

Recent case-law of the European Court of Human Rights on Non-Discrimination

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Topics

- **No chronological or ground-based review → see list of summaries (thematically categorised, April 2014 – now)**
- **Instead – discussion of some important issues:**
 - **Recognition of new concepts**
 - **Interesting developments**
 - **Continuing uncertainties**
 - **Odd application of existing doctrines**

Recognition of discrimination by association

***Guberina v. Croatia*, 22 March 2016, no. 23682/13**

78. ... in the light of its objective and nature of the rights which it seeks to safeguard, that Article 14 of the Convention **also covers instances in which an individual is treated less favourably on the basis of another person's status or protected characteristics.**

Recognition of reasonable accommodation

***Çam v. Turkey*, ECtHR 23 February 2016, no. 51500/08**

65. À cet égard, la Cour considère que **l'article 14 de la Convention doit être lu à la lumière des exigences de ces textes au regard des aménagements raisonnables** – entendus comme « **les modifications et ajustements nécessaires et appropriés** n'imposant pas de charge disproportionnée ou indue apportée, en fonction des besoins dans une situation donnée » – que les personnes en situation de handicap sont en droit d'attendre, aux fins de se voir assurer « la jouissance ou l'exercice, sur la base de l'égalité avec les autres, de tous les droits de l'homme et de toutes les libertés fondamentales » (article 2 de la Convention relative aux droits des personnes handicapées ...). De tels aménagements raisonnables **permettent de corriger des inégalités factuelles** qui, ne pouvant être justifiées, constituent une discrimination.

Çam v. Turkey, ECtHR 23 February 2016, no. 51500/08

66. ... Dans le domaine de l'éducation, elle reconnaît que **les aménagements raisonnables peuvent prendre différentes formes**, aussi bien matériels qu'immatériels, pédagogiques ou organisationnels, que ce soit en termes d'accessibilité architecturale aux établissements scolaires, de formation des enseignants, d'adaptation des programmes ou d'équipements adéquats. Cela étant, la Cour souligne qu'il ne lui appartient aucunement de définir les moyens à mettre en œuvre pour répondre aux besoins éducatifs des enfants en situation de handicap. En effet, **les autorités nationales**, grâce à leurs contacts directs et constants avec les forces vives de leur pays, **se trouvent en principe mieux placées que le juge international pour se prononcer sur la situation et les besoins locaux à cet égard.**



Çam v. Turkey, ECtHR 23 February 2016, no. 51500/08

67. Pour la Cour, il importe cependant que les États soient particulièrement attentifs à leurs choix dans ce domaine compte tenu de l'impact de ces derniers sur les enfants en situation de handicap, dont la particulière vulnérabilité ne peut être ignorée. **Elle considère en conséquence que la discrimination fondée sur le handicap englobe également le refus d'aménagements raisonnables.**

Application in this case:

- National authorities have done nothing to identify the needs of the applicant;
- National authorities have not tried to search for facilities to accommodate the special needs;
- Violation of Article 14 taken together with Article 2 P1

Legal recognition of same-sex unions

***Oliari a.O. v. Italy*, 21 July 2015, nos. 18766/11 and 36030/11**
174. ... the Court considers that in the absence of marriage, **same-sex couples like the applicants have a particular interest in obtaining the option of entering into a form of civil union or registered partnership**, since this would be the most appropriate way in which they could have their relationship legally recognised and which would guarantee them the relevant protection – in the form of core rights relevant to a couple in a stable and committed relationship – without unnecessary hindrance. Further, the Court has already held that **such civil partnerships have an intrinsic value for persons in the applicants' position**, irrespective of the legal effects, however narrow or extensive, that they would produce This recognition would further bring a sense of legitimacy to same-sex couples.

Oliari a.O. v. Italy, 21 July 2015, nos. 18766/11 and 36030/11
185. In conclusion, in the absence of a prevailing community interest being put forward by the Italian Government, against which to balance the applicants' momentous interests as identified ..., and in the light of domestic courts' conclusions on the matter which remained unheeded, the Court finds that the Italian Government have overstepped their margin of appreciation and failed to fulfil their **positive obligation to ensure that the applicants have available a specific legal framework providing for the recognition and protection of their same-sex unions.**

Recognition of 'identity' as part of Article 8

Sousa Goucha v. Portugal, 22 March 2016, no. 70434/12

27. The Court reiterates that **sexual orientation is a profound part of a person's identity** and that gender and sexual orientation are two distinctive and intimate characteristics. ... Any confusion between the two will therefore constitute an attack on one's reputation capable of attaining a sufficient level of seriousness for touching upon such **an intimate characteristic of a person**. Article 8 therefore applies to the present case.

