25803/94, §§ 74 and 75, ECHR 1999-V).

36. Article 35 provides for a distribution of the burden of proof. It is incumbent on the Government claiming non-exhaustion to satisfy the Court that the remedy was an effective one available in theory and in practice at the relevant time, that is to say, that it was accessible, was one which was capable of providing redress in respect of the complaints invoked and

offered reasonable prospects of success (see *Akdivar and Others v. Turkey*, 16 September 1996, *Reports of Judgments and Decisions* 1996-IV, § 68).

37. The Court would emphasise that the application of this rule must make due allowance for the context. Accordingly, it has recognised that Article 35 must be applied with some degree of flexibility and without excessive formalism (see *Cardot v. France*, 19 March 1991, Series A no. 200, § 34). It has further recognised that the rule of exhaustion of domestic remedies is neither absolute nor capable of being applied automatically; in reviewing whether the rule has been observed, it is essential to have regard to the particular circumstances of the individual case (see *Van Oosterwijck v. Belgium*, 6 November 1980, Series A no. 40, § 35). This means, amongst other things, that the Court must take realistic account not only of the existence of formal remedies in the legal system of the Contracting Party concerned but also of the general legal and political context in which they operate as well as the personal circumstances of the applicants (see *Akdivar and Others*, cited above, § 69).

38. In respect of a substantive complaint of failure of the State to take adequate positive measures to protect a person's life in violation of Article 2, the possibility of obtaining compensation for the death of a person will generally, and in normal circumstances, constitute an adequate and sufficient remedy (see, *E. and Others v. the United Kingdom*, no. 33218/96, § 110 and, *mutatis mutandis*, *Caraher v. the United Kingdom* (dec.), no. 24520/94, ECHR 2000-I).

39. The Court notes at the outset that the newly introduced sections 1100 and 1101 of the Civil Obligations Act, which entered into force on 1 January 2006, provide a possibility of seeking compensation in connection with the death of one's spouse, child or parent and that compensation may also be awarded to the siblings, grandparents, grandchildren and a common-law spouse where these persons and the deceased permanently shared the same household. The Court therefore finds that under domestic law the third to fifth applicants, being her aunts and uncles, have no right of compensation for the killing of V.T. It follows that the Government's objection in respect of the third to fifth applicants in connection with the death of V.T. must be rejected.

40. As to the first and second applicants' right of compensation for the deaths of both M.T. and V.T. and the third to fifth applicants' right of compensation for the death of M.T., the Court notes that sections 1100 and 1101 of the Civil Obligations Act do provide a legal ground for seeking compensation from the State. The Court will now examine whether the Government have shown that a civil action for compensation against the State is a remedy that has to be exhausted in the circumstances of the present case.

41. The Court notes that after M.M. had killed M.T. and V.T. no responsibility of the State officials involved was established in respect of

the relevant authorities' duty to protect the lives of the victims. In these circumstances it might be said that a civil action for damages against the State does not have much prospect of success, in particular in view of the requirement under domestic law and practice that the State's liability be engaged only in the event of unlawful conduct on the part of the authorities or unlawful failure to act and intent on the part of the authorities to cause damage to a third person or acceptance of that outcome.

42. However, and notwithstanding the chances of success of a potential civil action concerning the lawfulness of the acts of the relevant authorities, the Court notes that in any event the issue here is not a question of whether the authorities acted unlawfully or whether there was any individual responsibility of a State official on whatever grounds. Much more broadly, the central question of the present case is the alleged deficiencies of the national system for the protection of the lives of others from acts of dangerous criminals who have been identified as such by the relevant authorities and the treatment of such individuals, including the legal framework within which the competent authorities are to operate and the mechanisms provided for. In this connection the Court notes that the Government have not shown that these issues, and in particular the applicants' complaint under Article 2 of the Convention related to the insufficiencies of domestic law and practice preceding the deaths of M.T. and V.T., could be examined in any proceedings relied on by the Government.

43. As to the Government's argument that after the killings of M.T. and V.T. the applicants could also have lodged a criminal complaint, the Court notes that a step in that respect was taken by an investigating judge of the Varaždin County Court when, on 17 August 2006, he ordered a search of a flat and vehicle of a certain M.G. who had been suspected of having procured weapons to M.M. and by the Čakovec State Attorney's Office when, on 28 November 2006, it asked the Međimurje Police Department to collect all information concerning M.M.'s psychiatric treatment while he had been serving his prison sentence. However, those steps did not lead to any criminal or other proceedings against any of the persons involved. The Court cannot see how an additional criminal complaint about the same issues lodged by the applicants might have led to a different outcome. In this connection the Court reiterates that in cases concerning a death in circumstances that might give rise to the State's responsibility the authorities must act of their own motion once the matter has come to their attention. They cannot leave it to the initiative of the next-of-kin either to lodge a formal complaint or to take responsibility for the conduct of any investigative procedures (see, for example, *McKerr v. the United Kingdom*, no. 28883/95, § 111, ECHR 2001-III, and *Slimani v. France*, no. 57671/00, § 29, ECHR 2004-IX (extracts)).

44. It follows that the remedies proposed by the Government did not have to be exhausted. In making this conclusion, the Court has taken into consideration the specific circumstances of the present case as well as the fact that a right as fundamental as the right to life is at stake (see, among other authorities, *McCann and Others v. the United Kingdom*, 27 September 1995, Series A no. 324, § 147) and that the Convention is intended to guarantee rights that are not theoretical or illusory, but rights that are practical and effective (see, for example, *Matthews v. the United Kingdom* [GC], no. 24833/94, § 34, ECHR 1999-I). Accordingly, the Government's objection has to be rejected.

45. The Court finds that this part of the application is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. It further finds that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

The parties' arguments

46. The applicants complained that the State had failed to comply with their positive obligation because, although it had been well known to the authorities that M.M.'s threats against M.T. and V.T. had been serious, they had failed to order and carry out a search of his premises and vehicle in the course of the first set of criminal proceedings against him in which he had been charged with making serious threats against M.T. and V.T. They argued that, before his release from prison, the relevant authorities had failed to properly administer his psychiatric treatment and evaluate his mental condition and the likelihood that he would carry out his threats. They alleged insufficiencies of the regulation concerning the enforcement of a prison term and also maintained that the domestic law was defective because an accused found guilty of a crime could be given compulsory psychiatric treatment only for the duration of his or her prison term. The applicants also complained that the domestic authorities had failed to conduct a proper and thorough investigation into the State's possible responsibility for the deaths of their close relatives.

47. The Government argued that the domestic authorities had taken M.M.'s threats seriously and had for that reason remanded him in custody, where he had stayed during the whole trial. He had been sentenced to a prison term commensurate with the seriousness of his conviction and within the statutory framework of the offence he had been charged with. Furthermore, his compulsory psychiatric treatment had been ordered during his prison term, as provided for under domestic law.

48. As to their procedural obligation under Article 2, the Government contended that the competent State Attorney's Office had ordered the police to collect relevant information concerning the deaths of M.T. and V.T. The police had, *inter alia*, interviewed the prison governor, and this had shown how the measure of compulsory psychiatric treatment had been administered. The State Attorney's Office had not found that there had been any failure on the part of the prison authorities amounting to a criminal offence. As to their participation in the investigation, the applicants had failed to lodge a separate criminal complaint and had not shown that they had ever sought to be informed about the investigation.

The Court's assessment

a. Substantive aspect of Article 2 of the Convention

General principles

49. The Court reiterates that Article 2 enjoins the State to take appropriate steps to safeguard the lives of those within its jurisdiction (see *L.C.B. v. the United Kingdom*, 9 June 1998, *Reports of Judgments and Decisions* 1998-III, § 36). This involves a primary duty on the State to secure the right to life by putting in place effective criminal-law provisions to deter the commission of offences against the person backed up by law-enforcement machinery for the prevention, suppression and punishment of breaches of such provisions (see *Nachova and Others v. Bulgaria* [GC], nos. 43577/98 and 43579/98, § 160, ECHR 2005-VII).

50. It also extends in appropriate circumstances to a positive obligation on the authorities to take preventive operational measures to protect an individual whose life is at risk from the criminal acts of another individual. Bearing in mind the difficulties in policing modern societies, the unpredictability of human conduct and the operational choices which must be made in terms of priorities and resources, the Court is also careful, when considering positive obligations, not to interpret Article 2 in such a way as to impose an impossible or disproportionate burden on authorities (see *Osman v. the United Kingdom*, 28 October 1998, *Reports of Judgments and Decisions* 1998-VIII, § 116). Accordingly, not every claimed risk to life can entail for the authorities a Convention requirement to take operational measures to prevent that risk from materialising.

51. A positive obligation will arise where it has been established that the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual from the criminal acts of a third party and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected

to avoid that risk (see *Osman*, cited above, § 116; *Paul and Audrey Edwards v. the United Kingdom*, no. 46477/99, § 55, ECHR 2002-III; and *Bromiley v. the United Kingdom* (dec.), no. 33747/96, 23 November 1999).

Application of these principles to the present case

52. The Court has examined firstly whether the relevant authorities were or should have been aware that M.M. presented a risk for the lives of M.T. and V.T. The Court notes that the competent State Attorney's Office instituted criminal proceedings against M.M. on charges of making serious threats against M.T. and V.T., which resulted in M.M. being found guilty as charged and sentenced to five months' imprisonment. The domestic courts established that M.M. had been making threats against M.T. and V.T. for a long period of time, namely, from July to December 2005. They found further that he had not refrained from repeating those threats both before the employees of the Čakovec Welfare Centre and the police, including his announcement that he was going to blow M.T. and V.T. up with a bomb on the latter's first birthday, which was 1 March 2006. He repeatedly claimed that he was in possession of a bomb and could well have had other weapons. That these threats were taken by the domestic authorities as being meant seriously is shown by the fact that M.M. was sentenced to an unconditional prison term. Furthermore, a psychiatric examination of M.M. carried out in the course of the criminal proceedings established that he was suffering from a mixed personality disorder and was in need of compulsory psychiatric treatment in order to develop the ability to cope with difficult situations in life in a more constructive manner. It was established further that there was a danger that he would repeat the same or similar offences, which appears crucially important in the present case.

53. The above findings of the domestic courts and the conclusions of the psychiatric examination undoubtedly show that the domestic authorities were aware that the threats made against the lives of M.T. and V.T. were serious and that all reasonable steps should have been taken in order to protect them from those threats. The Court will now examine whether the relevant authorities took all steps reasonable in the circumstances of the present case to protect the lives of M.T. and V.T.

54. The Court firstly notes that although M.M. had mentioned on several occasions that he had a bomb, and could well have had other weapons, no search of his premises and vehicle was ordered in the course of the initial criminal proceedings against him. No such search was ordered and carried out, although the relevant authorities had been aware of his above statements as early as 4 January 2006, when the Čakovec Social Welfare Centre filed a report containing such allegations with the Međimurje Police Department.

55. The Court notes further that a psychiatric report drawn up for the purposes of the criminal proceedings against M.M. stressed the need for

continued psychiatric treatment in order to help him develop the capacity for coping with difficult situations in life in a more constructive manner. When the decision ordering his compulsory psychiatric treatment became final and enforceable following the adoption of the appellate court's judgment of 28 April 2006, M.M. had already spent two months and twenty-five days in detention. Since he was sentenced to five months' imprisonment, it follows that his psychiatric treatment could only have lasted two months and five days before his release from prison. The Court considers that in such a short period M.M.'s psychiatric problems, in view of their gravity as established in the psychiatric examination carried out during the criminal proceedings against him, could hardly have been addressed at all.

56. Moreover, the Government have failed to show that the compulsory psychiatric treatment ordered in respect of M.M. during his prison term was actually and properly administered. The documents submitted show that the treatment of M.M. in prison consisted of conversational sessions with the prison staff, none of whom was a psychiatrist. Furthermore, the Government have failed to show that an individual programme for the execution of M.M.'s prison term was designed by the Varaždin prison governor as required under section 69 of the Enforcement of Prison Sentences Act. Such individual programme in respect of M.M. takes on additional importance in view of the fact that his prison term was combined with a measure as significant as compulsory psychiatric treatment ordered by the domestic courts in relation to the serious death threats he had made in order to help him develop the capacity to cope with difficult situations in life in a more constructive manner.

57. The Court notes further that the regulation concerning the enforcement of a measure of compulsory psychiatric treatment, namely the relevant provisions of the Enforcement of Prison Sentences Act, is of a very general nature. In the Court's view, the present case shows that these general rules do not properly address the issue of enforcement of obligatory psychiatric treatment as a security measure, thus leaving it completely to the discretion of the prison authorities to decide how to act. However, the Court considers that such regulations need to be sufficient in order to ensure that the purpose of criminal sanctions is properly satisfied. In the present case neither the regulation on the matter nor the court's judgment ordering M.M.'s compulsory psychiatric treatment provided sufficient details on the administration of this treatment

58. Since no adequate psychiatric treatment was provided to M.M. in the prison there was also no assessment of his condition immediately prior to his release from prison with a view to assessing the risk that, once at large, he might carry out his previous threats against the lives of M.T. and V.T. The Court finds such a failure particularly striking given that his threats had been taken seriously by the courts and that the prior psychiatric report

expressly stated that there was a strong likelihood that he might repeat the same or similar offences. In this connection the Court notes that the appellate court established in its judgment of 28 April 2006 that M.M. had not shown any self-criticism as regards his acts or any remorse for what he had said. Furthermore, the Court notes that M.M. said on several occasions that he had meant to kill M.T. and V.T. on the latter's first birthday which was on 1 March 2006. In view of the fact that M.M. spent that day in prison, a fresh assessment of the threat he posed to the lives of M.T. and V.T. appears to have been all the more necessary before his final release.

59. The Court also notes that the first instance court ordered a measure of compulsory psychiatric treatment against M.M. during his imprisonment and afterwards as necessary as recommended by the psychiatrist (see § 7 above). However, the appellate court reduced that measure to the duration of his prison term since under Croatian law there is no possibility of extending compulsory psychiatric treatment beyond a prison term for those in need of such treatment.

60. In view of the above the Court considers that no adequate measures were taken to diminish the likelihood of M.M. to carry out his threats upon his release from prison (see *Osman v. the United Kingdom*, cited above, § 116).

61. The facts of this case, as established above, are sufficient to enable the Court to find a violation of the substantive aspect of Article 2 of the Convention on account of failure of the relevant domestic authorities to take all necessary and reasonable steps in the circumstances of the present case to afford protection for the lives of M.T. and V.T.

b. Procedural aspect of Article 2 of the Convention

62. The Court reiterates that the obligation to protect life under Article 2 of the Convention requires that there should be some form of effective official investigation when individuals have been killed as a result of the use of force, either by State officials or private individuals (see, *mutatis mutandis*, *McCann and Others v. the United Kingdom*, cited above, § 161, and *Kaya*, cited above, p. 329, § 105). The essential purpose of such an investigation is to secure the effective implementation of the domestic laws which protect the right to life (see, *mutatis mutandis*, *Paul and Audrey Edwards*, cited above, § 69). The authorities must take the reasonable steps available to them to secure the evidence concerning the incident. Any deficiency in the investigation which undermines its ability to establish the cause of death, or identify the person or persons responsible, will risk falling foul of this standard. Whatever mode is employed, the authorities must act of their own motion once the matter has come to their attention (see, for example, *mutatis mutandis*, *Ilhan v. Turkey* [GC], no. 22277/93, ECHR 2000-VII, § 63).

63. In the present case it was clear from the beginning that the perpetrator of the acts in question was a private individual, M.M., and his responsibility in that respect has never been put into question. However, M.M. killed himself and therefore any further application of criminal law mechanisms in respect of him became futile.

64. It now remains to be established whether in the circumstances of the present case the State had a further positive obligation to investigate the criminal responsibility of any of the State officials involved. The Court firstly reiterates that although the right to have third parties prosecuted or sentenced for a criminal offence cannot be asserted independently (see *Perez v. France* [GC], no. 47287/99, § 70, ECHR 2004-I), the Court has stated on a number of occasions that an effective judicial system, as required by Article 2, may, and under certain circumstances must, include recourse to the criminal law. However, if the infringement of the right to life or to physical integrity is not caused intentionally, the positive obligation imposed by Article 2 to set up an effective judicial system does not necessarily require the provision of a criminal-law remedy in every case. The Court has already held that in the specific sphere of medical negligence, the obligation may for instance also be satisfied if the legal system affords victims a remedy in the civil courts, either alone or in conjunction with a remedy in the criminal courts, enabling any liability of the doctors concerned to be established and any appropriate civil redress, such as an order for damages and for the publication of the decision, to be obtained. Disciplinary measures may also be envisaged (see *Vo v. France* [GC], no. 53924/00, § 90, ECHR 2004-VIII; *Calvelli and Ciglio v. Italy* [GC], no. 32967/96, § 51, ECHR 2002-I; *Lazzarini and Ghiacci v. Italy* (dec.), no. 53749/00, 7 November 2002; *Mastromatteo v. Italy* [GC], no. 37703/97, § 90, ECHR 2002-VIII and *Tarariyeva v. Russia*, no. 4353/03, § 75, ECHR 2006-... (extracts)). The same should apply in respect of the possible responsibility of State officials for the deaths occurring as a result of their negligence. However, the applicants' complaint in respect of the substantive aspect of Article 2 of the Convention is not whether there was any individual responsibility of a State official on whatever grounds. The Court considers that the central complaint concentrates on the deficiencies of the national system for the protection of the lives of others from acts of dangerous criminals who have been identified as such by the relevant authorities and the treatment of such individuals, including the legal framework within which the competent authorities are to operate and the mechanisms provided for.

65. In view of the nature of the applicants' complaint under the substantive aspect of Article 2 of the Convention and the Court's finding in this respect which imply that the procedures involved were necessarily insufficient from the standpoint of the substantive aspect of Article 2, the Court considers that there is no need for it to examine separately the

applicants' complaint under the procedural aspect of Article 2 of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 13 OF THE CONVENTION

66. The applicants further complained that they had no effective remedy at their disposal in respect of their Article 2 complaints. They relied on Article 13 of the Convention, which reads as follows:

“Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.”

A. Admissibility

67. The Court finds that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. It further finds that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

68. The Government argued that the applicants could have requested a criminal investigation into the deaths of M.T. and V.T. and also brought a civil action for compensation against the State under sections 1100 and 1101 of the Civil Obligations Act.

69. In reply to the Government's observations, the applicants submitted that there had been no need for them to lodge a separate criminal complaint because the authorities had been aware of all the facts surrounding the deaths of M.T. and V.T. As to the civil remedy relied on by the Government, they argued that it was not accessible to them.

70. The Court notes at the outset that the applicant's complaint under Article 13 of the Convention is linked to their complaints under Article 2 of the Convention, which are twofold (see paragraph 29 above). The Court proceeds by examining these two aspects of the alleged violation of Article 13 separately.

71. As regards the applicant's complaint that they had no effective remedy in respect of their complaint concerning the procedural aspect of Article 2 of the Convention, the Court considers that in view of its findings in respect of that aspect of Article 2, no separate issue is left to be examined under Article 13 of the Convention.

72. As regards the applicant's complaint that they had no effective remedy in respect of their allegations concerning the substantive violation of Article 2 of the Convention, the Court finds that what the applicants

challenge is the whole system for the protection of the lives of persons from the acts of dangerous criminals, including the legal framework within which the competent national authorities are to operate. In the Court's view, these are more questions of general policing in the national system for the prevention of crimes and not issues which could be properly addressed in any particular proceedings before the ordinary courts. It is not for an ordinary court to say whether the regulatory standards in operation are right or not, but to decide individual cases by applying the existing laws.

73. In this connection the Court reiterates that Article 13 does not guarantee a remedy allowing a Contracting State's laws as such to be challenged before a national authority on the ground of being contrary to the Convention or equivalent domestic norms (see *James and Others v. the United Kingdom*, 21 February 1986, Series A no. 98, § 85 and *Leander v. Sweden*, 26 March 1987, Series A no. 116, § 77). In Croatia the Convention has been incorporated into the national legal system and the right to life is also guaranteed by the Constitution and there is a possibility of challenging the constitutionality of the laws before the Constitutional Court. However, the applicants' main complaint under the substantive aspect of Article 2 of the Convention is not that the existing laws and practices are unconstitutional but that they are deficient in view of the requirements of Article 2 of the Convention, a claim that cannot be challenged before the national courts, since it is for the legislators and politicians involved in devising general criminal policy to deal with such issues.

74. However, the role of an international court for the protection of human rights is quite different from that of the national courts and it is for the former to examine the existing standards for the protection of the lives of persons, including the legal framework of a given State. In these circumstances the Court considers that after having established the State's responsibility for the deaths of M.T. and V.T. by finding a violation of the substantive aspect of Article 2 of the Convention, no separate issue needs to be examined under Article 13 of the Convention.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

75. Article 41 of the Convention provides:

"If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

76. Each applicant claimed 60,000 euros (EUR) in respect of non-pecuniary damage.

77. The Government deemed the applicants' claim for just satisfaction unsubstantiated and unfounded.

78. The Court notes that it has found that the authorities, in relation to the death of the applicants' two close relatives breached the Convention. In these circumstances the Court considers that the applicants must have sustained non-pecuniary damage. Ruling on an equitable basis and having regard to the awards made in comparable cases, it awards the applicants EUR 40,000 jointly under that head, plus any tax that may be chargeable to them.

B. Costs and expenses

79. The applicants also claimed HRK 9,150 for the costs and expenses incurred before the Court.

80. The Government did not comment.

81. According to the Court's case-law, an applicant is entitled to reimbursement of his costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and were reasonable as to quantum. In the present case, regard being had to the information in its possession and the above criteria, the Court considers it reasonable to award the sum of EUR 1,300 for the proceedings before the Court, plus any tax that may be chargeable to the applicants.

