D2.17 ECJ/ECHR case-law reports

Unlike described in project proposal, it was decided that as a case is identified, a summary is shared on the intranet with our members. It resulted in 12 individual case reports, all jointly represented in the present document.

Victim Support Europe

ECHR/ECJ case law review 2018

Case Law of the Court of Justice of the European Union

Case C-473/16 F v Bevándorlási és Állampolgársági Hivatal, Third Chamber, 25 January 2018

Underlying issue: An asylum seeker may not be subjected to a psychological test in order to determine his sexual orientation

Legal matter: Area of Freedom, Security and Justice

Brief overview of facts: In April 2015, a Nigerian national submitted an application for asylum to the Hungarian authorities claiming that he feared he would be persecuted in his country of origin on account of his homosexuality. Although the authorities did not consider the statements to be contradictory, they rejected the application on the ground that the psychologist's expert report they had commissioned for the purpose of exploring his personality had not confirmed his alleged sexual orientation. The asylum seeker brought an action against that decision before the Hungarian courts contending that the psychological tests used for the expert's report at issue seriously prejudiced his fundamental rights without making it possible to assess the plausibility of his sexual orientation. The Administrative and Labour Court of Szeged which is hearing the case, asks the Court of Justice whether the Hungarian authorities may assess an asylum seeker's statements relating to his sexual orientation on the basis of a psychologist's expert report.

Legal reasoning: The Court holds that the directive on standards for obtaining refugee status enables the national authorities to commission an expert's report in the context of the assessment of an application for asylum in order to better determine the asylum seeker's actual need for international protection. However, the procedures must be consistent with the fundamental rights guaranteed by the Charter of Fundamental Rights of the European Union, such as the right to respect for human dignity and the right to respect for private and family life. the Court notes nevertheless that, in the context of the assessment of an asylum seeker's statements relating to his sexual orientation, the national authorities and courts cannot base their decision solely on the conclusions of an expert's report and must not be bound by them. Recourse to a psychologist's expert report in order to determine the sexual orientation of the asylum seeker constitutes an interference with that person's right to respect for his private life. The Court holds that recourse to a psychologist's expert report for the purpose of assessing the veracity of a claim made by an asylum seeker as to his sexual orientation is not consistent with the Directive 2011/95/EU, read in the light of the Charter.

Litigation potential: The Court of Justice does not decide the dispute itself. It is for the national court or tribunal to dispose of the case in accordance with the Court's decision, which is similarly binding on other national courts or tribunals before which a similar issue is raised.

Case C-353/16 MP v Secretary of State for the Home Department, Grand Chamber, 24 April 2018

Underlying issue: Eligibility for subsidiary protection

Legal matter: Prohibition of torture

Brief overview of facts: MP is a national of Sri Lanka who lodged an asylum application in the UK claiming that he had been detained and tortured by Sri Lankan security forces for being a member of the Liberation Tigers of Tamil Eelam (LTTE). His application was rejected since it was not established that he would be at risk of further ill-treatment if returned to his country. His case was appealed and reached the UK Supreme Court, which sought the CJEU's assistance regarding the scope of the subsidiary protection under the EU Qualification Directive.

Legal reasoning: The CJEU ruled that, under EU law, being the victim of torture in the past is not in itself sufficient justification for a person to be eligible for subsidiary protection if there is no longer a risk of being tortured if returned. However, it noted that the subsidiary protection regime must be interpreted and applied in observance of the rights guaranteed by the Charter of Fundamental Rights of the European Union. In line with the recent case law of the ECHR, the CJEU found that Member States are prohibited from expelling a non-EU national where such expulsion would, in essence, result in significant and permanent deterioration of that person's mental health disorders, particularly if such deterioration would endanger his or her life. The CJEU ruled that the fact that the ECtHR precludes such a removal does not mean that that person should be granted subsidiary protection, as substantial aggravation of someone's health cannot, in itself, be regarded as inhuman or degrading treatment inflicted on that person. This will only be the case where that person would face a real risk of being intentionally deprived of psychical or psychological health care, including situations where the country of origin has adopted a discriminatory policy making it more difficult to certain groups to obtain access to such care. CJEU ruled that a person who has in the past been tortured in his country of origin is eligible for subsidiary protection if he faces a real risk of being intentionally deprived, in that country, of appropriate physical and psychological health care.