R.B. v. Hungary, 12 April 2016, no. 64602/12

78. ... [The notion of personal autonomy] can ... embrace multiple aspects of a person's physical and social identity. The Court has accepted in the past that an individual's **ethnic identity must be regarded as another such element**. ... In particular, any negative stereotyping of a group, when it reaches a certain level, is capable of impacting on the group's sense of identity and the feelings of self-worth and self-confidence of members of the group. It is in this sense that it can be seen as affecting the private life of members of the group ...

Domestic violence = discrimination against women

M.G. v. Turkey, ECtHR 22 March 2016, no. 646/10

96. Dans l'affaire *Opuz ...*, la Cour avait constaté que la violence domestique touchait principalement les femmes et que la passivité généralisée et discriminatoire de la justice turque créait un climat propice à cette violence. ...

116. La Cour souligne en outre que l'article 3 de la Convention d'Istanbul estime que le « terme 'violence à l'égard des femmes' doit être compris comme une violation des droits de l'homme et une **forme de discrimination à l'égard des femmes** ... ».

References to international treaties

The Court interprets Article 14 in the light of / in harmony with

- UN Disability Convention → *Guberina; Cam*
- CoE Convention of Istanbul on domestic violence → *M.D. v. Turkey*
- European Convention on Nationality → *Biao*
- CoE Framework Convention on National Minorities → *Partei Die Friesen*

Qualification of discriminatory violence

- **Physical harm? → Article 3 in conjunction with Article 14**
- **No physical harm? → Article 8 in conjunction with Article 14 ('identity'-based reasoning)**
 - *Begheluri a.O. v. Georgia*, 7 October 2014, no. 28490/02
 - *Identoba a.O. v. Georgia*, 12 May 2015, no. 73235/12
 - *M.C. and A.C. v. Romania*, 12 April 2016, no. 12060/12

Indirect discrimination

***Di Trizio v. Switzerland*, 2 February 2016, no. 7186/09**

Indirect gender discrimination in calculation method for disability allowances

***Biao v. Denmark*, 24 May 2016 (Grand Chamber), no. 3850/10**

Indirect discrimination based on ethnicity in exception to family reunion requirements

Assumption of disproportionate prejudicial effect

Biao v. Denmark, 24 May 2016 (Grand Chamber), no. 3850/10

112. The Court considers that **it can reasonably be assumed** that at least the vast majority of ... Danish expatriates and ... Danish nationals born and resident in Denmark, who could benefit from the 28-year rule, would usually be of Danish ethnic origin whereas ... persons acquiring Danish citizenship at a later point in their life ..., would generally be of foreign ethnic origin.

113. ... the 28-year rule had **the indirect effect of favouring Danish nationals of Danish ethnic origin, and placing at a disadvantage, or having a disproportionately prejudicial effect on persons who, like the first applicant, acquired Danish nationality later in life and who were of an ethnic origin other than Danish ...**

'Other status' = 'personal status'?

Is every difference in treatment covered by Article 14, or only differences in treatment based on a 'personal status' or 'personal characteristic'?

ECtHR in *Carson* – only 'personal characteristics' are covered

Later case-law – confusion and inconsistency

How now?

Confusion continued

S.S. v. UK, 21 April 2015 (dec.), no. 40356/10

38. ... in view of the relevant case-law, the status of prisoner is covered by the term “other status” in Article 14

Zammit and Attard Cassar v. Malta, 30 July 2015, no. 1046/12

69. ... the legal restrictions and impositions complained of apply to every owner whose property was rented under a contract of lease prior to 1995 and the applicants ... would not have been subjected to such restrictions and impositions in respect of contracts entered into after 1995. Thus, it would appear that there is no distinguishing criterion based on the personal status of the property owner, nor on any other ground which the applicants failed to mention

Fábián v. Hungary, 15 December 2015, no. 78117/13

27. As the applicant was denied payment of that pension on the ground of being simultaneously employed in the public sphere – which can be considered as “other status” covered by Article 14 ... – that provision is applicable

Very weighty reasons test

'Very weighty reasons' required in justification of unequal treatment based on suspect grounds

- **Which grounds are suspect?**
- **Why is a ground suspect?**
- **Is the very weighty reasons test always applied to unequal treatment based on these grounds?**

Very weighty reasons and disability discrimination (1)

Clearly and expressly recognised for:

- **Mental disability (*Alajos Kiss v. Hungary*)**
- **HIV-status (*Kiyutin v. Russia*, now confirmed in *Novruk v. Russia*, 15 March 2016)**

What about physical disability?