C. Default interest

82. The Court considers it appropriate that the default interest should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Declares* the application admissible;
2. *Holds* that there has been a violation of Article 2 of the Convention in its substantive aspect, on account of the lack of appropriate steps to prevent the deaths of M.T. and V.T.;

3. *Holds* that there is no need to examine separately the complaint under the procedural aspect of Article 2 of the Convention;
4. *Holds* that there is no need to examine the complaint under Article 13 of the Convention;
5. *Holds*
 - (a) that the respondent State is to pay the applicants jointly, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts which are to be converted into the national currency of the respondent State at the rate applicable at the date of settlement:
 - (i) EUR 40,000 (forty thousand euros) in respect of non-pecuniary damage, plus any tax that may be chargeable to the applicants;
 - (ii) EUR 1,300 (one thousand three hundred euros) in respect of costs and expenses, plus any tax that may be chargeable to the applicants;
 - (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;
6. *Dismisses* the remainder of the applicants' claim for just satisfaction.

Done in English, and notified in writing on 15 January 2009, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Søren Nielsen
Registrar

Christos Rozakis
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the concurring opinion of Judge Nicolaou is annexed to this judgment.

CONCURRING OPINION OF JUDGE NICOLAOU

It seems to me that what was primarily and urgently required in the present case was effective police protection of the victims, mother and child. That is not to say that psychiatric help, together with social support measures, directed towards the perpetrator of the crimes, should not also have been tried in the search for a better solution to what was, obviously, a very difficult situation.

There is, of course, no way of knowing whether compulsory psychiatric treatment of “a predominantly psychotherapeutic approach”, as prescribed by expert appointed, would have been effective at least in preventing the loss of life. What, however, is important here is that the courts, both at first instance and on appeal, considered that it was necessary to make such order, described in the relevant law as a “security measure”. It must be assumed that the courts were aware of the regulatory framework in which the order would take effect, including possible difficulties in its enforcement due to the lack of detailed rules. They must, nonetheless, have expected compliance in the absence of which the order would have been devoid of meaning and purpose. There was, unfortunately, no real compliance. As is pointed out in paragraph 56 of the judgment, it has not been shown “that the compulsory psychiatric treatment ordered was actually and properly administered”.

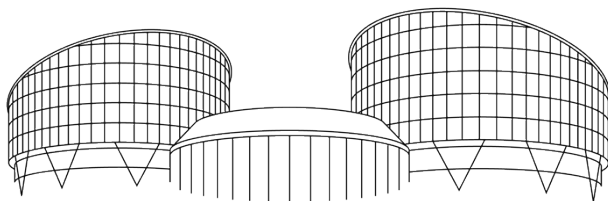
It would, undoubtedly, have been helpful to have had specific rules spelling out the practical steps for the enforcement of psychiatric treatment orders. But I find it difficult to accept that without such rules the order in question was, from its inception, ineffectual. The authorities have not explained convincingly that they did all that was possible to provide an environment in which the order would stand a chance of success. There is in fact no indication that specialist psychiatric help was made available to M.M. and neither is there any indication that efforts were made to enforce the order. It has been said that M.M. was himself reluctant to cooperate; but it should not be assumed that this would have persisted or that it would have prevailed if appropriate expert help, in the right context, had been forthcoming. Therefore, I am unable to subscribe to the view, expressed in paragraph 42 of the judgment, that “in any event the issue here is not a question of whether the authorities acted unlawfully or whether there was any individual responsibility of a State official on whatever grounds”.

In Croatia, under a rule established by domestic case-law, the fact that a person in authority is at fault, whether by act or omission, will not render the State vicariously liable for compensation unless it is shown “that there was an intent on the part of the authorities to cause damage to a third person

or acceptance of that outcome”. That restriction seems to me to be inconsistent with full State responsibility which must be regarded as an indispensable component in the protection of life under Article 2.

Having regard to the circumstances of the present case, the prospect of civil liability should not be associated with suppositions concerning what should have been the duration of sufficient treatment that would signal either success or failure. In the absence of actual experience, that could have been gained from properly administered treatment, no valid assessment was possible. Therefore, domestic provisions relating to length of treatment cannot here be directly relevant; a problem regarding duration would arise only where it was positively shown that a longer period of treatment was called for.

Finally and perhaps most importantly, it should have been apparent, if those responsible had carefully reflected on the situation, that the murder victims were, after M.M.’s release from prison, imperatively in need of police protection without which their lives remained in mortal danger. Sadly, nothing at all was done in that direction and, as it seems, no one has been held accountable in any way. In such circumstances individual fault should not be completely discounted by reason of imperfections in regulatory provisions concerning the enforcement of psychiatric treatment orders.



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

1959 · 50 · 2009

THIRD SECTION

CASE OF OPUZ v. TURKEY

(Application no. 33401/02)

JUDGMENT

STRASBOURG

9 June 2009

FINAL

09/09/2009

This judgment has become final under Article 44 § 2 of the Convention.

In the case of Opuz v. Turkey,

The European Court of Human Rights (Third Section), sitting as a Chamber composed of:

Josep Casadevall, *President*,

Elisabet Fura-Sandström,

Corneliu Bîrsan,

Alvina Gyulumyan,

Egbert Myjer,

Ineta Ziemele,

Işıl Karakaş, *judges*,

and Santiago Quesada, *Section Registrar*,

Having deliberated in private on 7 October 2008 and on 19 May 2009,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case originated in an application (no. 33401/02) against the Republic of Turkey lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by a Turkish national, Mrs Nahide Opuz (“the applicant”), on 15 July 2002.

2. The applicant was represented by Mr M. Beştaş, a lawyer practising in Diyarbakır. The Turkish Government (“the Government”) were represented by their Agent.

3. The applicant alleged, in particular, that the State authorities had failed to protect her and her mother from domestic violence, which had resulted in the death of her mother and her own ill-treatment.

4. On 28 November 2006 the Court decided to give notice of the application to the Government. Under the provisions of Article 29 § 3 of the Convention, it decided to examine the merits of the application at the same time as its admissibility.

5. Third-party comments were received from Interights, which had been given leave by the President to intervene in the procedure (Article 36 § 2 of the Convention and Rule 44 § 2 of the Rules of Court). The Government replied to those comments (Rule 44 § 5).

6. A hearing on the admissibility and merits of the case took place in public in the Human Rights Building, Strasbourg, on 7 October 2008 (Rule 59 § 3).

There appeared before the Court:

(a) *for the Government*

Ms D. AKÇAY,	<i>Co-Agent,</i>
Ms E. DEMİR,	
Ms Z. GÖKŞEN ACAR,	
Mr G. ŞEKER,	
Ms G. BÜKER,	
Ms E. ERCAN,	
Mr M. YARDIMCI,	<i>Advisers;</i>

(b) *for the applicant*

Mr M. BEŞTAŞ,	
Ms A. BAŞER,	<i>Lawyers;</i>

(c) *for the third-party intervener, Interights*

Ms A. COOMBER,	<i>Senior Lawyer,</i>
Ms D.I. STRAISTEANU,	<i>Lawyer.</i>

The Court heard addresses by Ms Akçay, Mr Beştaş and Ms Coomber.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

7. The applicant was born in 1972 and lives in Diyarbakır.

8. The applicant's mother married A.O. in a religious ceremony. In 1990 the applicant and H.O., A.O.'s son, started a relationship and began living together. They officially married on 12 November 1995. They had three children, in 1993, 1994 and 1996. The applicant and H.O. had heated arguments from the outset of their relationship. The facts set out below were not disputed by the Government.

A. The first assault by H.O. and A.O. against the applicant and her mother

9. On 10 April 1995 the applicant and her mother filed a complaint with the Diyarbakır Public Prosecutor's Office, alleging that H.O. and A.O had been asking them for money, and had beaten them and threatened to kill them. They also alleged that H.O. and his father wanted to bring other men home.

10. On the same day, the applicant and her mother were examined by a doctor. The applicant's medical report noted bruises on her body, an ecchymosis and swelling on her left eyebrow and fingernail scratches on the neck area. The medical report on the applicant's mother also noted bruises and swellings on her body. On 20 April 1995 definitive reports were issued, which confirmed the findings of the first report and stated that the injuries in question were sufficient to render both the applicant and her mother unfit to work for five days.

11. On 25 April 1995 the public prosecutor lodged indictments against H.O. and A.O. for death threats and actual bodily harm. On 15 June 1995 the Diyarbakır First Magistrate's Court discontinued the assault case, as the applicant and her mother had withdrawn their complaints and had thereby removed the basis for the proceedings under Article 456 § 4 of the Criminal Code.

12. On 11 September 1995 the Diyarbakır Second Magistrate's Court also acquitted the defendants of making death threats on account of the lack of evidence, and again discontinued the assault case, noting that it had been previously heard by the Diyarbakır First Magistrate's Court.

B. The second assault by H.O. against the applicant

13. On 11 April 1996, during an argument, H.O. beat the applicant very badly. The medical report drawn up on that occasion recorded surface bleeding on the applicant's right eye, bleeding on her right ear, an ecchymosis on her left shoulder and back pain. The report concluded that the applicant's injuries were sufficient to endanger her life. On the same day, at the request of the public prosecutor and by a decision of a single judge, H.O. was remanded in custody.

14. On 12 April 1996 the public prosecutor filed a bill of indictment with the Diyarbakır Criminal Court, accusing H.O. of aggravated bodily harm under Articles 456 § 2 and 457 § 1 of the Criminal Code.

15. On 15 April 1996 H.O. filed a petition with the Presidency of the First Magistrate's Court, requesting his release pending trial. He explained that during an argument with his wife he had become angry and had slapped his wife two or three times. Then his mother-in-law, who worked at a hospital, had obtained a medical report for his wife and that report had led to his detention for no reason. He stated that he did not want to lose his family and business and that he regretted beating his wife.

16. On 16 April 1996 the Second Magistrate's Court dismissed H.O.'s request for release pending trial and decided that his pre-trial detention should be continued.

17. At the hearing on 14 May 1996, the applicant repeated her complaint. The public prosecutor requested that H.O. be released pending

trial, considering the nature of the offence and the fact that the applicant had regained full health. Consequently, the court released H.O.

18. At a hearing of 13 June 1996, the applicant withdrew her complaint, stating that she and her husband had made their peace.

19. On 18 July 1996 the court found that the offence fell under Article 456 § 4 of the Criminal Code, for which the applicant's complaint was required in order to pursue the proceedings. It accordingly discontinued the case on the ground that the applicant had withdrawn her complaint.

C. The third assault by H.O. against the applicant and her mother

20. On 5 February 1998 the applicant, her mother, her sister and H.O. had a fight, in the course of which H.O. pulled a knife on the applicant. H.O., the applicant and her mother sustained injuries. The medical reports certified injuries which rendered them unfit to work for seven, three and five days respectively.

21. On 6 March 1998 the public prosecutor decided not to prosecute anyone in respect of this incident. He concluded that there was insufficient evidence to prosecute H.O. in connection with the knife assault, and that the other offences such as battery and damage to property could be the subject of civil lawsuits. There was thus no public interest in pursuing the case.

22. The applicant went to stay with her mother.

D. The fourth assault by H.O. against the applicant and her mother: threats and assault (using a car) leading to initiation of divorce proceedings

23. On 4 March 1998 H.O. ran a car into the applicant and her mother. The applicant's mother was found to be suffering from life-threatening injuries. At the police station, H.O. maintained that the incident had been an accident. He had only wished to give the applicant and her mother a lift, which they had refused before they continued walking. They had then thrown themselves in front of the car. The applicant's mother alleged that H.O. had told them to get into his car and that he would kill them if they refused. Since they did not want to get into the car and had started running away, H.O. had driven his car into the applicant, who had fallen. While the applicant's mother tried to help her daughter, H.O. reversed and then drove forward, this time into the mother. The applicant's mother regained consciousness in hospital. In her statements to the police the applicant confirmed her mother's statements and alleged that her husband had tried to kill them with his car.

24. On 5 March 1998 a single judge at the Diyarbakır Magistrate's Court remanded H.O. in custody.

25. On 19 March 1998 the public prosecutor initiated criminal proceedings against H.O. in the Diyarbakır Third Criminal Court for making death threats and inflicting grievous bodily harm. On the same day the Forensic Medicine Institute submitted a medical report which noted grazes on the applicant's knees. The report concluded that the applicant's injuries rendered her unfit to work for five days.

26. On 20 March 1998 the applicant brought divorce proceedings against H.O. on the grounds that they had intense disagreements, that he was evading his responsibilities as a husband and a father, that he was mistreating her (as proved by medical reports), and that he was bringing other women to their home. The applicant submits that she later dropped the divorce case due to threats and pressure from her husband.

27. On 2 April 1998 the applicant and her mother filed a petition with the Diyarbakır Chief Public Prosecutor's Office, asking for protective measures from the authorities subsequent to the death threats issued by H.O. and his father.

28. On 2 and 3 April 1998 police officers took statements from the applicant, her mother, her brother and the latter's wife as well as H.O. and his father. The applicant and her mother stated that H.O. had attempted to kill them with his car and that he had threatened to kill them if the applicant did not return to H.O. They noted that the applicant had already commenced divorce proceedings and that she did not want to return to live with H.O. The applicant's brother and his wife alleged that the applicant was discouraged by her mother from going back to her husband and that they knew nothing about the threats issued by H.O. and his father. H.O. contended that his only intention was to bring his family together, but that his mother-in-law was preventing this. He also alleged that he had gone to the applicant's brother and family elders for help, but to no avail. He maintained that he had never threatened the applicant or her mother and that their allegations were slanderous. H.O.'s father maintained that the applicant's mother wanted her daughter to divorce H.O. and to marry somebody else.

29. In a report dated 3 April 1998, the Director of the Law and Order Department of the Diyarbakır Security Directorate informed the Chief Public Prosecutor's Office of the outcome of the investigation into the allegations made by the applicant and her mother. He concluded that the applicant had left her husband and gone to live with her mother. H.O.'s repeated requests for the return of his wife had been turned down by the applicant's mother and the latter had insulted H.O. and made allegations that H.O. had issued death threats against her. H.O. had spent twenty-five days in prison for running a car into his mother-in-law and, following his release, had asked a number of mediators to convince his wife to return home. However, the mother did not allow the applicant to go back to H.O. Both parties had issued threats against each other. Furthermore, the mother

had wished to separate her daughter from H.O. in order to take revenge on her ex-husband, had constantly made slanderous allegations and had also “wasted” the security forces’ time.

30. On 14 April 1998 the Diyarbakır Chief Public Prosecutor indicted H.O. and his father A.O. and charged them with issuing death threats against the applicant and her mother, contrary to Article 188 § 1 of the Criminal Code.

31. On 30 April 1998 the Diyarbakır Criminal Court released H.O. pending trial. It further declared that it had no jurisdiction over the case and sent the file to the Diyarbakır Assize Court.

32. On 11 May 1998 the Assize Court classified the offence as attempted murder. During the hearing of 9 July 1998, H.O. repeated that the incident had been an accident; the car door was open, and had accidentally hit the complainants when he moved the car. The applicant and her mother confirmed H.O.’s statement and maintained that they no longer wished to continue the proceedings.

33. On 23 June 1998 the Diyarbakır Assize Court acquitted H.O. and his father of the charges of issuing death threats, for lack of sufficient evidence. The court noted that the accused had denied the allegations and the complainants had withdrawn their complaints. The applicant again resumed living with H.O.

34. On 9 July 1998 the applicant’s mother was given another medical examination, which found that her injuries were not life-threatening but were sufficient to render her unfit for work for twenty-five days.

35. At the hearing of 8 October 1998 the applicant and her mother withdrew their complaints. They stated that the car door had been open and that H.O. had accidentally hit them. When questioned about their complaints against H.O., the applicant and her mother stated that they had had a fight with H.O. and that they had made those allegations in anger.

36. On 17 November 1998 the Diyarbakır Assize Court concluded that the case should be discontinued in respect of the offence against the applicant, as she had withdrawn her complaint. However, it decided that, although the applicant’s mother had also withdrawn her complaint, H.O. should still be convicted of that offence, since the injuries were more serious. Subsequently, the court sentenced H.O. to three months’ imprisonment and a fine; the sentence of imprisonment was later commuted to a fine.

E. The fifth assault by H.O. against the applicant: causing grievous bodily harm

37. On 29 October 2001 the applicant went to visit her mother. Later that day H.O. telephoned and asked the applicant to return home. The applicant, worried that her husband would again be violent towards her, said

to her mother “this man is going to tear me to pieces!” The applicant’s mother encouraged the applicant to return home with the children. Three-quarters of an hour later one of the children went back, saying that his father had stabbed and killed his mother. The applicant’s mother rushed to the applicant’s house. She saw that the applicant was lying on the floor bleeding. With the help of neighbours, she put the applicant into a taxi and took her to the Diyarbakır State Hospital. The hospital authorities told her that the applicant’s condition was serious and transferred her to the Dicle University Hospital, which was better equipped. The medical report on the applicant noted seven knife injuries on different parts of her body. However, the injuries were not classified as life-threatening.

38. At about 11.30 p.m. on the same day, H.O. handed himself in at a police station. The police confiscated the knife which he had used during the incident. H.O. maintained that his wife and children were still not at home when he came back at 6 p.m. He had telephoned them and asked them to come back. On their return, he asked the applicant, “Why are you wandering outside? Why haven’t you cooked anything for me?” The applicant replied, “We ate at my mother’s”, and brought him a plate of fruit. They continued arguing. He told her, “Why are you going to your mother so often? Don’t go there so much, stay at home and look after the children!” The argument escalated. At some point, the applicant attacked him with a fork. They started fighting, during which he lost control, grabbed the fruit knife and stabbed her; he did not remember how many times. He claimed that his wife was bigger than him, so he had to respond when she attacked him. He added that his wife was not a bad person and that they had lived together peacefully until two years previously. However, they started fighting when the applicant’s mother began interfering with their marriage. He stated that he regretted what he had done. H.O. was released after his statement had been taken.

39. On 31 October 2001 the applicant’s mother’s lawyer petitioned the Diyarbakır Public Prosecutor’s Office. In her petition, she stated that the applicant’s mother had told her that H.O. had beaten her daughter very badly about five years earlier, after which he was arrested and detained. However, he was released at the first hearing. She maintained that her client and the applicant had been obliged to withdraw their complaints due to continuing death threats and pressure from H.O. She further stated that there was hearsay about H.O. being involved in trafficking women. Finally, she referred to the incident of 4 March 1998 (see paragraph 23 above), arguing that, following such a serious incident, H.O.’s release was morally damaging and requested that he be detained on remand.

40. On 2 November 2001 the applicant’s lawyer filed an objection with the Chief Public Prosecutor’s Office against the medical report of the Dicle Medical Faculty Hospital, which had concluded that the applicant’s injuries were not life-threatening. The lawyer requested a new medical examination.

41. On 9 November 2001 the applicant filed a petition with the Diyarbakır Chief Public Prosecutor's Office, complaining that she had been stabbed many times by H.O. subsequent to an argument with him. She asked the public prosecutor to send her to the Forensic Institute for a new medical examination.

42. On 8 November 2001 the applicant underwent a new medical examination at the Forensic Institute in Diyarbakır on the instructions of the public prosecutor. The forensic medical doctor noted the presence of wounds caused by a knife on the left-hand wrist (3 cm long), on the left hip (5 cm deep), another 2 cm-deep wound on the left hip and a wound just above the left knee. He opined that these injuries were not life-threatening but would render the applicant unfit for work for seven days.

43. On 12 December 2001 the public prosecutor filed a bill of indictment with the Diyarbakır Magistrate's Court, charging H.O. with knife assault under Articles 456 § 4 and 457 § 1 of the Criminal Code.

44. By a criminal decree of 23 May 2002, the Diyarbakır Second Magistrate's Court imposed a fine of 839,957,040 Turkish liras (TRL) on H.O. for the knife assault on the applicant. It decided that he could pay this fine in eight instalments.

F. The sixth incident whereby H.O. threatened the applicant

45. On 14 November 2001 the applicant lodged a criminal complaint with the Diyarbakır Public Prosecutor's Office, alleging that H.O. had been threatening her.

46. On 11 March 2002 the public prosecutor decided that there was no concrete evidence to prosecute H.O. apart from the allegations made by the applicant.

G. The applicant's mother filed a complaint with the public prosecutor's office alleging death threats issued by H.O. and A.O.

47. On 19 November 2001 the applicant's mother filed a complaint with the public prosecutor. In her petition, she stated that H.O., A.O. and their relatives had been consistently threatening her and her daughter. In particular, H.O. told her, "I am going to kill you, your children and all of your family!" He was also harassing her and invading her privacy by wandering around her property carrying knives and guns. She maintained that H.O. was to be held liable should an incident occur involving her and her family. She also referred to the events of 29 October 2001, when the applicant was stabbed by him (see paragraph 37 above). In response to this petition, on 22 November 2002, the public prosecutor wrote a letter to the Security Directorate in Diyarbakır and asked them to take statements from the complainant and H.O. and to submit an investigation report to his office.

48. In the meantime, on 14 December 2001 the applicant again initiated divorce proceedings in the Diyarbakır Civil Court.

49. On 23 December 2001 the police took statements from H.O. in relation to the applicant's mother's allegations. He denied the allegations against him and claimed that his mother-in-law, who had been interfering with his marriage and influencing his wife to lead an immoral life, had issued threats against him. The police took further statements from the applicant's mother on 5 January 2002. She claimed that H.O. had been coming to her doorstep every day, showing a knife or shotgun and threatening to kill her, her daughter and her grandchildren.