Litigation potential:

Michela Curto v. Parliament and T-377/17 SQ v. European Investment Bank, General Court, 13 July 2018

Underlying issue: Damages to members of staff who have suffered psychological harassment

Legal matter: Definition of psychological harassment.

Brief overview of facts: A parliamentary assistant at the European Parliament and an administrator at the European Investment Bank (EIB) were both victim of psychological harassment from their supervisors, an MEP and a Director.

- The assistant submitted a request for assistance on the ground that the MEP had subjected her to psychological harassment consisting of humiliating and scornful language, threats, insults and screams. The Parliament rejected that request, considering that the events in question had occurred against a background of great tension between the two women.
- The administrator lodged a complaint with the EIB to the effect that the behaviour of the new director towards her constituted psychological harassment. The EIB upheld the complaint in part only, finding that the administrator had been subjected to psychological harassment in connection with some of the acts alleged. the two members of staff brought actions for annulment of those decisions and claims for damages before the General Court of the European Union.

Legal reasoning: The General Court finds that the two members of staff in question were subjected to psychological harassment and orders the Parliament and the EIB to pay each of them 10 000 euros in damages. The Court recalls first of all that the concept of psychological harassment covers improper conduct in the form of physical behaviour, spoken or written language, gestures or other acts, which takes place over a period and is repetitive or systematic, suggesting that psychological harassment must be understood as a process that occurs over time and presupposes the existence of repetitive or continual behaviour which is intentional, as opposed to accidental. The MEP's behaviour appears to be improper and can in no way be regarded as an attitude befitting a Member of an EU institution. The Parliament erred in its assessment of the facts in the light of the definition of psychological harassment. The EIB erred in law in requiring that, in order to come within the definition of 'psychological harassment', conduct must be repeated in the same way, irrespective of the cumulative effect of the other kinds of conduct alleged in undermining the self-esteem and self-confidence of the person affected by that conduct. The EIB failed to examine whether each of the director's acts alleged could have, in conjunction with the others, resulted, objectively, in undermining the administrator's self-esteem and confidence

Litigation potential: An appeal, limited to points of law only, may be brought before the Court of Justice against the decision of the General Court within two months of notification of the decision.

European Court of Human Rights Case Law

GRA Stiftung Gegen Rassismus and Antisemitismus v. Switzerland, Third section, 9 January 2018

Underlying issue: Freedom to criticise hate speech

Legal matter: Freedom of expression

Brief overview of facts: The applicant is a Swiss registered NGO with main aim to advocate against rasism and anti-semitism. In 2009, during the Swiss camaiging for a constitutional ban of minaters, a young Swiss activits, who was advocating for the constitutional ban and stated that "The Swiss guiding culture ("schweizerische Leitkultur"), based on Christianity, cannot allow itself to be replaced by other cultures, B.K. added. A symbolic sign, such as the prohibition of minarets, would therefore be an expression of the preservation of one's own identity." The applicant organisation published an article on their website, marking this speech as verbal racism The young man, in return, sued the applicant organisation, asking for the withdrawal of the article from the organisation's website and for its replacement with the court's judgment. The request was granted and GRA filed a complaint to the ECtHR claiming that their freedom of speech was violated.