Still not clear

Very weighty reasons and disability discrimination (2)

No attention paid to this in *Çam v. Turkey*, 23 February 2016, no. 51500/08

***Guberina v. Croatia*, 22 March 2016, no. 23682/13**

73. On the one hand, **a wide margin** is usually allowed to the State under the Convention when it comes to general measures of economic or social strategy... On the other hand, if a restriction on fundamental rights applies to a particularly vulnerable group in society that has suffered considerable discrimination in the past, then the State's margin of appreciation is substantially narrower and it must have **very weighty reasons** for the restrictions in question. ... In any case, however, **irrespective of the scope of the State's margin of appreciation** the final decision as to the observance of the Convention's requirements rests with the Court.

Very weighty reasons and religion (1)

2013 – *Vojnity v. Hungary*

36. ... in the light of the importance of the rights enshrined in Article 9 of the Convention in guaranteeing the individual's self-fulfilment, such a treatment will only be compatible with the Convention if **very weighty reasons** exist ...

2013 – *Eweida and Others v. UK*

99. The Court considers that... the importance for the second applicant of being permitted to manifest her religion by wearing her cross visibly must weigh heavily in the balance. However ..., this is a field where the domestic authorities must be allowed a **wide margin of appreciation**. The hospital managers were better placed to make decisions about clinical safety than a court, particularly an international court which has heard no direct evidence.'

Very weighty reasons and religion (2)

Ebrahimian v. France, 26 November 2015, no. 64846/11

65. ... Quant à la marge d'appréciation reconnue à l'État en l'espèce, la Cour observe **qu'une majorité d'États au sein du Conseil de l'Europe ne réglementent pas le port de vêtements ou symboles à caractère religieux** sur le lieu de travail, y compris pour les fonctionnaires ... et que seuls cinq États ... dont la France sont recensés comme interdisant totalement le port de signes religieux à leur égard. Toutefois, ... il convient de prendre en compte le **contexte national des relations entre l'État et les Églises**, qui évolue dans le temps, avec les mutations de la société. Ainsi, la Cour retient que la France a opéré une conciliation entre le principe de neutralité de la puissance publique et la liberté religieuse, déterminant de la sorte **l'équilibre que doit ménager l'État entre des intérêts privés et publics concurrents ou différents droits protégés par la Convention** ..., ce qui laisse au gouvernement défendeur une **ample marge d'appréciation** En outre, la Cour a déjà indiqué que le milieu hospitalier implique une large marge d'appréciation, les responsables hospitaliers étant mieux placés pour prendre des décisions dans leur établissement que le juge ou, qui plus est, un tribunal international

Very weighty reasons and gender

M.D. v. Ireland, 16 September 2014 (dec.), no. 50936/12

33. Very weighty reasons would have to be put forward before a difference of treatment based on gender could be regarded as compatible with the Convention. In particular, references to traditions, general assumptions or prevailing social attitudes in a particular country are insufficient justification for a difference in treatment on grounds of sex. ...

36. The context in this case is different ...

37. ... [This case has as its backdrop underage sexual intercourse and the imperative of protecting the integrity and well-being of children. This is a very weighty matter of public interest. The Court therefore considers that in light of the specific circumstances, background and subject matter of this case, **the margin of appreciation of the respondent State should not be narrowly confined**

Very weighty reasons and indirect discrimination

Biao v. Denmark, 24 May 2016 (Grand Chamber), no. 3850/10
114. ... Having regard to the fact that no difference in treatment based exclusively or to a decisive extent on a person's ethnic origin is capable of being justified in a contemporary democratic society and a difference in treatment based exclusively on the ground of nationality is allowed only on the basis of compelling or very weighty reasons ..., **it falls to the Government to put forward compelling or very weighty reasons unrelated to ethnic origin if such indirect discrimination is to be compatible with Article 14 taken in conjunction with Article 8** of the Convention.