50. On 10 January 2002 H.O. was charged under Article 191 § 1 of the Criminal Code with making death threats.

51. On 27 February 2002 the applicant's mother submitted a further petition to the Diyarbakır Public Prosecutor's Office. She maintained that H.O.'s threats had intensified. H.O., together with his friends, had been harassing her, threatening her and swearing at her on the telephone. She stated that her life was in immediate danger and requested that the police tap her telephone and take action against H.O. On the same day, the public prosecutor instructed the Directorate of Turkish Telecom in Diyarbakır to submit to his office a list of all the numbers which would call the applicant's mother's telephone line over the following month. In the absence of any response, the public prosecutor repeated his request on 3 April 2002.

52. On 16 April 2002 the Diyarbakır Magistrate's Court questioned H.O. in relation to his knife assault on his mother-in-law. He repeated the statement he had made to the police, adding that he did not wish his wife to visit her mother, as the mother had been pursuing an immoral life.

H. The killing of the applicant's mother by H.O.

53. The applicant had been living with her mother since the incident of 29 October 2001.

54. On an unspecified date the applicant's mother made arrangements with a removal company to move her furniture to İzmir. H.O. learned of this and allegedly said, "Wherever you go, I will find and kill you!". Despite the threats, on 11 March 2002 the furniture was loaded onto the removal company's pick-up truck. The pick-up truck made two trips between the company's transfer centre and the house. On its third trip, the applicant's mother asked the driver whether she could drive with him to the transfer centre. She sat on the front seat, next to the driver. On their way, a taxi pulled up in front of the truck and started signalling. The pick-up driver, thinking that the taxi driver was going to ask for an address, stopped. H.O. got out of the taxi. He opened the front door where the applicant's mother

was sitting, shouted something like, “Where are you taking the furniture?” and shot her. The applicant’s mother died instantly.

I. The criminal proceedings against H.O.

55. On 13 March 2002 the Diyarbakır Public Prosecutor filed an indictment with the Diyarbakır Assize Court, accusing H.O. of intentional murder under Article 449 § 1 of the Criminal Code.

56. In his statements to the police, the public prosecutor and the court, H.O. claimed that he had killed the applicant’s mother because she had induced his wife to lead an immoral life, like her own, and had encouraged his wife to leave him, taking their children with her. He further alleged that on the day of the incident, when he asked the deceased where she was taking the furniture and where his wife was, the deceased had replied “F... off, I will take away your wife, and sell [her]”. He stated that he had lost his temper and had shot her for the sake of his honour and children.

57. In a final judgment dated 26 March 2008, the Diyarbakır Assize Court convicted H.O. of murder and illegal possession of a firearm. It sentenced him to life imprisonment. However, taking into account the fact that the accused had committed the offence as a result of provocation by the deceased and his good conduct during the trial, the court mitigated the original sentence, changing it to fifteen years and ten months’ imprisonment and a fine of 180 Turkish liras (TRY). In view of the time spent by the convict in pre-trial detention and the fact that the judgment would be examined on appeal, the court ordered the release of H.O.

58. The appeal proceedings are still pending before the Court of Cassation.

J. Recent developments following the release of H.O.

59. In a petition dated 15 April 2008, the applicant filed a criminal complaint with the Kemalpaşa Chief Public Prosecutor’s Office in İzmir, for submission to the Diyarbakır Chief Public Prosecutor’s Office, and asked the authorities to take measures to protect her life. She noted that her ex-husband¹, H.O., had been released from prison and that in early April he had gone to see her boyfriend M.M., who worked at a construction site in Diyarbakır, and had asked him about her whereabouts. Since M.M. refused to tell him her address, H.O. threatened him and told him that he would kill him and the applicant. The applicant claimed that H.O. had already killed her mother and that he would not hesitate to kill her. She had been changing her address constantly so that H.O. could not find her. Finally, she asked the

1. On an unspecified date subsequent to the killing of her mother, the applicant obtained a divorce from her husband.

prosecuting authorities to keep her address, indicated on the petition, and her boyfriend's name confidential and to hold H.O. responsible if anything untoward happened to her or her relatives.

60. On 14 May 2008 the applicant's representative informed the Court that the applicant's husband had been released from prison and that he had again started issuing threats against the applicant. She complained that no measures had been taken despite the applicant's request. She therefore asked the Court to request the Government to provide sufficient protection.

61. In a letter dated 16 May 2008, the Registry transmitted the applicant's request to the Government for comments and invited them to inform the Court of the measures to be taken by their authorities.

62. On 26 May 2008 the Director of the International Law and Relations Department attached to the Ministry of Justice faxed a letter to the Diyarbakır Chief Public Prosecutor's Office in relation to the applicant's complaints to the European Court of Human Rights. He informed the Chief Public Prosecutor's Office of the applicant's pending application before the Court and asked them to provide information on the current state of execution of H.O.'s sentence, the state of proceedings with regard to the applicant's criminal complaint filed with the Kemalpaşa Chief Public Prosecutor's Office in İzmir and the measures taken to protect the applicant's life.

63. On the same day, a public prosecutor from the Diyarbakır Chief Public Prosecutor's Office wrote to the Diyarbakır Governor's Office and asked him to take measures for the protection of the applicant.

64. By a letter of 28 May 2008 from the Diyarbakır Chief Public Prosecutor's Office to the Şehitler Central Police Directorate in Diyarbakır, the Public Prosecutor (A.E.) asked the police to summon H.O. to his office in relation to an investigation.

65. On 29 May 2008 A.E. questioned H.O. in relation to the criminal complaint filed by the applicant. H.O. denied the allegation that he had issued threats against the applicant and claimed that she had made such allegations in order to disturb him following his release from prison. He maintained that he did not feel any enmity towards the applicant and that he had devoted himself to his family and children.

66. On 3 June 2008 A.E. took statements from the applicant's boyfriend, M.M. The latter stated that H.O. had called him and asked him for the applicant's address, and had told him that he would kill her. M.M. did not meet H.O. Nor did he file a criminal complaint against H.O. He had, however, called the applicant and informed her about the threats issued by H.O.

67. In a letter dated 20 June 2008, the Government informed the Court that the applicant's husband had not yet served his sentence but that he had been released pending the appeal proceedings in order to avoid exceeding the permissible limit of pre-trial detention. They also stated that the local

governor's office and the Chief Public Prosecutor's Office had been informed about the applicant's complaint and that they had been instructed to take precautions for the protection of the applicant.

68. Finally, on 14 November 2008 the applicant's legal representative informed the Court that his client's life was in immediate danger since the authorities had still not taken any measures to protect her from her former husband. The Registry of the Court transmitted this letter on the same day to the Government, inviting them to provide information about the measures they had taken to protect the applicant.

69. On 21 November 2008 the Government informed the Court that the police authorities had taken specific measures to protect the applicant from her former husband. In particular, the photograph and fingerprints of the applicant's husband had been distributed to police stations in the region so that they could arrest him if he appeared near the applicant's place of residence. The police questioned the applicant in relation to the allegations. She stated that she had not been threatened by her husband over the past month and a half.

II. RELEVANT LAW AND PRACTICE

A. Domestic law and practice

70. The relevant domestic law provisions relied on by the judicial authorities in the instant case are set out below.

1. The Criminal Code

Article 188

“Whoever by use of force or threats compels another person to do or not to do something or to obtain the latter's permission to do something ... will be sentenced to between six months' and one year's imprisonment, and a major fine of between one thousand and three thousand liras ...”

Article 191 § 1

“Whoever, apart from the situations set out in law, threatens another person with severe and unjust damage will be sentenced to six months' imprisonment.”

Article 449

“If the act of homicide is:

(a) committed against a wife, husband, sister or brother, adoptive mother, adopted child, stepmother, stepfather, stepchild, father-in-law, mother-in-law, son-in-law, or daughter-in-law ... the offender will be sentenced to life imprisonment ...”

Article 456 §§ 1, 2 and 4

“Whoever torments another person physically or damages his or her welfare or causes cerebral damage, without intending murder, will be sentenced to between six months’ and one year’s imprisonment.

Where the act constitutes a danger to the victim’s life or causes constant weakness in one of the organs or senses, or permanent difficulty in speech or permanent injuries to the face, or physical or mental illness for twenty or more days, or prevents [the victim] from continuing his regular work for the same number of days, the offender will be sentenced to between two and five years’ imprisonment.

...

If the act did not cause any illness or did not prevent [the victim] from continuing his regular work or these situations did not last for more than ten days, the offender will be sentenced to between two and six months’ imprisonment or to a heavy fine of twelve thousand to one hundred and fifty thousand liras, provided that the injured person complains ...”

Article 457

“If the acts mentioned in Article 456 are committed against the persons cited in Article 449 or if the act is committed by a hidden or visible weapon or harmful chemical, the punishment shall be increased by one-third to a half of the main sentence.”

Article 460

“In situations mentioned under Articles 456 and 459, where commencement of the prosecution depends on the lodging of a complaint [by the victim], if the complainant waives his/her claims before the pronouncement of the final judgment the public prosecution shall be terminated.”

2. The Family Protection Act (Law no. 4320 of 14 January 1998)

Section 1

“If a spouse or a child or another family member living under the same roof is subjected to domestic violence and if the magistrate’s court dealing with civil matters is notified of the fact by that person or by the Chief Public Prosecutor’s Office, the judge, taking account of the nature of the incident, may on his or her own initiative

order one or more of the following measures or other similar measures as he or she deems appropriate. The offending spouse may be ordered:

- (a) not to engage in violent or threatening behaviour against the other spouse or the children (or other family members living under the same roof);
- (b) to leave the shared home and relinquish it to the other spouse and the children, if any, and not to approach the home in which the other spouse and the children are living, or their workplaces;
- (c) not to damage the property of the other spouse (or of the children or other family members living under the same roof);
- (d) not to disturb the other spouse or the children (or other family members living under the same roof) through the use of communication devices;
- (e) to surrender any weapons or similar instruments to law-enforcement officials;
- (f) not to arrive at the shared home when under the influence of alcohol or other intoxicating substances, or not to use such substances in the shared home.

The above-mentioned measures shall be applied for a period not exceeding six months. In the order, the offending spouse shall be warned that in the event of failure to comply with the measures imposed, he or she will be arrested and sentenced to a term of imprisonment. The judge may order interim maintenance payments, taking account of the victim's standard of living.

Applications made under section 1 shall not be subject to court fees."

Section 2

"The court shall transmit a copy of the protection order to the Chief Public Prosecutor's Office. The Chief Public Prosecutor's Office shall monitor implementation of the order by means of the law-enforcement agencies.

In the event of failure to comply with the protection order, the law-enforcement agency shall conduct an investigation on its own initiative, without the victim being required to lodge a complaint, and shall transmit the documents to the Chief Public Prosecutor's Office without delay.

The Chief Public Prosecutor's Office shall bring a public prosecution in the magistrate's court against a spouse who fails to comply with a protection order. The location and expeditious holding of the hearing in the case shall be subject to the provisions of Law no. 3005 on the procedure governing *in flagrante delicto* cases.

Even if the act in question constitutes a separate offence, a spouse who fails to comply with a protection order shall also be sentenced to three to six months' imprisonment."

3. Implementing regulations for the Family Protection Act, dated 1 March 2008

71. These regulations, which were drawn up to govern the implementation of Law no. 4320, set out the measures to be taken in respect of the family members perpetrating violence and the procedures and principles governing the application of those measures, in order to protect family members subjected to domestic violence.

B. Relevant international and comparative-law materials

1. The United Nations' position with regard to domestic violence and discrimination against women

72. The Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) was adopted in 1979 by the United Nations General Assembly and ratified by Turkey on 19 January 1986.

73. The CEDAW defines discrimination against women as “... any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.” As regards the States’ obligations, Article 2 of the CEDAW provides, in so far as relevant, the following:

“States Parties condemn discrimination against women in all its forms, agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women and, to this end, undertake:

...

(e) to take all appropriate measures to eliminate discrimination against women by any person, organisation or enterprise;

(f) to take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women;

...”

74. The Committee on the Elimination of All Forms of Discrimination Against Women (hereinafter “the CEDAW Committee”) has found that “gender-based violence is a form of discrimination that seriously inhibits women’s ability to enjoy rights and freedoms on a basis of equality with men” and is thus prohibited under Article 1 of the CEDAW. Within the general category of gender-based violence, the CEDAW Committee

includes violence by “private act”¹ and “family violence”². Consequently, gender-based violence triggers duties in States. General Recommendation No. 19 sets out a catalogue of such duties. They include a duty on States to “take all legal and other measures that are necessary to provide effective protection of women against gender-based violence”³, “including penal sanctions, civil remedies and compensatory provisions to protect women against all kinds of violence”⁴. In its Concluding Comments on the combined fourth and fifth periodic report of Turkey (hereinafter “the Concluding Comments”), the CEDAW Committee reiterated that violence against women, including domestic violence, is a form of discrimination (see UN doc. CEDAW/C/TUR/4-5 and Corr.1, 15 February 2005, § 28).

75. Furthermore, in its explanations of General Recommendation No. 19, the CEDAW Committee considered the following:

“... 6. The Convention in Article 1 defines discrimination against women. The definition of discrimination includes gender-based violence, that is, violence that is directed against a woman because she is a woman or that affects women disproportionately. It includes acts that inflict physical, mental or sexual harm or suffering, threats of such acts, coercion and other deprivations of liberty. Gender-based violence may breach specific provisions of the Convention, regardless of whether those provisions expressly mention violence.

7. Gender-based violence, which impairs or nullifies the enjoyment by women of human rights and fundamental freedoms under general international law or under human rights conventions, is discrimination within the meaning of Article 1 of the Convention.

Comments on specific Articles of the Convention

...

Articles 2 (f), 5 and 10 (c)

11. Traditional attitudes by which women are regarded as subordinate to men or as having stereotyped roles perpetuate widespread practices involving violence or coercion, such as family violence and abuse, forced marriage, dowry deaths, acid attacks and female circumcision. Such prejudices and practices may justify gender-based violence as a form of protection or control of women. The effect of such violence on the physical and mental integrity of women is to deprive them the equal enjoyment, exercise and knowledge of human rights and fundamental freedoms. While this comment addresses mainly actual or threatened violence the underlying consequences of these forms of gender-based violence help to maintain women in

1. See the CEDAW Committee’s General Recommendation No. 19 on violence against women, (1992) UN doc. CEDAW/C/1992/L.1/Add.15 at § 24 (a).

2. Ibid., at § 24 (b); see also § 24 (r).

3. Ibid., at § 24 (t).

4. Ibid., at § 24 (t) (i); see also § 24 (r) on measures necessary to overcome family violence.

subordinate roles and contribute to the low level of political participation and to their lower level of education, skills and work opportunities.”

76. In the case of *A.T. v. Hungary* (decision of 26 January 2005), where the applicant had alleged that her common-law husband and father of her two children had been physically abusing and threatening her from 1998 onwards, the CEDAW Committee directed Hungary to take measures “to guarantee the physical and mental integrity of the applicant and her family”, as well as to ensure that she was provided with a safe place of residence to live with her children, and that she received child support, legal assistance and compensation in proportion to the harm sustained and the violation of her rights. The Committee also made several general recommendations to Hungary on improving the protection of women against domestic violence, such as establishing effective investigative, legal and judicial processes, and increasing treatment and support resources.

77. In the case of *Fatma Yıldırım v. Austria* (decision of 1 October 2007), which concerned the killing of Mrs Yıldırım by her husband, the CEDAW Committee found that the State Party had breached its due diligence obligation to protect Fatma Yıldırım. It therefore concluded that the State Party had violated its obligations under Article 2 (a) and (c) to (f), and Article 3 of the CEDAW read in conjunction with Article 1 of the CEDAW and General Recommendation No. 19 of the CEDAW Committee and the corresponding rights of the deceased Fatma Yıldırım to life and to physical and mental integrity.

78. The United Nations General Assembly Declaration on the Elimination of Violence against Women (1993), in its Article 4 (c), urges States to “exercise due diligence to prevent, investigate and, in accordance with national legislation, punish acts of violence against women, whether those acts are perpetrated by the State or private persons”.

79. In his third report, of 20 January 2006, to the Commission on Human Rights of the United Nations Economic and Social Council (E/CN.4/2006/61), the special rapporteur on violence against women considered that there is a rule of customary international law that “obliges States to prevent and respond to acts of violence against women with due diligence”.

2. *The Council of Europe*

80. In its Recommendation Rec(2002)5 of 30 April 2002 on the protection of women against violence, the Committee of Ministers of the Council of Europe stated, *inter alia*, that member States should introduce, develop and/or improve where necessary national policies against violence based on maximum safety and protection of victims, support and assistance, adjustment of the criminal and civil law, raising of public awareness, training for professionals confronted with violence against women, and prevention.

81. The Committee of Ministers recommended, in particular, that member States should penalise serious violence against women such as sexual violence and rape, abuse of the vulnerability of pregnant, defenceless, ill, disabled or dependent victims, as well as penalising abuse of position by the perpetrator. The Recommendation also stated that member States should ensure that all victims of violence are able to institute proceedings, make provisions to ensure that criminal proceedings can be initiated by the public prosecutor, encourage prosecutors to regard violence against women as an aggravating or decisive factor in deciding whether or not to prosecute in the public interest, ensure where necessary that measures are taken to protect victims effectively against threats and possible acts of revenge and take specific measures to ensure that children's rights are protected during proceedings.

82. With regard to violence within the family, the Committee of Ministers recommended that member States should classify all forms of violence within the family as criminal offences and envisage the possibility of taking measures in order, *inter alia*, to enable the judiciary to adopt interim measures aimed at protecting victims, to ban the perpetrator from contacting, communicating with or approaching the victim, or residing in or entering defined areas, to penalise all breaches of the measures imposed on the perpetrator and to establish a compulsory protocol for operation by the police, medical and social services.

3. The Inter-American System

83. In *Velazquez-Rodriguez v. Honduras*, the Inter-American Court of Human Rights stated:

“An illegal act which violates human rights and which is initially not directly imputable to a State (for example, because it is the act of a private person or because the person responsible has not been identified) can lead to international responsibility of the State, not because of an act itself, but because of the lack of due diligence to prevent the violation or to respond to it as required by the Convention.”¹

84. The legal basis for the ultimate attribution of responsibility to a State for private acts relies on State failure to comply with the duty to ensure human rights protection, as set out in Article 1 § 1 of the American Convention on Human Rights². The Inter-American Court's case-law

1. Judgment of 29 July 1988, Inter-Am. Ct. H.R. (ser. C) No. 4, § 172.

2. Signed at the Inter-American Specialised Conference on Human Rights, San Jose, Costa Rica, 22 November 1969. Article 1 provides as follows: “1. The States Parties to this Convention undertake to respect the rights and freedoms recognised herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, colour, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition. 2. For the purposes of this Convention, ‘person’ means every human being.”

reflects this principle by repeatedly holding States internationally responsible on account of their lack of due diligence to prevent human rights violations, to investigate and sanction perpetrators or to provide appropriate reparations to their families.

85. The Inter-American Convention on the Prevention, Punishment and Eradication of Violence Against Women 1994 (the Belém do Pará Convention)¹ sets out States' duties relating to the eradication of gender-based violence. It is the only multilateral human rights treaty to deal solely with violence against women.

86. The Inter-American Commission adopts the Inter-American Court of Human Rights' approach to the attribution of State responsibility for the acts and omissions of private individuals. In the case of *Maria Da Penha v. Brazil*², the Commission found that the State's failure to exercise due diligence to prevent and investigate a domestic violence complaint warranted a finding of State responsibility under the American Convention on Human Rights and the Belém do Pará Convention. Furthermore, Brazil had violated the rights of the applicant and failed to carry out its duty (*inter alia*, under Article 7 of the Belém do Pará Convention, obliging States to condemn all forms of violence against women), as a result of its failure to act and its tolerance of the violence inflicted. Specifically, the Commission held that:

“... tolerance by the State organs is not limited to this case; rather, it is a pattern. The condoning of this situation by the entire system only serves to perpetuate the psychological, social, and historical roots and factors that sustain and encourage violence against women.

Given the fact that the violence suffered by Maria da Penha is part of a general pattern of negligence and lack of effective action by the State in prosecuting and convicting aggressors, it is the view of the Commission that this case involves not only failure to fulfil the obligation with respect to prosecute and convict, but also the obligation to prevent these degrading practices. That general and discriminatory judicial ineffectiveness also creates a climate that is conducive to domestic violence, since society sees no evidence of willingness by the State, as the representative of the society, to take effective action to sanction such acts.”³

4. Comparative-law materials

87. In eleven member States of the Council of Europe, namely in Albania, Austria, Bosnia and Herzegovina, Estonia, Greece, Italy, Poland, Portugal, San Marino, Spain and Switzerland, the authorities are required to continue criminal proceedings despite the victim's withdrawal of complaint in cases of domestic violence.

1. Adopted by the Organisation of American States and came into force on 5 March 1995.

2. Case 12.051, 16 April 2001, Report No. 54/01, Inter-Am. C.H.R., Annual Report 2000, OEA/Ser.L/V/II.111 Doc. 20 rev. (2000).

3. Ibid., §§ 55 and 56.

88. In twenty-seven member States, namely in Andorra, Armenia, Azerbaijan, Belgium, Bulgaria, Cyprus, the Czech Republic, Denmark, England and Wales, Finland, “the former Yugoslav Republic of Macedonia”, France, Georgia, Germany, Hungary, Ireland, Latvia, Luxembourg, Malta, Moldova, the Netherlands, the Russian Federation, Serbia, Slovakia, Sweden, Turkey and Ukraine, the authorities have a margin of discretion in deciding whether to pursue criminal proceedings against perpetrators of domestic violence. A significant number of legal systems make a distinction between crimes which are privately prosecutable (and for which the victim’s complaint is a prerequisite) and those which are publicly prosecutable (usually more serious offences for which prosecution is considered to be in the public interest).