Legal reasoning: The ECtHR discussed the difference between racism as a crime and racism as a societal phenomenon and concluded that "the tone taken in the political discourse of the supporters of the initiative in question was described in ECRI's 2009 report on Switzerland as one that 'largely contributes to the stigmatisation [of Muslims] and to the reinforcement of racist prejudice and discrimination against them by members of the majority community'. Likewise, the Swiss Federal Commission Against Racism noted in its recommendations that the initiative defamed and discriminated against Muslim men and women. Furthermore, in 2014 the UN Committee on the Elimination of Racial Discrimination reported on the initiative in its concluding observations under the title 'Racism and xenophobia in politics and the media'." Hence the ECtHR concluded that it cannot be said that classifying the said speech as "verbal racism" when it supported an initiative which had already been described by various organisations as discriminatory, xenophobic or racist, could be regarded as devoid of any factual basis. Therefore, the ECtHR concluded that ordering the removal of the statement and publication of the domestic court's judgment constituted a violation of freedom of speech.

Litigation potential: The judgment became final on 9 April 2018. The importance of the judgment can be seen in the confirmaton by the ECtHR of the freedom of NGOs to criticise hate speech and racism, without risking to be limited in their freedom of speech and that they have freedom to represent victims of hate speech, even if it is not officially qualified as a crime and to call it for what it is, when it interferes with rights and freedoms of vulnerable groups.

Case of Bikas v. Germany, Fifth section, 25 January 2018

Underlying issue: Procedural accommodations for victim with disabilities

Legal matter: Presumption of innocence

Brief overview of facts: Over a period of several years Mr Bikas sexualy abused a young woman with intellectual disabilities, on hundreds of ocassions. The court decided only to pursue the four incidents for which it found solid evidence and was able to establish precise time and place where they happened. The court also took into consideration the remaining dozens of incidents, for which the victim, due to her disability, could not give precision as to the exact time when they happened. These incidents were taken as aggraviating circumstances for Mr Bikas's sentencing. He was sentenced to 6

years in prison. Mr Bikas complained that, by taking into consideration the incidents for which he was not officialy prosecuted, his presumption of innocence had been violated.

Legal reasoning: Mr Bikas complained that, by taking into account the incidents. The ECtHR found that it was not a matter of finding him guilty without proof, but about having a different standard of proof for different types of incidents. Moreover, the Court found that this was, in a way, a procedural accommodation for a victim who had specific impairments. In Paragraph 59 the Court found: "While for the first four incidents the court had all elements to define the crimes as offences in the procedural sense, for fifty further incidents in respect of which it discontinued the proceedings it was convinced that the accused was guilty, but could not indicate the exact time and place at which the incidents took place owing to the victim's speech disorder (...) In this context the Court takes into account that the other fifty incidents were, as stated by the Regional Court, indeed similar and closely linked: they all related to the same type of offences, i.e. coercion to engage in sexual activity; they had been committed on the same victim within a certain period, from January 2001 to October 2007, with precisely the same intention of sexual abuse. This supported the finding that in such a case, against the background that the occurrence of the acts have been proven beyond reasonable doubt, it was not necessary to determine the exact time and place of every committed act. Thereby, the courts fulfilled the requirements which have been established in the domestic courts' case-law regarding the assessment of evidence in accordance with the particularities of serial offences in the field of sexual abuse ."

Litigation potential: The judgment became final on 28 May 2018. The ECtHR's conclusion means that victims with specific cognitive or speech impairments will still be credible witnesses, even if they are not able to give full details of their abuse and that their disability and inability to give testimony to the required level of detail, will not be used against them, but that they will be provided with adequate protection before the courts.

Selami and others v. The Former Yugoslav Republic of Macedonia, First Section, 1 March 2018

Underlying issue: Family members as victims of torture; adequate compensation for victims of torture

Legal matter: Prohibition of torture, Article 3

Brief overview of facts: The application was introduced by the wife and three children of Mr Salami. Mr Salami was deprived of liberty and tortured by the police of FYR of Macedonia. Him and his family members filed a claim for compensation. The family members' claim was rejected, since the domestic law only grants compensation to family members, if the ill-treatment caused direct victim's disability. However, since the direct victim had a pre-existing work-related disability, he could not have claimed to have become disabled again as a result of torture. Moreover, the compensation awarded was about 8,900 euros, which was not appropriate for the type of ill-treatment he suffered.