89. It appears from the legislation and practice of the above-mentioned twenty-seven countries that the decision on whether to proceed where the victim withdraws his/her complaint lies within the discretion of the prosecuting authorities, which primarily take into account the public interest in continuing criminal proceedings. In some jurisdictions, such as England and Wales, in deciding whether to pursue criminal proceedings against the perpetrators of domestic violence the prosecuting authorities (Crown Prosecution Service) are required to consider certain factors, including: the seriousness of the offence; whether the victim’s injuries are physical or psychological; if the defendant used a weapon; if the defendant has made any threats since the attack; if the defendant planned the attack; the effect (including psychological) on any children living in the household; the chances of the defendant offending again; the continuing threat to the health and safety of the victim or anyone else who was, or could become, involved; the current state of the victim’s relationship with the defendant; the effect on that relationship of continuing with the prosecution against the victim’s wishes; the history of the relationship, particularly if there was any other violence in the past; and the defendant’s criminal history, particularly any previous violence. Direct reference is made to the need to strike a balance between the victim’s and any children’s Article 2 and Article 8 rights in deciding on a course of action.

90. Romania seems to be the only State which bases the continuance of criminal proceedings entirely, and in all circumstances, on the wishes/complaints of the victim.

C. Reports concerning domestic violence and the situation of women in Turkey

1. The opinion of the Purple Roof Women's Shelter Foundation (Mor Çatı Kadın Sığınağı Vakfı – “the Mor Çatı Foundation”) on the implementation of Law no. 4320, dated 7 July 2007

91. According to this report, Law no. 4320 (see paragraph 70 above) is not yet being fully implemented. In recent years there has been an increase in “protection orders” or injunctions issued by family courts. However, some courts, in response to applications made to them by women in mortal danger, are still setting hearings two or even three months ahead. Under these circumstances, judges and prosecutors treat an action under Law no. 4320 as if it were a form of divorce action, whereas the point of the Law is to take urgent action on behalf of women who are seeking to protect their own lives. Once the injunction has been issued, women are confronted with a number of problems with its implementation.

92. In the two years before the report was released approximately 900 women applied to the Mor Çatı Foundation and made great efforts to use Law no. 4320, but of this number only 120 succeeded. The Mor Çatı Foundation has identified serious problems with the implementation of Law no. 4320. In particular, it was observed that domestic violence is still treated with tolerance at police stations, and that some police officers try to act as arbitrators, or take the side of the male, or suggest that the woman drop her complaint. There are also serious problems in serving the injunction issued by a court under Law no. 4320 on the husband. In the case of a number of women wishing to work with the Mor Çatı Foundation, injunctions were not implemented because their husbands were police officers or had friendly relations with officers at the police station in question.

93. Furthermore, there are unreasonable delays in issuing injunctions by the courts. This results from the attitude of the courts in treating domestic violence complaints as a form of divorce action. It is considered that behind such delays lies a suspicion that women might be making such applications when they have not suffered violence. The allegations that women abuse Law no. 4320 are not correct. Since the economic burden of the home lies almost 100% with men, it would be impossible for women to request implementation of Law no. 4320 unless they were confronted with mortal danger. Finally, the injunctions at issue are generally narrow in scope or are not extended by the courts.

2. *Research report prepared by the Women's Rights Information and Implementation Centre of the Diyarbakır Bar Association (KA-MER) on the Implementation of Law no. 4320, dated 25 November 2005*

94. According to this report, a culture of violence has developed in Turkey and violence is tolerated in many areas of life. A survey of legal actions at a magistrate's court dealing with civil matters (*sulh hukuk mahkemesi*) and three civil courts (*asliye hukuk mahkemesi*) in Diyarbakır identified 183 actions brought under Law no. 4320 from the date on which the Law entered into force in 1998 until September 2005. In 104 of these cases, the court ordered various measures, while in the remaining 79 actions the court held that there were no grounds for making an order, or dismissed the action, or ruled that it lacked jurisdiction.

95. Despite the importance of the problem of domestic violence, very few applications have been made under the said Law, because either the public is not generally aware of it or the level of confidence in the security forces is very low in the region. The most important problems were caused by the delay in issuing injunctions and the authorities' failure to monitor the implementation of injunctions.

96. Moreover, the negative attitude of police officers at police stations towards victims of domestic violence is one of the obstacles preventing women from using this Law. Women who go to police stations because they are subjected to domestic violence are confronted with attitudes which tend to regard the problem as a private family matter into which the police are reluctant to interfere.

97. This report makes recommendations to improve the implementation of Law no. 4320 and to enhance the protection of victims of domestic violence.

3. *Diyarbakır KA-MER Emergency Helpline statistics for the period 1 August 1997 to 30 June 2007*

98. This statistical information report was prepared following interviews conducted with 2,484 women. It appears that all of the complainants were subjected to psychological violence and approximately 60% were subjected to physical violence. The highest number of victims is in the 20-30 age group (43%). 57% of these women are married. The majority of victims are illiterate or of a low level of education. 78% of the women are of Kurdish origin. 91% of the victims who called the emergency helpline are from Diyarbakır. 85% of the victims have no independent source of income.

4. Amnesty International's 2004 report entitled "Turkey: women confronting family violence"

99. According to this report, statistical information about the extent of violence against women in Turkey is limited and unreliable. Nonetheless, it appears that a culture of domestic violence has placed women in double jeopardy, both as victims of violence and because they are denied effective access to justice. Women from vulnerable groups, such as those from low-income families or who are fleeing conflict or natural disasters, are particularly at risk. In this connection, it was found that crimes against women in south-east Turkey have gone largely unpunished.

100. It was noted that women's rights defenders struggle to combat community attitudes, which are tolerant of violence against women and are frequently shared by judges, senior government officials and opinion leaders in society. Even after legislative reforms have removed the legal authorisation for discriminatory treatment, attitudes that pressure women to conform to certain codes of behaviour restrict women's life choices.

101. The report states that at every level of the criminal justice system the authorities fail to respond promptly or rigorously to women's complaints of rape, sexual assault or other violence within the family. The police are reluctant to prevent and investigate family violence, including the violent deaths of women. Prosecutors refuse to open investigations into cases involving domestic violence or to order protective measures for women at risk from their family or community. The police and courts do not ensure that men, who are served with court orders, including protection orders, comply with them. They accord them undue leniency in sentencing, on the grounds of "provocation" by their victim and on the flimsiest of evidence.

102. There are many barriers facing women who need access to justice and protection from violence. Police officers often believe that their duty is to encourage women to return home and "make peace" and fail to investigate the women's complaints. Many women, particularly in rural areas, are unable to make formal complaints, because leaving their neighbourhoods subjects them to intense scrutiny, criticism and, in some cases, violence.

103. Furthermore, although some courts appear to have begun implementing the reforms, the discretion accorded to the courts continues to accord the perpetrators of domestic violence unwarranted leniency. Sentences in such cases are still frequently reduced at the discretion of the judges, who continue to take into account the "severe provocation" of the offence to custom, tradition or honour.

104. Finally, this report makes a number of recommendations to the Turkish government and to community and religious authorities with a view to addressing the problem of domestic violence.

5. Report on Honour Crimes, prepared by the Diyarbakır Bar Association's Justice For All Project and the Women's Rights Information and Implementation Centre

105. This report was prepared in order to look into the judicial dimensions of the phenomenon of so-called "honour crimes". A survey was carried out of judgments in cases before the Diyarbakır assize courts and children's courts. The purpose of the survey was to identify the proportion of such unlawful killings referred to the courts, the judiciary's attitude to them, the defendants' lines of defence in these cases, the role of social structure (that is, family councils and custom) and the reasons for the murders. To that end, cases in the Diyarbakır assize courts and children's courts between 1999 and 2005 were examined. In these seven years, 59 cases were identified in which a judgment was given. In these cases, there were 71 victims/persons killed, and 81 people were tried as defendants.

106. According to the researchers, in cases where the victim/person killed was male, it was observed that defendants claimed, in their defence, that the victim/person killed had raped, sexually assaulted, or abducted a relative of the defendant, or had attempted to draw a relative of the defendant into prostitution. In cases where the victim/person killed was a woman, defendants alleged, in their defence, that the victim/person killed had been talking to other men, had taken up prostitution, or had committed adultery. In 46 of the judgments, mitigating provisions concerning unjustified provocation were applied. In cases of 61 convictions, the provisions of Article 59 of the Turkish Criminal Code concerning discretionary mitigation were applied.

THE LAW

I. ADMISSIBILITY

107. The Government contested the admissibility of the application on two grounds.

A. Failure to observe the six-month rule under Article 35 § 1 of the Convention

108. The Government submitted that the applicant had failed to observe the six-month time-limit in respect of the events which had taken place before 2001. They argued that the events which had taken place between 1995 and 2001 should be considered as out of time. If the applicant was not satisfied with the decisions given by the domestic authorities subsequent to

the events which had taken place during the above-mentioned period, she should have submitted her application to the Commission or, following the entry into force of Protocol No. 11, to the Court within six months of each decision.

109. The applicant claimed that she had lodged her application within six months of the impugned events. In her opinion the events should be taken as a whole and should not be examined separately.

110. The Court reiterates that the purpose of the six-month rule under Article 35 § 1 of the Convention is to promote security of law and to ensure that cases raising issues under the Convention are dealt with within a reasonable time (see *Kenar v. Turkey* (dec.), no. 67215/01, 1 December 2005). According to its well-established case-law, where no domestic remedy is available the six-month period runs from the date of the act complained of.

111. In that regard, the Court notes that from 10 April 1995 the applicant and her mother had been victims of multiple assaults and threats by H.O. against their physical integrity. These acts of violence had resulted in the death of the applicant's mother and caused the applicant intense suffering and anguish. While there were intervals between the impugned events, the Court considers that the overall violence to which the applicant and her mother were subjected over a long period of time cannot be seen as individual and separate episodes and must therefore be considered together as a chain of connected events.

112. This being so, the Court notes that the applicant has submitted her application within six months of the killing of her mother by H.O., which event may be considered as the time that she became aware of the ineffectiveness of the remedies in domestic law, as a result of the authorities' failure to stop H.O. committing further violence. Given that these circumstances do not disclose any indication of a delay on the part of the applicant in introducing her application once it became apparent that no redress for her complaints was forthcoming, the Court considers that the relevant date for the purposes of the six-month time-limit should not be considered to be a date earlier than at least 13 March 2002 (see paragraph 54 above). In any event, the applicant's former husband had continued to issue threats against her life and well-being and, therefore, it cannot be said that the said pattern of violence has come to an end (see paragraphs 59-69 above).

113. In the specific context of this case, it follows that the applicant's complaints have been introduced within the six-month time-limit required by Article 35 § 1 of the Convention. The Court therefore dismisses the Government's preliminary objection in this regard.

B. Failure to exhaust domestic remedies

114. The Government further contended that the applicant had failed to exhaust domestic remedies since she and her mother had withdrawn their complaints many times and had caused the termination of the criminal proceedings against the applicant. They maintained that the applicant had also not availed herself of the protection afforded by Law no. 4320 and that she had prevented the public prosecutor from applying to the family court, in that she had withdrawn her complaints. They submitted further that the applicant could have availed herself of the administrative and civil law remedies whose effectiveness had been recognised by the Court in previous cases (citing *Aytekin v. Turkey*, 23 September 1998, *Reports of Judgments and Decisions* 1998-VII). Finally, relying on the Court's judgments in *Ahmet Sadık v. Greece* (15 November 1996, § 34, *Reports* 1996-V) and *Cardot v. France* (19 March 1991, § 30, Series A no. 200), the Government claimed that the applicant had failed to raise, even in substance, her complaints of discrimination before the national authorities and that, therefore, these complaints should be declared inadmissible.

115. The applicant claimed that she had exhausted all available remedies in domestic law. She argued that the domestic remedies had proven to be ineffective given the failure of the authorities to protect her mother's life and to prevent her husband from inflicting ill-treatment on her and her mother. As regards the Government's reliance on Law no. 4320, to the effect that she had not availed herself of the remedies therein, the applicant noted that the said law had come into force on 14 January 1998, whereas a significant part of the events at issue had taken place prior to that date. Prior to the entry into force of Law no. 4320, there was no mechanism for protection against domestic violence. In any event, despite her numerous criminal complaints to the Chief Public Prosecutor's Office, none of the protective measures provided for in Law no. 4320 had been taken to protect the life and well-being of the applicant and her mother.

116. The Court observes that the main question with regard to the question of exhaustion of domestic remedies is whether the applicants have failed to make use of available remedies in domestic law, particularly those provided by Law no. 4320, and whether the domestic authorities were required to pursue the criminal proceedings against the applicant's husband despite the withdrawal of complaints by the victims. These questions are inextricably linked to the question of the effectiveness of the domestic remedies in providing sufficient safeguards for the applicant and her mother against domestic violence. Accordingly, the Court joins these questions to the merits and will examine them under Articles 2, 3 and 14 of the Convention (see, among other authorities, *Şemsi Önen v. Turkey*, no. 22876/93, § 77, 14 May 2002).

117. In view of the above, the Court notes that the application is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

II. ALLEGED VIOLATION OF ARTICLE 2 OF THE CONVENTION

118. The applicant complained that the authorities had failed to safeguard the right to life of her mother, who had been killed by her husband, in violation of Article 2 § 1 of the Convention, the relevant part of which provides:

“Everyone’s right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law ...”

A. The parties’ submissions

1. *The applicant*

119. The applicant asserted at the outset that domestic violence was tolerated by the authorities and society and that the perpetrators of domestic violence enjoyed impunity. In this connection, she pointed out that, despite their numerous criminal complaints to the Diyarbakır Chief Public Prosecutor’s Office, none of the protective measures provided for in Law no. 4320 had been taken to protect the life and well-being of herself and her mother. Conversely, on a number of occasions, the authorities had tried to persuade the applicant and her mother to abandon their complaints against H.O. The domestic authorities had remained totally passive in the face of death threats issued by H.O. and had left her and her mother to the mercy of their aggressor.

120. The applicant pointed out that, by a petition dated 27 February 2002, her mother had applied to the Chief Public Prosecutor’s Office and had informed the authorities of the death threats issued by H.O. However, the public prosecutor had done nothing to protect the life of the deceased. In the applicant’s opinion, the fact that the authorities had not taken her mother’s complaint seriously was a clear indication that domestic violence was tolerated by society and the national authorities.

121. The applicant also claimed that, although H.O. had been convicted of murder, the punishment imposed on him was not a deterrent and was considerably less than the normal sentence imposed for murder. The imposition of a lenient sentence had resulted from the fact that, in his defence submissions before the Assize Court, the accused had claimed to have killed her mother in order to protect his honour. It was the general

practice of the criminal courts in Turkey to mitigate sentences in cases of “honour crimes”. In cases concerning “honour crimes”, the criminal courts imposed a very lenient punishment or no punishment at all on the perpetrators of such crimes.

2. The Government

122. The Government stressed that the local authorities had provided immediate and tangible follow-up to the complaints lodged by the applicant and her mother. In this connection, subsequent to the filing of their complaints, the authorities had registered the complaints, conducted medical examinations, heard witnesses, conducted a survey of the scenes of the incidents and transmitted the complaints to the competent legal authorities. When necessary and depending on the gravity of the incident, the aggressor had been remanded in custody and had been convicted by the criminal courts. These proceedings had been carried out within the shortest time possible. The authorities had displayed diligence and were sensitive to the complaints, and no negligence had been shown.

123. However, by withdrawing their complaints, the applicant and her mother had prevented the authorities from pursuing criminal proceedings against H.O. and had thus contributed to the impunity enjoyed by the aggressor. In this regard, it did not appear from the case file that the applicant and her mother had withdrawn their complaints as a result of any pressure exerted on them either by H.O. or the public prosecutor in charge of the investigation. The pursuit of criminal proceedings against the aggressor was dependent on the complaints lodged or pursued by the applicant, since the criminal acts in question had not resulted in sickness or unfitness for work for ten days or more, within the meaning of Articles 456 § 4, 457 and 460 of the Criminal Code. Furthermore, in most cases the criminal courts had not convicted H.O. because the evidence against him was insufficient. Accordingly, the authorities could not be expected to separate the applicant and her husband and convict the latter while they were living together as a family, as this would amount to a breach of their rights under Article 8 of the Convention.

124. As regards the petition filed by the applicant’s mother on 27 February 2002, the Government claimed that the content of this petition was no different to the previous ones and was of a general nature. There was no tangible fact or specific indication that her life was indeed in danger. In the petition the mother had failed to request any protection at all but she had merely requested a speedy examination of her complaint and the punishment of the applicant’s husband. Nonetheless, subsequent to the receipt of the petition dated 27 February 2002, the authorities had registered the complaint and had held a hearing on 27 May 2002, which had been followed by other hearings. Finally, following the killing of the applicant’s

mother by H.O., the latter had been convicted and had received a heavy punishment.

3. Interights, the third-party intervener

125. Referring to international practice, Interights submitted that where the national authorities failed to act with due diligence to prevent violence against women, including violence by private actors, or to investigate, prosecute and punish such violence, the State might be responsible for such acts. The *jus cogens* nature of the right to freedom from torture and the right to life required exemplary diligence on the part of the State with respect to investigation and prosecution of these acts.

126. In the context of domestic violence, victims were often intimidated or threatened into either not reporting the crime or withdrawing complaints. However, the responsibility to ensure accountability and guard against impunity lay with the State, not with the victim. International practice recognised that a broad range of interested persons, not just the victim, should be able to report and initiate an investigation into domestic violence. Further, international practice increasingly suggested that where there was sufficient evidence and it was considered in the public interest, prosecution of perpetrators of domestic violence should continue even when a victim withdrew her complaint. These developments indicated a trend away from requiring victim participation towards placing the responsibility for effective prosecution squarely on the State.

127. While a decision not to prosecute in a particular case would not necessarily be in breach of due diligence obligations, a law or practice which automatically paralysed a domestic violence investigation or prosecution where a victim withdrew her complaint would be. In respect of these obligations and with reference to the *Fatma Yıldırım v. Austria* decision of the CEDAW Committee (cited in the relevant international materials section above), it was submitted that the State had not only to ensure an appropriate legislative framework, but also to ensure effective implementation and enforcement practice.

B. The Court's assessment

1. Alleged failure to protect the applicant's mother's life

(a) Relevant principles

128. The Court reiterates that the first sentence of Article 2 § 1 enjoins the State not only to refrain from the intentional and unlawful taking of life, but also to take appropriate steps to safeguard the lives of those within its jurisdiction (see *L.C.B. v. the United Kingdom*, 9 June 1998, § 36, *Reports*

1998-III). This involves a primary duty on the State to secure the right to life by putting in place effective criminal-law provisions to deter the commission of offences against the person backed up by law-enforcement machinery for the prevention, suppression and punishment of breaches of such provisions. It also extends in appropriate circumstances to a positive obligation on the authorities to take preventive operational measures to protect an individual whose life is at risk from the criminal acts of another individual (see *Osman v. the United Kingdom*, 28 October 1998, § 115, *Reports* 1998-VIII, cited in *Kontrová v. Slovakia*, no. 7510/04, § 49, 31 May 2007).

129. Bearing in mind the difficulties in policing modern societies, the unpredictability of human conduct and the operational choices which must be made in terms of priorities and resources, the scope of the positive obligation must be interpreted in a way which does not impose an impossible or disproportionate burden on the authorities. Not every claimed risk to life, therefore, can entail for the authorities a Convention requirement to take operational measures to prevent that risk from materialising. For a positive obligation to arise, it must be established that the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual from the criminal acts of a third party and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk. Another relevant consideration is the need to ensure that the police exercise their powers to control and prevent crime in a manner which fully respects the due process and other guarantees which legitimately place restraints on the scope of their action to investigate crime and bring offenders to justice, including the guarantees contained in Articles 5 and 8 of the Convention (see *Osman*, cited above, § 116).

130. In the opinion of the Court, where there is an allegation that the authorities have violated their positive obligation to protect the right to life in the context of their above-mentioned duty to prevent and suppress offences against the person, it must be established to its satisfaction that the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual or individuals from the criminal acts of a third party and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk. Furthermore, having regard to the nature of the right protected by Article 2, a right fundamental in the scheme of the Convention, it is sufficient for an applicant to show that the authorities did not do all that could be reasonably expected of them to avoid a real and immediate risk to life of which they have or ought to have knowledge. This is a question which can only be answered in the light of all the circumstances of any particular case (*ibid.*).

(b) Application of the above principles to the present case

(i) Scope of the case

131. On the above understanding, the Court will ascertain whether the national authorities have fulfilled their positive obligation to take preventive operational measures to protect the applicant's mother's right to life. In this connection, it must establish whether the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of the applicant's mother from criminal acts by H.O. As it appears from the parties' submissions, a crucial question in the instant case is whether the local authorities displayed due diligence to prevent violence against the applicant and her mother, in particular by pursuing criminal or other appropriate preventive measures against H.O. despite the withdrawal of complaints by the victims.

132. However, before embarking upon these issues, the Court must stress that the issue of domestic violence, which can take various forms ranging from physical to psychological violence or verbal abuse, cannot be confined to the circumstances of the present case. It is a general problem which concerns all member States and which does not always surface since it often takes place within personal relationships or closed circuits and it is not only women who are affected. The Court acknowledges that men may also be the victims of domestic violence and, indeed, that children, too, are often casualties of the phenomenon, whether directly or indirectly. Accordingly, the Court will bear in mind the gravity of the problem at issue when examining the present case

(ii) Whether the local authorities could have foreseen a lethal attack from H.O.

133. Turning to the circumstances of the case, the Court observes that the applicant and her husband, H.O., had a problematic relationship from the very beginning. As a result of disagreements, H.O. resorted to violence against the applicant and the applicant's mother therefore intervened in their relationship in order to protect her daughter. She thus became a target for H.O., who blamed her for being the cause of their problems (see paragraph 28 above). In this connection, the Court considers it important to highlight some events and the authorities' reaction.

(i) On 10 April 1995 H.O. and A.O. beat up the applicant and her mother, causing severe physical injuries, and threatened to kill them. Although the applicant and her mother initially filed a criminal complaint about this event, the criminal proceedings against H.O. and A.O. were terminated because the victims withdrew their complaints (see paragraphs 9-11 above).

(ii) On 11 April 1996 H.O. again beat the applicant, causing life-threatening injuries. H.O. was remanded in custody and a criminal

prosecution was commenced against him for aggravated bodily harm. However, following the release of H.O., the applicant withdrew her complaint and the charges against H.O. were dropped (see paragraphs 13-19 above).

(iii) On 5 February 1998 H.O. assaulted the applicant and her mother using a knife. All three were severely injured and the public prosecutor decided not to prosecute anyone on the ground that there was insufficient evidence (see paragraphs 20 and 21 above).

(iv) On 4 March 1998 H.O. ran his car into the applicant and her mother. Both victims suffered severe injuries, and the medical reports indicated that the applicant was unfit for work for seven days and that her mother's injuries were life-threatening. Subsequent to this incident, the victims asked the Chief Public Prosecutor's Office to take protective measures in view of the death threats issued by H.O., and the applicant initiated divorce proceedings. The police investigation into the victims' allegations of death threats concluded that both parties had threatened each other and that the applicant's mother had made such allegations in order to separate her daughter from H.O. for the purpose of revenge, and had also "wasted" the security forces' time. Criminal proceedings were instituted against H.O. for issuing death threats and attempted murder, but following H.O.'s release from custody (see paragraph 31 above) the applicant and her mother again withdrew their complaints. This time, although the prosecuting authorities dropped the charges against H.O. for issuing death threats and hitting the applicant, the Diyarbakır Assize Court convicted him for causing injuries to the mother and sentenced him to three months' imprisonment, which was later commuted to a fine (see paragraphs 23-36 above).

(v) On 29 October 2001 H.O. stabbed the applicant seven times following her visit to her mother. H.O. surrendered to the police claiming that he had attacked his wife in the course of a fight caused by his mother-in-law's interference with their marriage. After taking H.O.'s statements the police officers released him. However, the applicant's mother applied to the Chief Public Prosecutor's Office seeking the detention of H.O., and also claimed that she and her daughter had had to withdraw their complaints in the past because of death threats and pressure by H.O. As a result, H.O. was convicted of knife assault and sentenced to a fine (see paragraphs 37-44 above).

(vi) On 14 November 2001 H.O. threatened the applicant but the prosecuting authorities did not press charges for lack of concrete evidence (see paragraphs 45 and 46 above).

(vii) On 19 November 2001 the applicant's mother filed a petition with the local public prosecutor's office, complaining about the ongoing death threats and harassment by H.O., who had been carrying weapons. Again, the police took statements from H.O. and released him, but the public

prosecutor pressed charges against him for making death threats (see paragraphs 47-49 above).

(viii) Later, on 27 February 2002, the applicant's mother applied to the public prosecutor's office, informing him that H.O.'s threats had intensified and that their lives were in immediate danger. She therefore asked the police to take action against H.O. The police took statements from H.O. and the Diyarbakır Magistrate's Court questioned him about the allegations only after the killing of the applicant's mother. H.O. denied the allegations and claimed that he did not wish his wife to visit her mother, who was living an immoral life (see paragraphs 51-52 above).

134. In view of the above events, it appears that there was an escalating violence against the applicant and her mother by H.O. The crimes committed by H.O. were sufficiently serious to warrant preventive measures and there was a continuing threat to the health and safety of the victims. When examining the history of the relationship, it was obvious that the perpetrator had a record of domestic violence and there was therefore a significant risk of further violence.

135. Furthermore, the victims' situations were also known to the authorities and the mother had submitted a petition to the Diyarbakır Chief Public Prosecutor's Office, stating that her life was in immediate danger and requesting the police to take action against H.O. However, the authorities' reaction to the applicant's mother's request was limited to taking statements from H.O. about the mother's allegations. Approximately two weeks after this request, on 11 March 2002, he killed the applicant's mother (see paragraph 54 above).

136. Having regard to the foregoing, the Court finds that the local authorities could have foreseen a lethal attack by H.O. While the Court cannot conclude with certainty that matters would have turned out differently and that the killing would not have occurred if the authorities had acted otherwise, it reiterates that a failure to take reasonable measures which could have had a real prospect of altering the outcome or mitigating the harm is sufficient to engage the responsibility of the State (see *E. and Others v. the United Kingdom*, no. 33218/96, § 99, 26 November 2002). Therefore, the Court will next examine to what extent the authorities took measures to prevent the killing of the applicant's mother.

(iii) *Whether the authorities displayed due diligence to prevent the killing of the applicant's mother*

137. The Government claimed that each time the prosecuting authorities commenced criminal proceedings against H.O., they had to terminate those proceedings, in accordance with the domestic law, because the applicant and her mother withdrew their complaints. In their opinion, any further interference by the authorities would have amounted to a breach of the victims' Article 8 rights. The applicant explained that she and her mother

had had to withdraw their complaints because of death threats and pressure exerted by H.O.

138. The Court notes at the outset that there seems to be no general consensus among States Parties regarding the pursuance of the criminal prosecution against perpetrators of domestic violence when the victim withdraws her complaints (see paragraphs 87 and 88 above). Nevertheless, there appears to be an acknowledgement of the duty on the part of the authorities to strike a balance between a victim's Article 2, Article 3 or Article 8 rights in deciding on a course of action. In this connection, having examined the practices in the member States (see paragraph 89 above), the Court observes that there are certain factors that can be taken into account in deciding to pursue the prosecution:

- the seriousness of the offence;
- whether the victim's injuries are physical or psychological;
- if the defendant used a weapon;
- if the defendant has made any threats since the attack;
- if the defendant planned the attack;
- the effect (including psychological) on any children living in the household;
- the chances of the defendant offending again;
- the continuing threat to the health and safety of the victim or anyone else who was, or could become, involved;
- the current state of the victim's relationship with the defendant and the effect on that relationship of continuing with the prosecution against the victim's wishes;
- the history of the relationship, particularly if there had been any other violence in the past; and
- the defendant's criminal history, particularly any previous violence.

139. It can be inferred from this practice that the more serious the offence or the greater the risk of further offences, the more likely that the prosecution should continue in the public interest, even if victims withdraw their complaints.

140. As regards the Government's argument that any attempt by the authorities to separate the applicant and her husband would have amounted to a breach of their right to family life, and bearing in mind that under Turkish law there is no requirement to pursue the prosecution in cases where the victim withdraws her complaint and did not suffer injuries which renders her unfit for work for ten or more days, the Court will now examine whether the local authorities struck a proper balance between the victim's Article 2 and Article 8 rights.

141. In this connection, the Court notes that H.O. resorted to violence from the very beginning of his relationship with the applicant. On many instances both the applicant and her mother suffered physical injuries and were subjected to psychological pressure, given the anguish and fear. For

some assaults H.O. used lethal weapons, such as a knife or a shotgun, and he constantly issued death threats against the applicant and her mother. Having regard to the circumstances of the killing of the applicant's mother, it may also be stated that H.O. had planned the attack, since he had been carrying a knife and a gun and had been wandering around the victim's house on occasions prior to the attack (see paragraphs 47 and 54 above).

142. The applicant's mother became a target as a result of her perceived involvement in the couple's relationship, and the couple's children can also be considered as victims on account of the psychological effects of the ongoing violence in the family home. As noted above, in the instant case, further violence was not only possible but even foreseeable, given the violent behaviour and criminal record of H.O., his continuing threat to the health and safety of the victims and the history of violence in the relationship (see paragraphs 10, 13, 23, 37, 45, 47 and 51 above).

143. In the Court's opinion, it does not appear that the local authorities sufficiently considered the above factors when repeatedly deciding to discontinue the criminal proceedings against H.O. Instead, they seem to have given exclusive weight to the need to refrain from interfering with what they perceived to be a "family matter" (see paragraph 123 above). Moreover, there is no indication that the authorities considered the motives behind the withdrawal of the complaints. This is despite the applicant's mother's indication to the Diyarbakır Public Prosecutor that she and her daughter had withdrawn their complaints because of the death threats issued and pressure exerted on them by H.O. (see paragraph 39 above). It is also striking that the victims withdrew their complaints when H.O. was at liberty or following his release from custody (see paragraphs 9-12, 17-19, 31 and 35 above).

144. As regards the Government's argument that any further interference by the national authorities would have amounted to a breach of the victims' rights under Article 8 of the Convention, the Court notes its ruling in a similar case of domestic violence (see *Bevacqua and S. v. Bulgaria*, no. 71127/01, § 83, 12 June 2008), where it held that the authorities' view that no assistance was required as the dispute concerned a "private matter" was incompatible with their positive obligations to secure the enjoyment of the applicants' rights. Moreover, the Court reiterates that, in some instances, the national authorities' interference with the private or family life of the individuals might be necessary in order to protect the health and rights of others or to prevent commission of criminal acts (see *K.A. and A.D. v. Belgium*, nos. 42758/98 and 45558/99, § 81, 17 February 2005). The seriousness of the risk to the applicant's mother rendered such intervention by the authorities necessary in the present case.

145. However, the Court regrets to note that the criminal investigations in the instant case were strictly dependent on the pursuance of complaints by the applicant and her mother on account of the domestic-law provisions

in force at the relevant time; namely Articles 456 § 4, 457 and 460 of the now defunct Criminal Code, which prevented the prosecuting authorities from pursuing the criminal investigations because the criminal acts in question had not resulted in sickness or unfitness for work for ten days or more (see paragraph 70 above). It observes that the application of the above-mentioned provisions and the cumulative failure of the domestic authorities to pursue criminal proceedings against H.O. deprived the applicant's mother of the protection of her life and safety. In other words, the legislative framework then in force, particularly the minimum ten days' sickness unfitness requirement, fell short of the requirements inherent in the State's positive obligations to establish and apply effectively a system punishing all forms of domestic violence and providing sufficient safeguards for the victims. The Court thus considers that, bearing in mind the seriousness of the crimes committed by H.O. in the past, the prosecuting authorities should have been able to pursue the proceedings as a matter of public interest, regardless of the victims' withdrawal of complaints (see, in this respect, Recommendation Rec(2002)5 of the Committee of the Ministers, paragraphs 80-82 above).

146. The legislative framework preventing effective protection for victims of domestic violence aside, the Court must also consider whether the local authorities displayed due diligence to protect the right to life of the applicant's mother in other respects.

147. In this connection, the Court notes that despite the deceased's complaint that H.O. had been harassing her, invading her privacy by wandering around her property and carrying knives and guns (see paragraph 47 above), the police and prosecuting authorities failed either to place H.O. in detention or to take other appropriate action in respect of the allegation that he had a shotgun and had made violent threats with it (see *Kontrová*, cited above, § 53). While the Government argued that there was no tangible evidence that the applicant's mother's life was in imminent danger, the Court observes that it is not in fact apparent that the authorities assessed the threat posed by H.O. and concluded that his detention was a disproportionate step in the circumstances; rather the authorities failed to address the issues at all. In any event, the Court would underline that in domestic violence cases perpetrators' rights cannot supersede victims' human rights to life and to physical and mental integrity (see the *Fatma Yıldırım v. Austria* and *A.T. v. Hungary* decisions of the CEDAW Committee, both cited above, §§ 12.1.5 and 9.3 respectively).

148. Furthermore, in the light of the State's positive obligation to take preventive operational measures to protect an individual whose life is at risk, it might have been expected that the authorities, faced with a suspect known to have a criminal record of perpetrating violent attacks, would take special measures consonant with the gravity of the situation with a view to protecting the applicant's mother. To that end, the local public prosecutor or

the judge at the Diyarbakır Magistrate's Court could have ordered on his/her initiative one or more of the protective measures enumerated under sections 1 and 2 of Law no. 4320 (see paragraph 70 above). They could also have issued an injunction with the effect of banning H.O. from contacting, communicating with or approaching the applicant's mother or entering defined areas (see, in this respect, Recommendation Rec(2002)5 of the Committee of the Ministers, paragraph 82 above). On the contrary, in response to the applicant's mother's repeated requests for protection, the police and the Diyarbakır Magistrate's Court merely took statements from H.O. and released him (see paragraphs 47-52 above). While the authorities remained passive for almost two weeks apart from taking statements, H.O. shot dead the applicant's mother.

149. In these circumstances, the Court concludes that the national authorities cannot be considered to have displayed due diligence. They therefore failed in their positive obligation to protect the right to life of the applicant's mother within the meaning of Article 2 of the Convention.

2. The effectiveness of the criminal investigation into the killing of the applicant's mother

150. The Court reiterates that the positive obligations laid down in the first sentence of Article 2 of the Convention also require by implication that an efficient and independent judicial system should be set in place by which the cause of a murder can be established and the guilty parties punished (see, *mutatis mutandis*, *Calvelli and Ciglio v. Italy* [GC], no. 32967/96, § 51, ECHR 2002-I). The essential purpose of such investigation is to secure the effective implementation of the domestic laws which protect the right to life and, in those cases involving State agents or bodies, to ensure their accountability for deaths occurring under their responsibility (see *Paul and Audrey Edwards v. the United Kingdom*, no. 46477/99, §§ 69 and 71, ECHR 2002-II). A requirement of promptness and reasonable expedition is implicit in the context of an effective investigation within the meaning of Article 2 of the Convention (see *Yaşa v. Turkey*, 2 September 1998, §§ 102-04, *Reports* 1998-VI, and *Çakıcı v. Turkey* [GC], no. 23657/94, §§ 80-87 and 106, ECHR 1999-IV). It must be accepted that there may be obstacles or difficulties which prevent progress in an investigation in a particular situation. However, a prompt response by the authorities in investigating a use of lethal force may generally be regarded as essential in maintaining public confidence in their adherence to the rule of law and in preventing any appearance of tolerance of unlawful acts (see *Avşar v. Turkey*, no. 25657/94, § 395, ECHR 2001-VII).

151. The Court notes that a comprehensive investigation has indeed been carried out by the authorities into the circumstances surrounding the killing of the applicant's mother. However, although H.O. was tried and convicted of murder and illegal possession of a firearm by the Diyarbakır

Assize Court, the proceedings are still pending before the Court of Cassation (see paragraphs 57 and 58 above). Accordingly, the criminal proceedings in question, which have already lasted more than six years, cannot be described as a prompt response by the authorities in investigating an intentional killing where the perpetrator had already confessed to the crime.

3. Conclusion

152. In the light of the foregoing, the Court considers that the above-mentioned failures rendered recourse to criminal and civil remedies equally ineffective in the circumstances. It accordingly dismisses the Government's preliminary objection (see paragraph 114 above) based on non-exhaustion of these remedies.

153. Moreover, the Court concludes that the criminal-law system, as applied in the instant case, did not have an adequate deterrent effect capable of ensuring the effective prevention of the unlawful acts committed by H.O. The obstacles resulting from the legislation and failure to use the means available undermined the deterrent effect of the judicial system in place and the role it was required to play in preventing a violation of the applicant's mother's right to life as enshrined in Article 2 of the Convention. The Court reiterates in this connection that, once the situation has been brought to their attention, the national authorities cannot rely on the victim's attitude for their failure to take adequate measures which could prevent the likelihood of an aggressor carrying out his threats against the physical integrity of the victim (see *Osman*, cited above, § 116). There has therefore been a violation of Article 2 of the Convention.

III. ALLEGED VIOLATION OF ARTICLE 3 OF THE CONVENTION

154. The applicant complained that she had been subjected to violence, injury and death threats several times but that the authorities were negligent towards her situation, which caused her pain and fear in violation of Article 3 of the Convention, which provides:

“No one shall be subjected to torture or to inhuman or degrading treatment or punishment.”

A. The parties' submissions

155. The applicant alleged that the injuries and anguish she had suffered as a result of the violence inflicted upon her by her husband had amounted to torture within the meaning of Article 3 of the Convention. Despite the ongoing violence and her repeated requests for help, however, the authorities had failed to protect her from her husband. It was as though the

violence had been inflicted under State supervision. The insensitivity and tolerance shown by the authorities in the face of domestic violence had made her feel debased, hopeless and vulnerable.

156. The Government argued that the applicant's withdrawal of complaints and her failure to cooperate with the authorities had prevented the prosecuting authorities from pursuing the criminal proceedings against her husband. They further claimed that, in addition to the available remedies under Law no. 4320, the applicant could have sought shelter in one of the guest houses set up to protect women with the cooperation of public institutions and non-governmental organisations (NGOs). In this respect, the applicant could have petitioned the Directorate of Social Services and Child Protection Agency for admission to one of the guest houses. The addresses of these guest houses were secret and they were protected by the authorities.

157. Interights maintained that States were required to take reasonable steps to act immediately to stop ill-treatment, whether by public or private actors, of which they have known or ought to have known. Given the opaque nature of domestic violence and the particular vulnerability of women who are too often frightened to report such violence, it is submitted that a heightened degree of vigilance is required of the State.

B. The Court's assessment

1. Applicable principles

158. The Court reiterates that ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3. The assessment of this minimum is relative: it depends on all the circumstances of the case, such as the nature and context of the treatment, its duration, its physical and mental effects and, in some instances, the sex, age and state of health of the victim (see *Costello-Roberts v. the United Kingdom*, 25 March 1993, § 30, Series A no. 247-C).

159. As regards the question whether the State could be held responsible, under Article 3, for the ill-treatment inflicted on persons by non-state actors, the Court reiterates that the obligation on the High Contracting Parties under Article 1 of the Convention to secure to everyone within their jurisdiction the rights and freedoms defined in the Convention, taken together with Article 3, requires States to take measures designed to ensure that individuals within their jurisdiction are not subjected to torture or inhuman or degrading treatment or punishment, including such ill-treatment administered by private individuals (see, *mutatis mutandis*, *H.L.R. v. France*, 29 April 1997, § 40, *Reports* 1997-III). Children and other vulnerable individuals, in particular, are entitled to State protection, in the form of effective deterrence, against such serious breaches of personal

integrity (see *A. v. the United Kingdom*, 23 September 1998, § 22, *Reports* 1998-VI).

2. Application of the above principles to the case

160. The Court considers that the applicant may be considered to fall within the group of “vulnerable individuals” entitled to State protection (see *A. v. the United Kingdom*, cited above, § 22). In this connection, it notes the violence suffered by the applicant in the past, the threats issued by H.O. following his release from prison and her fear of further violence as well as her social background, namely the vulnerable situation of women in south-east Turkey.

161. The Court observes also that the violence suffered by the applicant, in the form of physical injuries and psychological pressure, were sufficiently serious to amount to ill-treatment within the meaning of Article 3 of the Convention.

162. Therefore, the Court must next determine whether the national authorities have taken all reasonable measures to prevent the recurrence of violent attacks against the applicant’s physical integrity.

163. In carrying out this scrutiny, and bearing in mind that the Court provides final authoritative interpretation of the rights and freedoms defined in Section I of the Convention, the Court will consider whether the national authorities have sufficiently taken into account the principles flowing from its judgments on similar issues, even when they concern other States.

164. Furthermore, in interpreting the provisions of the Convention and the scope of the State’s obligations in specific cases (see, *mutatis mutandis*, *Demir and Baykara v. Turkey* [GC], no. 34503/97, §§ 85 and 86, ECHR 2008) the Court will also look for any consensus and common values emerging from the practices of European States and specialised international instruments, such as the CEDAW, as well as giving heed to the evolution of norms and principles in international law through other developments such as the Belém do Pará Convention, which specifically sets out States’ duties relating to the eradication of gender-based violence.

165. Nevertheless, it is not the Court’s role to replace the national authorities and to choose in their stead from among the wide range of possible measures that could be taken to secure compliance with their positive obligations under Article 3 of the Convention (see, *mutatis mutandis*, *Bevacqua and S.*, cited above, § 82). Moreover, under Article 19 of the Convention and under the principle that the Convention is intended to guarantee not theoretical or illusory, but practical and effective rights, the Court has to ensure that a State’s obligation to protect the rights of those under its jurisdiction is adequately discharged (see *Nikolova and Velichkova v. Bulgaria*, no. 7888/03, § 61, 20 December 2007).

166. Turning to its examination of the facts, the Court notes that the local authorities, namely the police and public prosecutors, did not remain

totally passive. After each incident involving violence, the applicant was taken for medical examination and criminal proceedings were instituted against her husband. The police and prosecuting authorities questioned H.O. in relation to his criminal acts, placed him in detention on two occasions, indicted him for issuing death threats and inflicting actual bodily harm and, subsequent to his conviction for stabbing the applicant seven times, sentenced him to pay a fine (see paragraphs 13, 24 and 44 above).

167. However, none of these measures were sufficient to stop H.O. from perpetrating further violence. In this respect, the Government blamed the applicant for withdrawing her complaints and failing to cooperate with the authorities, which prevented the latter from continuing the criminal proceedings against H.O., pursuant to the domestic law provisions requiring the active involvement of the victim (see paragraph 70 above).

168. The Court reiterates its opinion in respect of the complaint under Article 2 of the Convention, namely that the legislative framework should have enabled the prosecuting authorities to pursue the criminal investigations against H.O. despite the withdrawal of complaints by the applicant on the basis that the violence committed by H.O. was sufficiently serious to warrant prosecution and that there was a constant threat to the applicant's physical integrity (see paragraphs 137-48 above).