Legal reasoning: The ECtHR found that only one of four applicants - Mr Salami's son who was declared his only heir after his death, to have the victim status, within the meaning of the ECHR. The ECtHR

found in Paragraph 63: "In the Court's view, complaints related to torture, as the gravest form of ill-treatment prohibited under Article 3 of the Convention, in principle raise an issue of general interest pertaining to "respect for human rights". In this connection the Court also reiterates the significance of the deterrent effect of the judicial system in place and of the role it is required to play in preventing violations of the prohibition of ill-treatment and, in particular, torture. This is essential for maintaining public confidence and ensuring adherence to the rule of law and for preventing any appearance of tolerance of or collusion in unlawful acts. Furthermore, cases before the Court generally also have a moral or principled dimension and next of kin may have a legitimate interest in obtaining a ruling even after the death of the direct victim."

Litigation potential: The judgment became final on 28 May 2018.

Abdennacer Naït-Liman v Switzerland, Grand Chamber, 15 March 2018

Underlying issue: Compensation for victims of torture

Legal matter: Access to court, Article 6

Brief overview of facts: The applicant was subject to torture in Tunisia. Following the ill-treatment, he found refuge in Switzerland and is now a Swiss citizen. He wanted to claim compensation against the then Minister of Interior Affairs of Tunisia, his alleged torturer, but was informed by a Tunisian lawyer that such a claim could never be successful before Tunisian courts. He, hence, filed a civil claim before Swiss courts, claiming universal jurisdiction. His claim was rejected and the ECtHR was asked to find a violation of Article 6(1) of the European Convention - the right to access to a court.

Legal reasoning: The Grand Chamber of the ECtHR found that there has been no violation of Mr Nait-Liman's right of access to court, finding that there is no obligation to establish universal jurisdiction over the right to compensation for victims of torture. Para 218 of the judgment reads: "it should be reiterated that this conclusion does not call into question the broad consensus within the international community on the existence of a right for victims of acts of torture to obtain appropriate and effective redress, nor the fact that the States are encouraged to give effect to this right by endowing their courts with jurisdiction to examine such claims for compensation, including where they are based on facts which occurred outside their geographical frontiers. In this respect, the efforts by States to make access to a court as effective as possible for those seeking compensation for acts of torture are commendable."

Litigation potential: The judgment is final. The court, however, does reiterate that there is an international consensus on the existence of a right for victims of torture to receive compensation. Nonetheless, while the right is universal, the States do not have a duty to discuss in relation to facts that happened outside of their jurisdiction.

Case of Lozovyye v. Russia, Third section, 24 April 2018

Underlying issue: Burial of a victim of a criminal act without taking reasonable steps to inform his relatives

Legal matter: Respect for private and family life

Brief overview of facts: The applicants' son was murdered in St Petersburg. While the authorities made some attempt to identify the relatives of the deceased, the son was buried in St Petersburg before that investigation process ended. The applicants later found out, exhumed his body and reburied him in their home town. Responding to their complaints about the authorities' failure to notify them of their son's death, a district court established that the investigator had not taken sufficient steps to find the relatives of the deceased, though the criminal case-file contained enough information to do so. Subsequently, the applicants instituted unsuccessful compensation proceedings

Legal reasoning: In choosing how to comply with their positive obligations under article 8, States enjoy a broad margin of appreciation. In situations such as the one in the present case, where the State authorities, but not other family members, are aware of a death, there is an "obligation for the relevant authorities to at least undertake reasonable steps to ensure that surviving members of the family are informed". The Court argues that the authorities "did not act with reasonable diligence and therefore did not comply with their positive obligation". The Court found a violation of Article 8 of the Convention.