169. However, it cannot be said that the local authorities displayed the required diligence to prevent the recurrence of violent attacks against the applicant, since the applicant's husband perpetrated them without hindrance and with impunity to the detriment of the rights recognised by the Convention (see, *mutatis mutandis*, *Maria da Penha v. Brazil*, Case 12.051, 16 April 2001, Report No. 54/01, Inter-Am. Ct. H.R., Annual Report 2000, OEA/Ser.L/V/II.111 Doc. 20 rev. (2000), §§ 42-44). By way of example, the Court notes that, following the first major incident (see paragraphs 9 and 10 above), H.O. again beat the applicant severely, causing her injuries which were sufficient to endanger her life, but he was released pending trial "considering the nature of the offence and the fact that the applicant had regained full health". The proceedings were ultimately discontinued because the applicant withdrew her complaints (see paragraphs 13 and 19 above). Again, although H.O. assaulted the applicant and her mother using a knife and caused them severe injuries, the prosecuting authorities terminated the proceedings without conducting any meaningful investigation (see paragraphs 20 and 21 above). Likewise, H.O. ran his car into the applicant and her mother, this time causing injuries to the former and life-threatening injuries to the latter. He spent only twenty-five days in prison and received a fine for inflicting serious injuries on the applicant's mother (see paragraphs 23-36 above). Finally, the Court was particularly struck by the Diyarbakır Magistrate's Court's decision to impose merely a small fine, which could be paid by instalments, on H.O. as punishment for stabbing the applicant seven times (see paragraphs 37 and 44 above).

170. In the light of the foregoing, the Court considers that the response to the conduct of the applicant's former husband was manifestly inadequate to the gravity of the offences in question (see, *mutatis mutandis*, *Ali and Ayşe Duran v. Turkey*, no. 42942/02, § 54, 8 April 2008). It therefore observes that the judicial decisions in this case reveal a lack of efficacy and a certain degree of tolerance, and had no noticeable preventive or deterrent effect on the conduct of H.O.

171. As regards the Government's assertion that, in addition to the available remedies under Law no. 4320, the applicant could have sought shelter in one of the guest houses set up to protect women, the Court notes that until 14 January 1998 – the date on which Law no. 4320 entered into force – Turkish law did not provide for specific administrative and policing measures designed to protect vulnerable persons against domestic violence. Even after that date, it does not appear that the domestic authorities effectively applied the measures and sanctions provided by that Law with a view to protecting the applicant against her husband. Taking into account the overall amount of violence perpetrated by H.O., the public prosecutor's office ought to have applied on its own motion the measures contained in Law no. 4320, without expecting a specific request to be made by the applicant for the implementation of that Law.

172. This being said, even assuming that the applicant had been admitted to one of the guest houses, as suggested by the Government, the Court notes that this would only be a temporary solution. Furthermore, it has not been suggested that there was any official arrangement to provide for the security of the victims staying in those houses.

173. Finally, the Court notes with grave concern that the violence suffered by the applicant had not come to an end and that the authorities had continued to display inaction. In this connection, the Court points out that, immediately after his release from prison, H.O. again issued threats against the physical integrity of the applicant (see paragraph 59 above). Despite the applicant's petition of 15 April 2008 requesting the prosecuting authorities to take measures for her protection, nothing was done until after the Court requested the Government to provide information about the measures that have been taken by their authorities. Following this request, on the instructions of the Ministry of Justice, the Diyarbakır Public Prosecutor questioned H.O. about the death threats issued by him and took statements from the applicant's current boyfriend (see paragraphs 60-67 above).

174. The applicant's legal representative again informed the Court that the applicant's life was in immediate danger, given the authorities' continuous failure to take sufficient measures to protect her client (see paragraph 68 above). It appears that following the transmission of this complaint and the Court's request for an explanation in this respect, the local authorities have now put in place specific measures to ensure the protection of the applicant (see paragraph 69 above).

175. Having regard to the overall ineffectiveness of the remedies suggested by the Government in respect of the complaints under Article 3, the Court dismisses the Government's objection of non-exhaustion of domestic remedies.

176. The Court concludes that there has been a violation of Article 3 of the Convention as a result of the State authorities' failure to take protective measures in the form of effective deterrence against serious breaches of the applicant's personal integrity by her husband.

IV. ALLEGED VIOLATION OF ARTICLE 14 OF THE CONVENTION READ IN CONJUNCTION WITH ARTICLES 2 AND 3

177. The applicant complained under Article 14 of the Convention, read in conjunction with Articles 2 and 3, that she and her mother had been discriminated against on the basis of their gender.

Article 14 of the Convention provides:

"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."

A. The parties' submissions

1. *The applicant*

178. The applicant alleged that the domestic law of the respondent State was discriminatory and insufficient to protect women, since a woman's life was treated as inferior in the name of family unity. The former Civil Code, which was in force at the relevant time, contained numerous provisions distinguishing between men and women, such as the husband being the head of the family, his wishes taking precedence as the representative of the family union. The then Criminal Code also treated women as second-class citizens. A woman was viewed primarily as the property of society and of the male within the family. The most important indicator of this was that sexual offences were included in the section entitled "Crimes Relating to General Morality and Family Order", whereas in fact sexual offences against women are direct attacks on a woman's personal rights and freedoms. It was because of this perception that the Criminal Code imposed lighter sentences on persons who had murdered their wives for reasons of family honour. The fact that H.O. received a sentence of fifteen years is a consequence of that classification in the Criminal Code.

179. Despite the reforms carried out by the Government in the areas of the Civil Code and Criminal Code in 2002 and 2004 respectively, domestic

violence inflicted by men is still tolerated and impunity is granted to the aggressors by judicial and administrative bodies. The applicant and her mother had been victims of violations of Articles 2, 3, 6 and 13 of the Convention merely because of the fact that they were women. In this connection, the applicant drew the Court's attention to the improbability of any men being a victim of similar violations.

2. The Government

180. The Government averred that there was no gender discrimination in the instant case, since the violence in question was mutual. Furthermore, it cannot be claimed that there was institutionalised discrimination resulting from the criminal or family laws or from judicial and administrative practice. Nor could it be argued that the domestic law contained any formal and explicit distinction between men and women. It had not been proven that the domestic authorities had not protected the right to life of the applicant because she was a woman.

181. The Government further noted that subsequent to the reforms carried out in 2002 and 2004, namely revision of certain provisions of the Civil Code and the adoption of a new Criminal Code, and the entry into force of Law no. 4320, Turkish law provided for sufficient guarantees, meeting international standards, for the protection of women against domestic violence. The Government concluded that this complaint should be declared inadmissible for failure to exhaust domestic remedies or as being manifestly ill-founded since these allegations had never been brought to the attention of the domestic authorities and, in any event, were devoid of substance.

3. Interights, the third-party intervener

182. Interights submitted that the failure of the State to protect against domestic violence would be tantamount to failing in its obligation to provide equal protection of the law based on sex. They further noted that there was increasing recognition internationally – both within the United Nations and Inter-American systems – that violence against women was a form of unlawful discrimination.

B. The Court's assessment

1. The relevant principles

183. In its recent ruling in *D.H. and Others v. the Czech Republic* ([GC], no. 57325/00, 13 November 2007, §§ 175-80, ECHR 2007-IV), the Court laid down the following principles on the issue of discrimination:

“175. The Court has established in its case-law that discrimination means treating differently, without an objective and reasonable justification, persons in relevantly similar situations (see *Willis v. the United Kingdom*, no. 36042/97, § 48, ECHR 2002-IV, and *Okpiz v. Germany*, no. 59140/00, § 33, 25 October 2005). ... The Court has also accepted that a general policy or measure that has disproportionately prejudicial effects on a particular group may be considered discriminatory notwithstanding that it is not specifically aimed at that group (see *Hugh Jordan [v. the United Kingdom]*, no. 24746/94, § 154[, 4 May 2001], and *Hoogendijk [v. the Netherlands]* (dec.), no. 58461/00, 6 January 2005), and that discrimination potentially contrary to the Convention may result from a *de facto* situation (see *Zarb Adami [v. Malta]*, no. 17209/02, § 76[, ECHR 2006-VIII]).

...

177. As to the burden of proof in this sphere, the Court has established that once the applicant has shown a difference in treatment, it is for the Government to show that it was justified (see, among other authorities, *Chassagnou and Others v. France* [GC], nos. 25088/94, 28331/95 and 28443/95, §§ 91-92, ECHR 1999-III, and *Timishev [v. Russia]*, nos. 55762/00 and 55974/00, § 57[, ECHR 2005-XII]).

178. As regards the question of what constitutes *prima facie* evidence capable of shifting the burden of proof on to the respondent State, the Court stated in *Nachova and Others* ([v. *Bulgaria* [GC], nos. 43577/98 and 43579/98, § 147[, ECHR 2005-VII]) that in proceedings before it 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 unrebutted 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.

179. The Court has also recognised that Convention proceedings do not in all cases lend themselves to a rigorous application of the principle *affirmanti incumbit probatio* (he who alleges something must prove that allegation – see *Aktaş v. Turkey*, no. 24351/94, § 272, ECHR 2003-V). In certain circumstances, 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 (see *Salman v. Turkey* [GC], no. 21986/93, § 100, ECHR 2000-VII, and *Anguelova v. Bulgaria*, no. 38361/97, § 111, ECHR 2002-IV). In *Nachova and Others* (cited above, § 157), the Court did not rule out requiring a respondent Government to disprove an arguable allegation of discrimination in certain cases, even though it considered that it would be difficult to do so in that particular case, in which the allegation was that an act of violence had been motivated by racial prejudice. It noted in that connection that in the legal systems of many countries proof of the discriminatory effect of a policy, decision or practice would dispense with the need to prove intent in respect of alleged discrimination in employment or in the provision of services.

180. As to whether statistics can constitute evidence, the Court has in the past stated that statistics could not in themselves disclose a practice which could be classified as

discriminatory (see *Hugh Jordan*, cited above, § 154). However, in more recent cases on the question of discrimination in which the applicants alleged a difference in the effect of a general measure or *de facto* situation (see *Hoogendijk*, cited above, and *Zarb Adami*, cited above, §§ 77-78), the Court relied extensively on statistics produced by the parties to establish a difference in treatment between two groups (men and women) in similar situations.

Thus, in *Hoogendijk* the Court stated: “[W]here 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 women than men, it is for the respondent Government to show that this is the result of objective factors unrelated to any discrimination on grounds of sex. If the onus of demonstrating that a difference in impact for men and women is not in practice discriminatory does not shift to the respondent Government, it will be in practice extremely difficult for applicants to prove indirect discrimination.”

2. Application of the above principles to the facts of the present case

(a) The meaning of discrimination in the context of domestic violence

184. The Court notes at the outset that when it considers the object and purpose of the Convention provisions, it also takes into account the international-law background to the legal question before it. Being made up of a set of rules and principles that are accepted by the vast majority of States, the common international or domestic law standards of European States reflect a reality that the Court cannot disregard when it is called upon to clarify the scope of a Convention provision that more conventional means of interpretation have not enabled it to establish with a sufficient degree of certainty (see *Saadi v. the United Kingdom* [GC], no. 13229/03, § 63, ECHR 2008, cited in *Demir and Baykara*, cited above, § 76).

185. In this connection, when considering the definition and scope of discrimination against women, in addition to the more general meaning of discrimination as determined in its case-law (see paragraph 183 above), the Court has to have regard to the provisions of more specialised legal instruments and the decisions of international legal bodies on the question of violence against women.

186. In that context, the CEDAW defines discrimination against women under Article 1 as

“... any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.”

187. The CEDAW Committee has reiterated that violence against women, including domestic violence, is a form of discrimination against women (see paragraph 74 above).

188. The United Nations Commission on Human Rights expressly recognised the nexus between gender-based violence and discrimination by stressing in resolution 2003/45 that “all forms of violence against women occur within the context of *de jure* and *de facto* discrimination against women and the lower status accorded to women in society and are exacerbated by the obstacles women often face in seeking remedies from the State.”

189. Furthermore, the Belém do Pará Convention, which is so far the only regional multilateral human rights treaty to deal solely with violence against women, describes the right of every woman to be free from violence as encompassing, among others, the right to be free from all forms of discrimination.

190. Finally, the Inter-American Commission also characterised violence against women as a form of discrimination owing to the State’s failure to exercise due diligence to prevent and investigate a domestic violence complaint (see *Maria da Penha v. Brazil*, cited above, § 80).

191. It transpires from the above-mentioned rules and decisions that the State’s failure to protect women against domestic violence breaches their right to equal protection of the law and that this failure does not need to be intentional.

(b) The approach to domestic violence in Turkey

192. The Court observes that although the Turkish law then in force did not make explicit distinction between men and women in the enjoyment of rights and freedoms, it needed to be brought into line with international standards in respect of the status of women in a democratic and pluralistic society. Like the CEDAW Committee (see the Concluding Comments on the combined fourth and fifth periodic report of Turkey CEDAW/C/TUR/4-5 and Corr.1, 15 February 2005, §§ 12-21), the Court welcomes the reforms carried out by the Government, particularly the adoption of Law no. 4320 which provides for specific measures for protection against domestic violence. It thus appears that the alleged discrimination at issue 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 the women were treated at police stations when they reported domestic violence and judicial passivity in providing effective protection to victims. The Court notes that the Turkish Government have already recognised these difficulties in practice when discussing the issue before the CEDAW Committee (*ibid.*).

193. In that regard, the Court notes that the applicant produced reports and statistics prepared by two leading NGOs, the Diyarbakır Bar Association and Amnesty International, with a view to demonstrating discrimination against women (see paragraphs 94-97 and 99-104 above). Bearing in mind that the findings and conclusions reached in these reports

have not been challenged by the Government at any stage of the proceedings, the Court will consider them together with its own findings in the instant case (see *Hoogendijk v. the Netherlands* (dec.), no. 54861/00, 6 January 2005, and *Zarb Adami v. Malta*, no. 17209/02, §§ 77-78, ECHR 2006-VIII).

194. Having examined these reports, the Court finds that the highest number of reported victims of domestic violence is in Diyarbakır, where the applicant lived at the relevant time, and that the victims were all women who suffered mostly physical violence. The great majority of these women were of Kurdish origin, illiterate or of a low level of education and generally without any independent source of income (see paragraph 98 above).

195. Furthermore, there appear to be serious problems in the implementation of Law no. 4320, which was relied on by the Government as one of the remedies for women facing domestic violence. The research conducted by the above-mentioned organisations indicates that when victims report domestic violence to police stations, police officers do not investigate their complaints but seek to assume the role of mediator by trying to convince the victims to return home and drop their complaint. In this connection, police officers consider the problem as a “family matter with which they cannot interfere” (see paragraphs 92, 96 and 102 above).

196. It also transpires from these reports that there are unreasonable delays in issuing injunctions by the courts, under Law no. 4320, because the courts treat them as a form of divorce action and not as an urgent action. Delays are also frequent when it comes to serving injunctions on the aggressors, given the negative attitude of the police officers (see paragraphs 91-93, 95 and 101 above). Moreover, the perpetrators of domestic violence do not seem to receive dissuasive punishments, because the courts mitigate sentences on the grounds of custom, tradition or honour (see paragraphs 103 and 106 above).

197. As a result of these problems, the above-mentioned reports suggest that domestic violence is tolerated by the authorities and that the remedies indicated by the Government do not function effectively. Similar findings and concerns were expressed by the CEDAW Committee when it noted “the persistence of violence against women, including domestic violence, in Turkey” and called upon the respondent State to intensify its efforts to prevent and combat violence against women. It further underlined the need to fully implement and carefully monitor the effectiveness of Law no. 4320 on the protection of the family, and of related policies in order to prevent violence against women, to provide protection and support services to the victims, and punish and rehabilitate offenders (see the Concluding Comments, § 28).

198. In the light of the foregoing, the Court considers that the applicant has been able to show, supported by unchallenged statistical information, the existence of a *prima facie* indication that the domestic violence affected

mainly women and that the general and discriminatory judicial passivity in Turkey created a climate that was conducive to domestic violence.

(c) Whether the applicant and her mother have been discriminated against on account of the authorities' failure to provide equal protection of law

199. The Court has established that the criminal-law system, as operated in the instant case, did not have an adequate deterrent effect capable of ensuring the effective prevention of unlawful acts by H.O. against the personal integrity of the applicant and her mother and thus violated their rights under Articles 2 and 3 of the Convention.

200. Bearing in mind its finding above that the general and discriminatory judicial passivity in Turkey, albeit unintentional, mainly affected women, the Court considers that the violence suffered by the applicant and her mother may be regarded as gender-based violence which is a form of discrimination against women. Despite the reforms carried out by the Government in recent years, the overall unresponsiveness of the judicial system and impunity enjoyed by the aggressors, as found in the instant case, indicated that there was insufficient commitment to take appropriate action to address domestic violence (see, in particular, section 9 of the CEDAW Committee's General Recommendation No. 19, cited at paragraph 74 above).

201. Taking into account the ineffectiveness of domestic remedies in providing equal protection of law to the applicant and her mother in the enjoyment of their rights guaranteed by Articles 2 and 3 of the Convention, the Court holds that there existed special circumstances which absolved the applicant from her obligation to exhaust domestic remedies. It therefore dismisses the Government's objection on non-exhaustion in respect of the complaint under Article 14 of the Convention.

202. In view of the above, the Court concludes that there has been a violation of Article 14 of the Convention, read in conjunction with Articles 2 and 3, in the instant case.

V. ALLEGED VIOLATION OF ARTICLES 6 AND 13 OF THE CONVENTION

203. Relying on Articles 6 and 13 of the Convention, the applicant complained that the criminal proceedings brought against H.O. were ineffective and had failed to provide sufficient protection for her and her mother.

204. The Government contested that argument.

205. Having regard to the violations found under Articles 2, 3 and 14 of the Convention (see paragraphs 153, 176 and 202 above), the Court does not find it necessary to examine the same facts also in the context of Articles 6 and 13.

VI. APPLICATION OF ARTICLE 41 OF THE CONVENTION

206. Article 41 of the Convention provides:

“If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party.”

A. Damage

207. The applicant claimed 70,000 Turkish liras (TRL) (approximately 35,000 euros (EUR)) in respect of pecuniary damage resulting from the death of her mother and TRL 250,000 (approximately EUR 125,000) for non-pecuniary damage. She explained that subsequent to the killing of her mother she had been deprived of any economic support from her. The killing of her mother and ongoing violence perpetrated by her former husband had caused her stress and anguish, as well as irreparable damage to her psychological well-being and self-esteem.

208. The Government submitted that the amounts claimed were not justified in the circumstances of the case. They claimed, in the alternative, that the amounts were excessive and that any award to be made under this head should not lead to unjust enrichment.

209. As regards the applicant’s claim for pecuniary damage, the Court notes that while the applicant has demonstrated that on a number of occasions she had sought shelter at her mother’s home, it has not been proven that she was in any way financially dependent on her. However, this does not exclude an award in respect of pecuniary damage being made to an applicant who has established that a close member of the family has suffered a violation of the Convention (see *Aksoy v. Turkey*, 18 December 1996, § 113, *Reports* 1996-VI, where the pecuniary claims made by the applicant prior to his death in respect of loss of earnings and medical expenses arising out of detention and torture were taken into account by the Court in making an award to the applicant’s father, who had continued the application). In the present case, however, the claims for pecuniary damage relate to alleged losses accruing subsequent to the death of the applicant’s mother. The Court is not convinced that the applicant’s mother incurred any losses before her death. Thus, the Court does not find it appropriate in the circumstances of this case to make any award to the applicant in respect of pecuniary damage.

210. On the other hand, as regards the non-pecuniary damage, the Court notes that the applicant has undoubtedly suffered anguish and distress on account of the killing of her mother and the authorities’ failure to undertake sufficient measures to prevent the domestic violence perpetrated by her husband and to give him deterrent punishment. Ruling on an equitable basis,

the Court awards the applicant EUR 30,000 in respect of the damage sustained by her as a result of violations of Articles 2, 3 and 14 of the Convention.

B. Costs and expenses

211. The applicant also claimed TRL 15,500 (approximately EUR 7,750) for the costs and expenses incurred before the Court. This included fees and costs incurred in respect of the preparation of the case (38 hours' legal work) and attendance at the hearing before the Court in Strasbourg as well as other expenses, such as telephone, fax, translation or stationary.

212. The Government submitted that in the absence of any supporting documents the applicant's claim under this head should be rejected.

213. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and were reasonable as to quantum. In the present case, regard being had to the information in its possession and the above criteria, the Court considers it reasonable to award the sum of EUR 6,500 for costs and expenses for the proceedings before the Court, less EUR 1,494 received by way of legal aid from the Council of Europe.

C. Default interest

214. The Court considers it appropriate that the default interest rate should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT UNANIMOUSLY

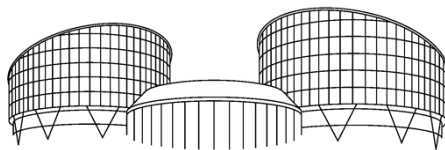
1. *Dismisses* the Government's preliminary objection concerning the alleged failure to observe the six-month rule;
2. *Joins* to the merits of the complaints under Articles 2, 3 and 14 of the Convention the Government's preliminary objections of non-exhaustion of domestic remedies and *dismisses* them;
3. *Declares* the application admissible;

4. *Holds* that there has been a violation of Article 2 of the Convention in respect of the death of the applicant's mother;
5. *Holds* that there has been a violation of Article 3 of the Convention in respect of the authorities' failure to protect the applicant against domestic violence perpetrated by her former husband;
6. *Holds* that there is no need to examine the complaints under Articles 6 and 13 of the Convention;
7. *Holds* that there has been a violation of Article 14 of the Convention read in conjunction with Articles 2 and 3;
8. *Holds*
 - (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts, to be converted into Turkish liras at the rate applicable at the date of settlement:
 - (i) a total sum of EUR 30,000 (thirty thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;
 - (ii) EUR 6,500 (six thousand five hundred euros), less EUR 1,494 (one thousand four hundred and ninety-four euros) received by way of legal aid from the Council of Europe, plus any tax that may be chargeable to the applicant, for costs and expenses;
 - (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;
9. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 9 June 2009, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Santiago Quesada
Registrar President

Josep Casadevall



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

FIFTH SECTION

CASE OF A AND B v. GEORGIA

(Application no. 73975/16)

JUDGMENT

Art 2 (substantive and procedural) (+ Art 14) • Discrimination • Positive obligations • Failure to prevent gender-based violence culminating in murder by a police officer and to investigate the response of law-enforcement authorities • Passive and even accommodating attitudes of law-enforcement, conducive to proliferating violence against women

STRASBOURG

10 February 2022

FINAL

10/05/2022

This judgment has become final under Article 44 § 2 of the Convention. It may be subject to editorial revision.

A AND B v. GEORGIA JUDGMENT

In the case of A and B v. Georgia,

The European Court of Human Rights (Fifth Section), sitting as a Chamber composed of:

Síofra O’Leary, *President*,
 Ganna Yudkivska,
 Stéphanie Mourou-Vikström,
 Lətif Hüseyinov,
 Lado Chanturia,
 Arnfinn Bårdsen,
 Mattias Guyomar, *judges*,

and Martina Keller, *Deputy Section Registrar*,

Having regard to:

the application (no. 73975/16) against Georgia lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by two Georgian nationals, A (“the first applicant”) and B (“the second applicant”), on 16 September 2016;

the decision to give notice of the application to the Georgian Government (“the Government”);

the decision not to have the applicants’ names disclosed;

the parties’ observations;

Having deliberated in private on 18 January 2022,

Delivers the following judgment, which was adopted on that date:

INTRODUCTION

1. The case mainly concerns complaints under Articles 2 and 14 of the Convention about the respondent State’s failure to protect the applicants’ next of kin from domestic violence and conduct an effective investigation into the matter.

THE FACTS

2. The first and second applicants were born in 1972 and 2013 respectively and live in Georgia. They were represented before the Court by five Georgian lawyers – Ms T. Dekanosidze, Ms T. Abazadze, Ms N. Jomarjidge, Ms A. Arganashvili and Ms A. Abashidze – and four British lawyers – Mr Ph. Leach, Ms K. Levin, Ms J. Evans and Ms J. Gavron.

3. The Government were represented by their Agent, Mr B. Dzamashvili, of the Ministry of Justice.

4. The facts of the case, as submitted by the parties, may be summarised as follows.

A AND B v. GEORGIA JUDGMENT

I. CIRCUMSTANCES LEADING TO C'S KILLING

5. The first and second applicants are the mother and son of C, who was born on 24 November 1994 and killed by her partner, D, the second applicant's father, on 25 July 2014 (see paragraph 17 below).

6. In 2011 C, who was seventeen years old, was kidnapped for marriage by D, a twenty-two years' old police officer serving in the small city where she lived. As C was under constant threat from D, she began cohabiting with him. The couple never registered their marriage.

7. The couple's cohabitation, which was marked often by disputes fuelled by D's jealousy, lasted from December 2011 until June 2012, when C, exhausted by the physical and psychological harassment from her partner, returned to her parents' house. She was two months pregnant at the time.

8. From December 2011, C and her family became the target of regular verbal and physical abuse from D. He threatened to kill C and her parents, referring to his official status as a police officer and strong connections within the police. The family members were afraid to report the majority of the incidents to the police but still managed to report a number of the most violent ones.

9. On an unspecified date in July 2012 C called the police, complaining that D had threatened to kill her mother, the first applicant. She received no response to her complaint.

10. According to the materials available in the case file, on 31 August 2013 D, following an altercation over child support payments, beat up C in her parents' house. The police were called and three patrol officers, all of whom were D's acquaintances, interviewed C in his presence. As confirmed by several independent eyewitnesses, such as neighbours, D was on good terms with the officers, who were his immediate colleagues, during the interview. One of the officers told C that wife-beating was commonplace and that not much importance need be attached to it. When the officers were interviewing C and she, who was bearing signs of recent physical abuse, started reporting the above-mentioned details of her ill-treatment, D interfered in the process, mocking C's responses and shouting at her, but the officers did not attempt to stop him. Without interviewing the alleged abuser, the police officers drew up a report that did not accurately reflect the extent of the violence of the incident, referring to it as "a minor family altercation related to child support payments". C initially refused to sign the report, but D forced her to do so, making threats to kill her, which were overheard by the police officers. Prior to leaving the house, one of the police officers told C not to contact them in the future without a valid reason or face being fined for wasting police time as they were busy with other, more serious matters. D left C's house with the officers and they drove away in the same car.

11. On the same day, C filed a criminal complaint with a local public prosecutor's office. She complained about D, for physically abusing her, and

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the three police officers, for failing to carry out their duties with due diligence. In her complaint, she also pointed out that her former partner had been constantly harassing her, resorting to threats to kill and physical violence. He had also threatened to abduct their child. She asked the prosecution authority to take all the measures necessary to put an end to D's violent behaviour. She also added that since her abuser was a police officer, she could not trust that the police would come to her assistance, hence she had addressed her complaint to the public prosecutor's office.

12. Following C's criminal complaint, on 4 September 2013 a public prosecutor interviewed C, D and one of the police officers regarding the incident of 31 August 2013, both of whom denied that C had been ill-treated in any way. D's version of events was that they had simply had an argument over child support payments. On 9 September 2013 D gave a written undertaking for the attention of the prosecution authority that he would never again verbally or physically abuse either C or her family members. The prosecution authority was satisfied with that undertaking and decided not to launch a criminal investigation.

13. On 5 July 2014 C complained to the General Inspectorate of the Ministry of the Interior ("the General Inspectorate"), the division in charge of conducting disciplinary inquiries against police officers, that D had physically assaulted her twice in public, on 3 and 5 July 2014.

14. According to the material available in the case file, numerous independent witnesses confirmed in their written statements that D had been using various attributes of his official position to commit abuse against C between April 2011 and July 2014. Notably, during that period, he had (i) intimidatingly flaunted his service pistol on at least seven occasions, (ii) regularly threatened to bring false charges against C's father and brother if she reported their altercations to the law-enforcement authorities and (iii) often said that he was not afraid of the law-enforcement machinery as he was part of it himself. All this information was made known to both the police and prosecution authority.

15. On 20 July 2014 D was promoted to the rank of senior police lieutenant.

16. On 25 July 2014 a representative of the General Inspectorate summoned C for an interview in relation to the two incidents referred to in her complaint of 5 July 2014 (see paragraph 13 above). During the interview she reiterated that D had been systematically subjecting her to physical and psychological harassment. Whilst she wanted the General Inspectorate to intervene and put an end to her former partner's violent behaviour, she asked it not to be too harsh with him because he was the father of her child.

17. Shortly after C had left the interview, D stalked her in the street. Eyewitnesses saw them having a tense and loud argument in a public park. All of a sudden, D pulled his service pistol out and fired five shots at C's chest and stomach at close range. She died instantly.

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II. CRIMINAL PROCEEDINGS AGAINST D

18. On the same day, a criminal case was opened and D was charged with C's murder. When questioned the following day, he told the investigators that his relationship with C had been strained from the very beginning because she had always wanted to move to Tbilisi, the capital, to pursue a modelling career, to which he had strongly objected. He had become particularly jealous after their separation because he had started seeing her date other men. He also stated that what had served as a trigger for his rage, and what had made him use his gun on the day of the shooting, had been something C had said, in an intentionally provocative and vulgar way, namely that her private and sex life did not concern him at all. In his view, C had "humiliated him", and that was why he had used a gun on her.

19. By a judgment of 17 April 2015, the Kutaisi City Court found D guilty of premeditated murder of a family member and sentenced him to eleven years' imprisonment. D pleaded insanity, claiming that he had shot C because of an episodic mental disorder caused by pathological jealousy. That line of defence was however dismantled by the results of a court-ordered forensic examination of D's mental health. The decision became final on 15 February 2016. The conviction did not refer to the possible role of gender-based discrimination in the commission of the crime (see paragraph 29 below).

III. CRIMINAL COMPLAINTS AGAINST THE RELEVANT LAW-ENFORCEMENT AUTHORITIES

20. On 22 January 2015 the first applicant, acting on behalf of herself and the second applicant, filed a complaint with the Chief Public Prosecutor's Office, requesting that a criminal investigation be launched into the failure of the relevant police officers and public prosecutors to protect her daughter's life and give proper consideration to the repeated reports of domestic violence. The first applicant argued that the State agents' negligent conduct might have been influenced by gender-based discrimination.

21. On 19 February 2015 the prosecution authority opened a criminal case into the police officers' alleged failure to properly respond to C's allegations of domestic violence and interviewed the three patrol officers who had attended the incident of 31 August 2013 (see paragraphs 10 and 11 above). According to the officers, they did not think that the incident was of a violent nature. On 27 February 2015 the first applicant was interviewed and told the prosecution authority the entire history of the strained relationship between her daughter and D, including his repeated use of violence. As regards the incident of 31 August 2013, she confirmed the sequence of events as described above (see paragraph 10 above).

22. Between March and August 2015, the public prosecutor's office interviewed five witnesses to the incident of 31 August 2013, who were either

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relatives of A and C or their neighbours. The majority of them gave evidence indicating that the incident was of a particularly violent nature.

23. On 2 March, 29 April and 23 June 2015 and 21 January 2016 the first applicant repeatedly enquired with the Chief Public Prosecutor's Office about the progress of the investigation, if any, and on 20 March 2015 it replied that a criminal investigation had been launched into the alleged negligence of the police officers. The first applicant received no response to her complaint directed against the public prosecutors (see paragraph 20 above).

24. By letters of 1 and 16 March 2016, a regional public prosecutor's office informed the first applicant that the criminal investigation into the alleged negligence of the police officers was pending, but that no charges had been pressed against anyone and it was not necessary to grant her victim status at that time. She received no response to her complaint directed against the public prosecutors.

25. On 17 March 2016 the first applicant again enquired with the Chief Public Prosecutor's Office whether a criminal investigation into the actions of the public prosecutors had been launched. She received no response.

IV. CIVIL ACTIONS AGAINST THE LAW-ENFORCEMENT AUTHORITIES

26. On 22 January 2015 the first applicant, acting on behalf of herself and the second applicant, sued the Ministry of the Interior and Chief Public Prosecutor's Office under Article 1005 of the Civil Code for failure to protect her daughter's life, claiming compensation in respect of non-pecuniary damage in the amount of 120,000 Georgian laris (GEL – approximately 34,000 euros (EUR)).

27. By a judgment of 24 July 2015, the Tbilisi City Court allowed the claim in part, awarding compensation in respect of non-pecuniary damage in the amount of GEL 20,000 (approximately EUR 7,000). The court found that there was a causal link between the inactivity of the relevant police officers and public prosecutors and C's killing. It emphasised, in that connection, that the public authorities were under an obligation to respond promptly and effectively to allegations of discrimination. That obligation had however been blatantly disregarded in the case in issue, in breach of Articles 3 and 8 of the Convention. The court observed, referring to the incident of 31 August 2013, that the police officers had not interviewed C or the witnesses to the incident, had not issued a restraining order against D and had not taken measures aimed at restricting the use of his service pistol. As regards the role of the public prosecutors, the court noted that they had failed in their obligation to conduct an adequate criminal investigation into the violent incidents in question. The court concluded that the respondent authorities, who ought to be considered liable together with the relevant individual officials, had failed to take

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measures to put an end to the gender-based discrimination and protect C's life.

28. The judgment of 24 July 2015 became final on 29 June 2017, when the Supreme Court of Georgia finally terminated the proceedings.

RELEVANT LEGAL FRAMEWORK AND PRACTICE

29. On 27 March 2012 an amendment to Article 53 of the Criminal Code of Georgia was adopted whereby discrimination was recognised as a bias motivation and an aggravating circumstance in the commission of a criminal offence. The relevant provision reads as follows:

Article 53 § 3 (1)

“The commission of any offence listed in this Code on the grounds of any type of discrimination, such as, for instance and not exclusively, that linked to race, skin colour, language, sex, sexual orientation and gender identity, age, religion, political and other views, disabilities, citizenship, national, ethnic or social background, origin, economic status or societal position or place of residence shall be an aggravating circumstance.”

30. Other relevant domestic law, as well as international material concerning violence against women in Georgia, is comprehensively summarised in paragraphs 25-40 of the Court's judgment in the case of *Tkheldze v. Georgia* (no. 33056/17, 8 July 2021).

THE LAW

I. ALLEGED VIOLATION OF ARTICLES 2 AND 14 OF THE CONVENTION

31. Relying on Articles 2, 3 and 14 of the Convention, the applicants complained that the domestic authorities had failed to protect C from domestic violence and conduct an effective criminal investigation into the circumstances contributing to her death.

32. Having regard to its case-law and the nature of the applicant's complaints, the Court, being master of the characterisation to be given in law to the facts of a case, considers that the issues raised in the present case should be examined solely from the perspective of the substantive positive and procedural aspects of Article 2 of the Convention, taken in conjunction with Article 14 (compare *Kurt v. Austria* [GC], no. 62903/15, § 104, 15 June 2021). The relevant parts of these provisions read as follows:

Article 2

“1. Everyone's right to life shall be protected by law ...”

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Article 14

“The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as sex ..., or other status.”

A. Admissibility

33. The Government submitted that the applicants had lost victim status for the purposes of Article 34 of the Convention given the outcome of the criminal proceedings initiated against D (see paragraphs 18-19 above) and civil proceedings initiated against the law-enforcement authorities (see paragraphs 26-28 above). In particular, they submitted that since the perpetrator of C’s killing had been promptly identified and sufficiently punished and the domestic civil courts had duly acknowledged the law-enforcement authorities’ wrongful conduct and even awarded the applicants compensation, the application should be declared inadmissible as incompatible *ratione personae* with the provisions of the Convention pursuant to Article 35 §§ 3 (a) and 4.

34. The applicants disagreed with the Government’s objection, arguing that the various domestic remedies pursued by them had not resulted in either sufficient acknowledgment of the violation of their various rights under the Convention or sufficient redress. They specified in this connection that the crux of their application was the inaction of the law-enforcement authorities, which had significantly contributed to the domestic violence and death of C, their next of kin.

35. The Court observes that in the present case the question of possible loss by the applicants of their victim status on the basis of the outcome of the various sets of domestic proceedings is closely linked to the issue of the effectiveness of the investigation into the circumstances contributing to the death of their next of kin. The Court thus considers it appropriate to join this matter to the merits of the complaint made by the applicants under the procedural limb of Article 2 of the Convention, read together with Article 14 (compare, for instance, *Petrović v. Serbia*, no. 40485/08, §§ 64 and 65, 15 July 2014, and *Özcan and Others v. Turkey*, no. 18893/05, § 55, 20 April 2010).

36. The Court further notes that the application is neither manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention nor inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits*1. The parties’ submissions*

37. The applicants submitted that although they had been aware of the danger to C’s life from D’s violent behaviour, the police and prosecution authority had nevertheless failed to take the necessary preventive measures.

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They complained that the law-enforcement authorities had inadequately and inaccurately gathered and recorded evidence when dealing with the allegations of domestic violence. The applicants further submitted that the inappropriate and discriminatory responses of the police and prosecution authority to the complaints made by C about her partner's abusive behaviour, coupled with their failure to investigate the circumstances contributing to her death and hold the implicated law-enforcement agents criminally responsible for their failure to protect her life, were at the heart of the breach by the respondent State of its substantive positive obligations under Articles 2 and 14 of the Convention.

38. Without disputing the facts of the case as submitted by the applicants, and without contesting their legal arguments submitted on the merits of the relevant complaints, the Government limited their comments to providing the Court with an overview of various legislative, budgetary and administrative measures taken by the respondent State to tackle domestic violence and, more generally, violence committed against women from 2014 onwards. In that connection, they submitted information about various training and awareness-raising courses provided, between 2015 and 2017, to the judicial, prosecutorial and law-enforcement authorities on the problem of violence against women.

2. *The Court's assessment*

39. Having regard to the applicants' allegations that the authorities' double failure – the lack of protection of their next of kin from domestic violence and the absence of an effective investigation into the law-enforcement authorities' inaction – stemmed from their insufficient acknowledgment of the phenomenon of discrimination against women, the Court finds, firstly, that the most appropriate way to proceed would be to subject the complaints to a simultaneous dual examination under Article 2 taken in conjunction with Article 14 of the Convention (see *Tkheldidze v. Georgia*, no. 33056/17, § 47, 8 July 2021, with further references). Secondly, given that the issue of the applicants' victim status has been joined to the merits of their complaint under the procedural limb of Article 2 of the Convention, the Court considers it appropriate to start its examination of the merits of the application with the latter complaint. Thirdly, the Court emphasises that the present case is not directly about the violent actions of D, which finally led to his criminal conviction following the murder of C., but rather about the authorities response, or a lack thereof, to his actions and C and her family's complaints prior to and after her murder. The fact that he was a serving police officer and an acquaintance of those who had been investigating C's complaints may therefore be relevant to the Court's assessment of questions relating to the procedural and substantive limbs of Article 2 and alleged loss of victim status.

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(a) General principles

40. The Court reiterates that, under the principle of subsidiarity, it falls first to the national authorities to redress any alleged violation of the Convention. In this regard, the question whether an applicant can claim to be a victim of the violation alleged is relevant at all stages of the proceedings under the Convention. A decision or measure favourable to the applicant is not in principle sufficient to deprive him or her of his or her status as a “victim” unless the national authorities have acknowledged, either expressly or in substance, and then afforded redress for, the breach of the Convention. Only where both these conditions have been satisfied does the subsidiary nature of the protective mechanism of the Convention preclude examination of the application (see *Selahattin Demirtaş v. Turkey* (no. 2), no. 14305/17, § 218, 20 November 2018). The principle of subsidiarity does not mean renouncing all supervision of the result obtained from using domestic remedies, otherwise the rights guaranteed by the Convention would be devoid of any substance (see, for instance, *Nikolova and Velichkova v. Bulgaria*, no. 7888/03, § 49, 20 December 2007).

41. In cases concerning possible responsibility on the part of State officials for deaths occurring as a result of their alleged negligence, the obligation imposed by Article 2 to set up an effective judicial system does not necessarily require the provision of a criminal-law remedy in every case. However, there may be exceptional circumstances where only an effective criminal investigation would be capable of satisfying the procedural positive obligation imposed by Article 2. Such circumstances can be present, for example, where a life was lost or put at risk because of the conduct of a public authority that goes beyond an error of judgment or carelessness. Where it is established that the negligence attributable to State officials or bodies goes beyond an error of judgment or carelessness, in that the authorities in question – fully realising the likely consequences and disregarding the powers vested in them – failed to take measures that were necessary and sufficient to avert the risks, the fact that those responsible for endangering life have not been charged with a criminal offence or prosecuted may amount to a violation of Article 2, irrespective of any other types of remedy that individuals may exercise on their own initiative (see *Tkheldze*, cited above, § 59).

42. As regards the general principles concerning the State’s relevant substantive positive obligations under Articles 2 and 14 of the Convention, they were comprehensively summarised in *Tkheldze*, the first case exposing the State’s failure to tackle domestic violence and violence against women in general (cited above, §§ 48-51). In addition, the Court further reiterates that a State’s failure to protect women against domestic violence breaches their right to equal protection before the law and that this failure need not be intentional. It has previously held that “general and discriminatory judicial passivity [creating] a climate ... conducive to domestic violence” amounts to a violation of Article 14 of the Convention (see *Opuz v. Turkey*, no. 33401/02,

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§§ 191 et seq., ECHR 2009). Such discriminatory treatment occurs where the authorities' actions are not a simple failure or delay in dealing with the violence in question, but amount to repeatedly condoning such violence and reflect a discriminatory attitude towards the complainant as a woman (see *Talpis v. Italy*, no. 41237/14, § 141, 2 March 2017). Indeed, an immediate response to allegations of domestic violence is required from the authorities who must establish whether there exists a real and immediate risk to the life of one or more identified victims of domestic violence by carrying out an autonomous, proactive and comprehensive risk assessment (see *Kurt*, cited above, § 190).

(b) Application of these principles to the circumstances of the present case

(i) Procedural obligations and victim status

43. The Court observes that, since the crux of the application is that the inactivity and negligence of the law-enforcement authorities was one of the main reasons why the domestic abuse was allowed to escalate, culminating in C's murder, and given that the authorities knew or should have known of the high level of risk faced by her if they failed to discharge their policing duties properly – as she was complaining about a fellow police officer, with access to a firearm – and were thus in a position to establish whether he had been involved in similar incidents in the past or his propensity to violence, the Court considers that their inactivity and negligence went beyond a mere error of judgment or carelessness. Consequently, amongst the remedies used by the applicants at domestic level, the most pertinent for the purposes of Article 35 § 1 of the Convention were the criminal proceedings instituted against the police officers and public prosecutors involved (see paragraphs 20-25 above and compare *Tkheldze*, cited above, § 60).

44. However, the Court notes with concern that the competent investigative authority neither made an attempt to establish responsibility on the part of the police officers for their failure to respond properly to the multiple incidents of gender-based violence occurring prior to C's murder nor deem it necessary to grant the applicants victim status. No disciplinary inquiry into the police's alleged inaction was even opened, and no steps were taken to train the police officers in question on how to respond properly to allegations of domestic violence in the future. As regards the part of the applicants' complaint calling into question the inaction of the public prosecutors, no response was received whatsoever – the applicants repeatedly sought but failed to receive information from the investigative authority on this aspect of their criminal complaint. However, in the light of the relevant circumstances of the case, in particular the existence of indices pointing to possible gender based discrimination as at least partly informing the response of law enforcement to the complainant and the complaints and the fact that they permitted the alleged perpetrator to participate in the questioning of the

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complainant and victim of the alleged domestic abuse, the Court considers that there was a pressing need to conduct a meaningful investigation into the response of law enforcement and their inaction, which might have been motivated by gender-based discrimination, in the face of C's complaints (compare *Tkheldze*, cited above, § 60). The fact that the alleged perpetrator of the violence of the abuse was a member of law enforcement himself, and that the threats he had used against the victim and her family referred to this fact and what he considered to be his impunity, rendered the need for a proper investigation all the more pressing.