Litigation potential:

Case of Hovhannisyan v. Armenia, first section, 19 July 2018

Underlying issue: Failure to hold effective investigation into allegations of degrading treatment in the workplace

Legal matter: Prohibition of torture and inhuman or degrading treatment or punishment

Brief overview of facts: The applicant is a civil servant working for the Ministry of Environmental Protection. According to the applicant, she had an argument with her supervisor over her appraisal report in his office. The latter and his deputy assaulted her, grabbed her hands, insulted her and forcibly took the report away from her. As a result of violence, she fainted, sustained bodily injuries, received numerous bruises on her hands and was seriously humiliated. She reported the incident to the head of staff and the police. The forensic medical examination confirmed that the applicant had sustained bruises on different parts of her arm. However all her colleagues who gave statements and who were subordinates of the alleged perpetrators denied the account of events. The investigator refused to institute criminal proceedings.

Legal reasoning: The Court found that the State authorities have failed to conduct a proper investigation into the applicant's allegations of ill-treatment. No investigation had even been launched, no internal investigation had been conducted. No steps had been taken to take evidence from the applicant's colleagues under oath in order to avoid any possible problems created by the fact that they were subordinates of the alleged perpetrators. The Court found a violation of article 3.

Litigation potential: This judgment became final on 19 October 2018.

Luisa Abuyevna TAPAYEVA and Others v. Russia, Third section, lodged on 23 May 2018, communicated on 22 October 2018

Underlying issue: Kidnapping of children by paternal grandparents after the death of the husband and father of the applicants

Legal matter: Respect for private and family life

Brief overview of facts: The first applicant married Ch.A. The couple settled with Ch.A.'s parents in the village of Goyty in the Urus-Martan District of the Chechen Republic. The first applicant gave birth to their four daughters, the second, third, fourth and fifth applicants. On 8 June 2015 Ch.A. died. The applicants moved in with the first applicant's parents in the same village of Goyty. The girls maintained contact with their paternal grandparents by spending weekends with them. Starting from 2016 the paternal grandparents did not seek any contact with the children. On 10 April 2016 the first applicant's father-in-law B.A., assisted by unknown persons, kidnapped the children. The first applicant was prevented from communicating with her daughters. She has hardly seen them since then.

Questions to the parties:

1. Has there been an interference with the applicants' right to respect for their family life, contrary to Article 8 of the Convention? If so, was that interference "in accordance with the law" and "necessary" within the meaning of Article 8 § 2 of the Convention?

2. Have the domestic authorities taken any steps that could be expected from them to discharge their positive obligation under Article 8 of the Convention to ensure that the family ties between applicants are maintained?

3. Did the applicants have at their disposal an effective domestic remedy for their complaints under Article 8, as required by Article 13 of the Convention?

4. Did the first applicant suffer discrimination on the ground of sex, contrary to Article 14 of the Convention, read in conjunction with Article 8? Reference is made to allegedly overtly discriminatory policies prevailing in the northern Caucasus region of the Russian Federation towards women in the sphere of, in particular, child rearing.

The parties are invited to inform the Court on the outcome of the residence dispute. The Government is further requested to inform the Court on the status of the judgment of the Supreme Court of the Chechen Republic of 15 September 2016 and relevant enforcement proceedings.

Case of Akelienė v. Lithuania, fourth section, 16 October 2018

Underlying issue: Authorities' failure to enforce the custodial sentence imposed on individual convicted of murdering the applicant's son

Legal matter: Right to life

Brief overview of facts: The applicant's son was murdered in 1994. The authorities launched an investigation into the case shortly after the applicant's daughter reported her brother missing. A.G was formally charged with murder in 2005. He was arrested in March 2006 and held in detention on remand until November of the same year, when an obligation not to leave his place of residence was imposed on him. In 2009 he was acquitted, and his acquittal was upheld on appeal. In 2011 the Supreme Court quashed this decision and remitted the case for fresh examination. In November 2012 the Court of Appeal convicted A.G of aggravated murder and sentenced him to fourteen years' imprisonment. In December 2012 it was established that A.G had absconded to avoid serving his sentence.