45. Although the above considerations are sufficient for the Court to conclude that there has been a breach by the respondent State of its procedural obligations under Article 2 read in conjunction with Article 14 of the Convention (*ibid.*, §§ 58-60), it notes in addition the insufficiency of the redress offered by the two other sets of domestic proceedings – the criminal prosecution of the perpetrator and civil proceedings brought by the applicants against the law-enforcement authorities. With respect to the former, the Court notes that D's trial and conviction did not involve any examination of the possible role of gender-based discrimination in the commission of the crime (see paragraph 19 above). As regards the latter, whilst it was undoubtedly positive that the domestic courts acknowledged the law-enforcement authorities' failure to take measures aimed at putting an end to the gender-based discrimination and protect C's life, the Court notes that they did not expand their scrutiny to the question of whether the official tolerance of incidents of domestic violence might have been conditioned by the same gender bias. Nor have the courts addressed the question of whether there had been indications of the relevant law-enforcement officers' acquiescence or connivance in the gender-motivated abuses perpetrated by their colleague, D. These gaps in the response of the domestic courts do not sit well with the respondent State's heightened duty to tackle prejudice-motivated crimes.

46. The Court thus concludes that, in the particular circumstances of the present case and having regard to the nature and quantum of the pecuniary award, the applicants have retained their victim status within the meaning of Article 34 (see paragraph 35 above) and that there has been a violation of the procedural limb of Article 2 read in conjunction with Article 14 of the Convention.

(ii) *Substantive positive obligations*

47. Like the leading case of *Tkheldze*, the circumstances of the present application confirm that there was clearly a lasting situation of domestic violence, which means that there could be no doubt about the immediacy of the danger to the victim, and that the police knew or certainly ought to have known of the nature of that situation. Although they were put on alert about the seriousness of the risks, the police failed to display the requisite special diligence and committed major failings in their work such as inaccurate,

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incomplete or even misleading evidence gathering and not attempting to conduct a proper analysis of what the potential trigger factors for the violence could be (see paragraphs 10 and 12 above and compare with *Tkheldze*, cited above, § 53). In this connection, the Court reiterates that shortcomings in the gathering of evidence in response to a reported incident of domestic violence can result in an underestimation of the level of violence actually committed, can have deleterious effects on the prospects of opening a criminal investigation and even discourage victims of domestic abuse, who are often already under pressure from society, from reporting an abusive family member to the authorities in the future (*ibid.*, § 54).

48. The Court also observes that whilst the domestic legislative framework provided for various temporary restrictive measures in respect of alleged abusers (compare *Tkheldze*, cited above, 55), the relevant domestic authorities did not resort to them at all. It does not appear from the various reports and records drawn up by the police officers that the victim was ever advised by the police of her procedural rights and of the various legislative and administrative measures of protection available to her. The Court further considers that the inactivity of the domestic law-enforcement authorities appears to be even more concerning when assessed against the fact that the abuser was himself a police officer. What is more, whilst the law-enforcement authorities were perfectly aware that he was using various attributes of his official position to commit abuse against C (intimidating her with his service pistol on many occasions, repeatedly claiming impunity for his acts on account of his belonging to the law-enforcement machinery, threatening to bring false charges against C's father and brother if the victim reported the abuse to the police, and so on), not only did the police not put an end to that demonstration of ultimate impunity and arbitrariness (see *Ushakov and Ushakova v. Ukraine*, no. 10705/12, § 83, 18 June 2015), they, on the contrary, allowed the alleged abuser to participate in the questioning of his victim and soon after promoted the abuser to a higher police rank (see paragraphs 14 and 15 above). The Court finds this aspect of the case to be particularly troubling because it expects Member States to be all the more stringent when investigating and, where appropriate, punishing their own law-enforcement officers for the commission of serious crimes, including domestic violence and violence against women in general, than they are with ordinary offenders, because what is at stake is not only the issue of the individual criminal-law liability of the perpetrators but also the State's duty to combat any sense of impunity felt by the offenders by virtue of their very office, and maintain public confidence in and respect for the law-enforcement system (see, *mutatis mutandis*, *Vazagashvili and Shanava v. Georgia*, no. 50375/07, § 92, 18 July 2019, and *Makuchyan and Minasyan v. Azerbaijan and Hungary*, no. 17247/13, § 157, 26 May 2020).

49. The Court thus concludes that the present case can be seen as yet another vivid example of how general and discriminatory passivity of the

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law-enforcement authorities in the face of allegations of domestic violence can create a climate conducive to a further proliferation of violence committed against victims merely because they are women. In disregard of the panoply of various protective measures that were directly available, the authorities did not prevent gender-based violence against the applicants' next-of-kin, which culminated in her death, and they compounded this failure with an attitude of passivity, even accommodation, as regards the alleged perpetrator, later convicted of the victim's murder. The respondent State has thus breached its substantive positive obligations under Article 2 of the Convention read in conjunction with Article 14.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

50. Article 41 of the Convention provides:

“If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party.”

A. Damage

51. The applicants claimed 50,000 euros (EUR) in respect of non-pecuniary damage. They further requested that the Court indicate to the respondent State that there was a need to implement the following two general measures – (i) to put in place a mechanism for “the institutional responsibility of the State organs for preventing and adequately responding to femicide” and (ii) to take legislative measures in order “to explicitly criminalise femicide and ensure that all killings of women are investigated from a gender perspective”.

52. The Government submitted that the amounts claimed were not justified in the circumstances of the case.

53. The Court accepts that the applicants must have suffered non-pecuniary damage which cannot be compensated for solely by the finding of a violation. It finds it appropriate to award them EUR 35,000 under this head (compare *Tkheldze*, cited above, § 65).

54. As regards the applicants' request for additional measures to be indicated to the respondent State, the Court considers that, in the case at hand, it would be for the respondent State to choose, subject to supervision by the Committee of Ministers, the exact means to be used in its domestic legal order to discharge its obligations under the Convention, including those in relation to the problem of the discriminatory passivity of the law-enforcement authorities in the face of allegations of violence against women (see *Abu Zubaydah v. Lithuania*, no. 46454/11, §§ 682 and 683, 31 May 2018, and

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Aghdgomelashvili and Japaridze v. Georgia, no. 7224/11, § 57, 8 October 2020).

B. Costs and expenses

55. On 10 May 2019, within the time-limit allocated by the Court for the submission of just satisfaction claims under Rule 60 of the Rules of Court, the applicants claimed EUR 22,817.60 for the costs and expenses incurred before the Court by two of their British lawyers. No claim was made with respect to the applicant's representation by the remaining seven (five Georgian and two British) lawyers (see paragraph 2 above). No copies of legal service contracts, invoices, vouchers or any other supporting financial documents were submitted. The amount claimed was based on the number of hours spent by the British lawyers in question on the case (ninety-eight hours and thirty minutes) and the lawyers' hourly rate (GBP 150) and included, in addition, a claim for postal, translation and other administrative expenses incurred by them.

56. On 24 June 2019 the Government replied that the claims were unsubstantiated and excessive. They stated, in particular, that no copy of the legal service contract between the applicants and two British lawyers had been submitted.

57. On 21 August 2019 the applicants, without being invited by the Court to do so and without being given any additional time for this submission, supplemented their previous claims with a legal service contract dated 5 August 2019 signed by them and their British lawyers.

58. The Court observes, at the outset, that the applicants' submissions of 21 August 2019 were submitted in breach of the relevant procedural requirement contained in Rule 60 of the Rules of Court. That is to say, the submissions reached the Court outside the relevant time-limit, and no extension of time was requested before the expiry of that period. Furthermore, the submissions consisted of a legal service contract signed and dated after the applicants had formally filed their just satisfaction claims with the Court (compare paragraphs 56 and 58), and no explanation for this discrepancy was given. In these circumstances, the submissions of 21 August 2019 cannot be taken into consideration by the Court (compare, amongst other authorities, *Kováčik v. Slovakia*, no. 50903/06, §§ 91-93, 29 November 2011, and *Stavebná spoločnosť TATRY Poprad, s.r.o. v. Slovakia*, no. 7261/06, §§ 55-56, 3 May 2011).

59. As regards the applicants' claims submitted under Rule 60 of the Rules of Court on 10 May 2019, the Court observes that they did not contain documents showing that they had paid or were under a legal obligation to pay the fees charged by their two British representatives. In the absence of such documents, the Court finds no basis on which to accept that the costs and expenses claimed by the applicants have actually been incurred (see

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Merabishvili v. Georgia [GC], no. 72508/13, § 371, 28 November 2017, and, as a recent authority, *Tkheldze*, cited above, § 68).

60. It follows that the claims must be rejected.

C. Default interest

61. The Court considers it appropriate that the default interest rate should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Joins* to the merits the question relating to the applicants' victim status;
2. *Declares* the application admissible;
3. *Holds* that the applicants may claim to be victims for the purposes of Article 34 and that there has been a violation of Article 2 under its substantive positive and procedural limbs taken in conjunction with Article 14 of the Convention;
4. *Holds*
 - (a) that the respondent State is to pay the applicants jointly, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 35,000 (thirty-five thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage, to be converted into the currency of the respondent State at the rate applicable at the date of settlement; and
 - (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;
5. *Dismisses* the remainder of the applicants' claim for just satisfaction.

Done in English, and notified in writing on 10 February 2022, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

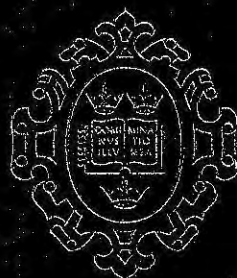
Martina Keller
Deputy Registrar

Síofra O'Leary
President

MONAGHAN ON EQUALITY LAW

SECOND EDITION

KARON MONAGHAN QC



OXFORD

expressed) to a person who does not have a disability includes a reference to a person who has not had the disability.³⁷³

Whether a person had a disability at a particular time in the past ('the relevant time') must be determined as if the provisions of, or made under, the EA 2010 in force when the act complained of was done, had been in force at the relevant time.³⁷⁴ The relevant time may be a time before the coming into force of the provision of EA 2010 to which the complaint relates.³⁷⁵

As mentioned previously,³⁷⁶ in deciding whether a past condition constituted a disability, the effect of an impairment is to be treated as long-term if it lasted for at least twelve months after the first occurrence, or its effects recurred.³⁷⁷ In *Greenwood v British Airways Plc*³⁷⁸ the claimant was off work between October 1993 and March 1994 due to 'nervous tension'. He was thereafter absent on three occasions on dates between December 1996 and February 1997 which, along with his earlier absence, triggered the sickness absence procedure. He was refused a promotion shortly afterwards on the basis, in part, that he was viewed as unreliable due to his previous sickness record. He went sick with depression in August 1997 and when he was refused promotion brought a complaint of disability discrimination. Overturning the decision of the employment tribunal, the Employment Appeal Tribunal concluded that the claimant had had a disability in the past; the tribunal had failed to have regard to the fact that the adverse effect of the claimant's depression recurred and he was therefore to be regarded as having had a past disability.

(21) Future disabilities

The EA 2010 does not protect persons who have some disposition to become disabled in the future by reason of some genetic condition or otherwise.³⁷⁹ This is because of the functional nature of the test for disability and the fact that, outside specific conditions, including progressive conditions, a person who is and remains symptom-free will not satisfy it.³⁸⁰ The same may not be true of the UNCRPD³⁸¹ (and, therefore, EU law³⁸²) with its focus on a social model of disability.

H. Gender Reassignment

(1) Introduction

As is further addressed later,³⁸³ the law constructs a concept of 'sex' which is binary and biologically determinist. One is a man or a woman, and a clear legal delineation between the two is maintained. In the case of *Corbett v Corbett*,³⁸⁴ the court concluded that sex (for the purpose

³⁷³ EA 2010, s 6(4), except for the purposes of EA 2010, Part 12 (Disabled Persons: Transport) and s 190 (Improvements to Let Dwelling Houses).

³⁷⁴ The drafting of this provision lacks some precision and clarity but such is its effect.

³⁷⁵ EA 2010, Sch 1, para 9 and *Guidance* (2011), para A16.

³⁷⁶ Paragraphs 5.105 and 5.110.

³⁷⁷ EA 2010, Sch 1, para 2(1)(a) and (2) and *Guidance* (2011), para C12.

³⁷⁸ *Greenwood v British Airways Plc* [1999] ICR 969, [1999] IRLR 600.

³⁷⁹ See the discussion of 'genetic predisposition discrimination' in the *Discrimination Law Review* (2007), paras 8.23–8.31.

³⁸⁰ See para 5.121 for asymptomatic cancer, HIV, and multiple sclerosis.

³⁸¹ See Ch 4, para 4.249 *et seq.* and para 5.54.

³⁸² See para 5.54 and see EU Charter of Fundamental Rights (2010), Arts 21 and 27; see Ch 4, para 4.98.

³⁸³ Paragraph 5.280.

³⁸⁴ *Corbett v Corbett* [1971] Probate Reports 83.

of determining whether respective parties to a marriage were male and female³⁸⁵) was to be determined by the application of chromosomal, gonadal, and genital tests where these are congruent and ignoring any surgical intervention.³⁸⁶ 'Sex' was to be determined and 'fixed at birth (at the latest)', and could not be 'changed, either by the natural development of organs of the opposite sex, or by medical or surgical means'. Gender reassignment surgery, therefore, could not 'affect ... true sex. The only cases where the term "change of sex" is appropriate are those in which a mistake as to sex is made at birth and subsequently revealed by further medical investigation.'³⁸⁷ That approach was thereafter adopted for general (legal) purposes, in *R v Tan*³⁸⁸ (in the context of a criminal offence that could only be committed by a man, said to have been committed by the defendant, a transsexual woman).

- 5.135** No uncertainty is assumed to pertain to the meaning of 'sex', then, and this is achieved by ignoring its social—or gendered—aspects. This has meant that gender variant behaviours have fallen entirely outside the rigidly cast protections against sex discrimination.³⁸⁹ Transgenderism, transvestitism, and cross-dressing have challenged the presumptive relationship between sex and gender identity inherent in such an approach. However, the phenomenon of gender reassignment has wholesale challenged the assumptions made about sex and gender. In an obvious sense the law cannot regard sex—and therefore gender—as immutable when it is indeed fundamentally changeable. The law has historically addressed this dilemma by pathologizing and medicalizing transpersons. But with the increasing pervasiveness of human rights values and respect for human dignity, gender reassignment status has been recognized and protected. However, generally this is still achieved through a medical, rather than a social, model. Indeed, standard medical texts treat gender dysphoria or gender identity disorder as a clinical condition; a psychiatric or behavioural disorder.³⁹⁰
- 5.136** Feminist theorists and practitioners would argue that the restrictive concept of sex, grounded as it is in biological assumptions which can obscure the experience of gendered disadvantage³⁹¹ and fail to protect those who refuse to (or cannot) conform to gender norms, are at the root of the problem, not illness. That 'gender'—that is the social aspects of an assigned sex—can be, and is often, far more determinative of a person's identity than physiology has not generally been reflected in domestic law.
- 5.137** The EA 2010, like the Sex Discrimination Act 1975 (SDA), treats 'sex' (and therefore 'gender') as immutable and, connectedly, biologically determined.³⁹² When forced by the ECtHR and CJEU to protect transpersons against discrimination, the UK did so not by adopting a socially constructed concept of 'sex' under the SDA, but by amending the SDA so as to make

³⁸⁵ See Matrimonial Causes Act 1973, s 11(c).

³⁸⁶ *Corbett*, 104D–E, 106, B, D–E, F, per Ormrod J.

³⁸⁷ *Corbett*, 104, D–F.

³⁸⁸ *R v Tan* [1983] 1 QB 1053, 1064, A–D, per Parker J.

³⁸⁹ Cf 'The Yogyakarta Principles' 'gender identity is understood to refer to each person's deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth, including the personal sense of the body (which may involve, if freely chosen, modification of bodily appearance or function by medical, surgical or other means) and other expressions of gender, including dress, speech and mannerisms' (footnote 2, *Yogyakarta Principles on the Application of International Human Rights Law in relation to Sexual Orientation and Gender Identity* (2006), available at <http://www.yogyakartaprinciples.org/principles_En.htm> [accessed 26 June 2012]).

³⁹⁰ WHO International Classification of Diseases ICD–10, F64.0 ('transsexualism') under the heading 'Disorders of Adult Personality Behaviors and Behavior'. And see American Psychiatric Association (DSM–IV). See, too, *Goodwin v UK* (2002) 35 EHRR 447; *Grant v United Kingdom* (Application no 32570/03) [2006] All ER (D) 337 (May); and *Bellinger v Bellinger* [2003] 2 AC 467, at para 30.

³⁹¹ See para 5.278 *et seq.*

³⁹² See para 5.295 *et seq.*

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³⁹³ EA 2010

³⁹⁴ *P v S and*

³⁹⁵ 76/207/E

³⁹⁶ 2006/54

³⁹⁷ *P v S*, par

³⁹⁸ Advocate

³⁹⁹ Inserted l

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⁴⁰⁰ SDA, s 2.

⁴⁰¹ 2006/54

⁴⁰² *KB v Nat*

⁴⁰³ *KB v NH*

[...]

- 5.279** The SDA outlawed sex discrimination against 'women' and 'men'. The prohibitions did not extend to protecting against 'gender' discrimination and the concepts of discrimination adopted were such as to require a comparison with a man, for the purposes of establishing whether any unlawful act had occurred.⁷⁸³ This made challenging some of the more entrenched forms of inequality for women, and for others discriminated against for failing to conform to gender norms, problematic. In broad terms, however, EA 2010 adopts the same approach to 'sex'.
- 5.280** The binary approach to sex, adopted by, first, the SDA and now the EA 2010, is entirely dependent upon a biologically determinist view of sex. 'Sex' is to be determined by reference to certain biological characteristics that make individuals 'men' or 'women'. These are assumed to be self-explanatory and require no further definition or explication. Further, women are treated as undifferentiated—an homogenous grouping. What matters is that which they have in common, namely biology.⁷⁸⁴
- 5.281** There is very little case law on the meaning of 'sex'. Such case law as there is focuses, firstly, on the issue of gender reassignment and its relationship to the concept of 'sex'; secondly, on the impact of pregnancy and maternity; and thirdly, though to a more limited extent, on the significance of sexual orientation.⁷⁸⁵
- 5.282** Much of the case law on what it means to be a 'woman' or a 'man' has entrenched commonly held but socially constructed understandings, both of the terms themselves and the conduct to be expected of each grouping. Some of the older case law was explicit in so doing.⁷⁸⁶ Other more recent cases have held quite clearly that adverse treatment based on sex stereotypes will violate anti-discrimination law. But, on closer analysis, the approach adopted in some of the case law is still founded on assumptions of biological determinism. Such cases ignore the socially constructed aspects of gender, and in so doing sanction gender stereotyping in many contexts. This is particularly so where the difference in treatment reflects entrenched social norms. Some older cases under the SDA had the effect of reinforcing gender stereotypes through holdings of no less favourable treatment,⁷⁸⁷ in circumstances where the differences in treatment afforded men and women reflected accepted social habits.⁷⁸⁸ Some gender-based norms continue to be reinforced through the court's approach to the identification of less favourable treatment and often, too, in the identification of the appropriate comparator. This can be seen most especially in the 'dress code' cases.⁷⁸⁹
- 5.283** A long line of cases have held that sex distinct dress codes⁷⁹⁰ will not constitute less favourable treatment by reason only that they are sex distinct.⁷⁹¹ In *Smith v Safeways*

⁷⁸³ See Ch 6.

⁷⁸⁴ For a further discussion on this, see para 5.134 *et seq.*

⁷⁸⁵ See paras 5.134, 5.175 *et seq.* and 5.300, respectively.

⁷⁸⁶ See for example the notorious observations of Lord Denning in *Jeremiah v Ministry of Defence* [1980] QB 87, at 96 and *Peake v Automotive Products Ltd* [1978] QB 233, 238; [1977] ICR 968, 973, discussed in Ch 1, para 1.21.

⁷⁸⁷ As to 'less favourable treatment', see Ch 6, para 6.47 *et seq.*

⁷⁸⁸ Some of these cases have been replaced by more modern case law recognizing gender stereotyping as anti-theoretical to equality; see, for example, *Hurley v Mustoe* [1981] ICR 490 at 496; [1991] IRLR 208; and *Moyhing v Barts and London NHS Trust* [2006] IRLR 860.

⁷⁸⁹ It is difficult to see how a difference in treatment based on membership of a racial group would be anything but less favourable. However, examples might, as with gender, include differences in dress codes so that exceptions to dress codes which permit Sikhs to wear turbans or Muslims to wear hijabs might constitute differences in treatment which do not amount to less favourable treatment of non-Sikhs or non-Muslims, but such examples address inclusionary rather than exclusionary rules.

⁷⁹⁰ L Flynn, 'Gender Equality Laws and Employers Dress Codes' (1995) 24 ILJ 255; R Wintemute, 'Recognising New Kinds of Direct Sex Discrimination: Transsexualism, Sexual Orientation and Dress Codes' (1997) 60 MLR 343.

⁷⁹¹ *Schmidt v Austicks Bookshops Limited* [1978] ICR 85; [1977] IRLR 360 (no trouser rule for women); *Burrett v West Birmingham Health Authority* [1994] IRLR 7 (requirement that female nurses wear a cap); and

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