Legal reasoning: The measures taken by the State with the aim of finding A.G. after his conviction and having him extradited to Lithuania had been sufficient as regards its responsibility to enforce criminal law against those who had unlawfully taken the life of another. The Court found no violation of article 2.

Litigation potential: This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention.

Case Kaboğlu and Oran v. Turkey, first section, 30 October 2018

Underlying issue: Failure to respect private life of two academics who were targeted by threats and hate speech in newspaper articles

Legal matter: Private and family life

Brief overview of facts: The case concerned newspaper articles containing threats and hate speech against the applicants, attacking them for the ideas they had presented in a report addressed to the government concerning questions of minority and cultural rights. The applicants lost their cases before the domestic courts, which took the view that the offending articles fell within legislation protecting freedom of expression.

Legal reasoning: The Court found in particular that the verbal attacks and threats of physical harm made against the applicants sought to undermine their intellectual personality, causing them feelings of fear, anxiety and vulnerability in order to humiliate them and break their will to defend their ideas. The Court also found that the domestic courts had not provided a satisfactory answer to the question of whether freedom of the press could justify, in the circumstances of the case, the damage caused to the applicants' right to respect for their private life by passages amounting to hate speech and

incitement to violence, thus being likely to expose them to public contempt. The Court concluded that the domestic courts had not struck a fair balance between the applicants' right to respect for their private life and freedom of the press.

Litigation potential: This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention.

Case of Lakatošová and Lakatoš v. Slovakia, Third Section, 11 December 2018

Underlying issue: Slovakian authorities failed to investigate possible racist motive in shooting by off-duty police officer at Roma family's home

Legal matter: right to life and non-discrimination

Brief overview of facts: The case concerned a shooting spree in 2012 by an off-duty police officer at the home of a Roma family. The two applicants in the case, a married couple, were seriously injured and three members of their family were killed. When questioned by the police, the officer stated that he had been thinking about "a radical solution" for "dealing with" Roma people. He was ultimately given a reduced sentence of nine years' imprisonment owing to diminished responsibility. The ruling was adopted in the form of a simplified judgment which contained no legal reasoning. Relying on Article 14 (prohibition of discrimination) read in conjunction with Article 2 (right to life), the applicants essentially complained that the Slovakian authorities had failed to conduct an effective investigation into whether the attack on their family had had racial overtones. They also complained under Article 13 (right to an effective remedy), read in conjunction with Article 2, that they had been prevented from actively participating in the criminal proceedings.

Legal reasoning: The Court conceded that, in practice, it was often extremely difficult to prove a racist motivation. Nevertheless, the authorities had to do whatever was reasonable in the circumstances to discover the truth. In particular, if evidence of racism came to light in an investigation, it had to be checked and, if confirmed, a thorough examination carried out. The Court considered that there had been plausible information in the applicant couple's case to alert the investigators and prosecutors to the need to carry out an initial assessment of racism, which they had indeed done. The investigating authorities had in particular questioned Mr J. and other witnesses as to a possible racist background to his actions and had requested psychologists to assess his motives. However, they had not extended their investigation and analysis beyond this. Furthermore, despite the evidence collected in the investigation, Mr J. had not been charged with a racially motivated crime. The prosecutor had then failed to address that shortcoming in the indictment, not addressing or discussing at all the possible aggravating factor of a racist motive. The Court emphasised that racist violence was a particular affront to human dignity, which required special vigilance and a vigorous reaction from the authorities. However, the investigation and prosecution in the applicants' case had been impaired to an extent that it had been irreconcilable with that obligation. Indeed, in the face of powerful indicators of racism, the authorities had failed to properly examine whether or not the attack had been motivated by racial hatred. There had therefore been a violation of Article 14, read in conjunction with Article 2.

Litigation potential: This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention.


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