



ALMA MATER STUDIORUM
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Recent ECtHR case law in non-discrimination matters

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Main points

1. A brief recall:

- *Article 14*
 - content
 - ‘ordinary’ application
- *The Strict Scrutiny Test*
 - *rationale*
 - relevant grounds

2. Recent case law (2017-2018):

- *When Article 14 has been applied:*
 - does it confirm previous case law?
 - does it confirm the strict scrutiny test?
 - what are the relevant grounds?
- *When Article 14 has not been applied:*
 - exploring the *rationale*
 - does it confirm previous case law?



Article 14 ECHR – Key aspects

Art. 14 reads as follows:

“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”

Key points:

- a complementary provision... *but an autonomous right*
- an open list... *followed by an evolutionary interpretation of grounds*
- the need to identify a “clear situation of inequality” *in order to be applied* (see *Opuz v. Turkey*)
- *the “within the ambit” test: the “magnifying effect” on the ECHR, while waiting for the ratification of Protocol no. 12 by all CoE Members...*



Article 14 – The ‘Ordinary’ Application

An issue arises under Article 14 if:

- there is a difference in treatment of persons in relevantly similar situations... to be demonstrated, *despite no clear criteria exist*: the lack of comparable situations is a justification in itself!
- the difference in treatment has *no objective and reasonable justification*:
 - it does not pursue a legitimate aim (overall *protecting the life of a democratic society*)
 - there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realised (*only if manifestly disproportionate*)

Attention: States enjoy a margin of appreciation in assessing *whether and to what extent* differences in otherwise similar situations justify a difference in treatment...



The Strict Scrutiny Test

- aimed to:
 - *combating particularly dangerous kinds of discrimination opposite to the idea of democratic society and involving «vulnerable groups»*
 - *differentiating among grounds*
- characterised by:
 - *a (partial) reversal of burden of proof*
 - *the need of “particularly serious reasons” by way of justification: not only attention on the relationship of proportionality but also on the necessity to achieve the proposed aim*
- consequences:
 - the ECHR is usually read as a *«living instrument»*
 - the margin of appreciation is progressively restricted, esp. in light of the specific grounds at stake



Relevant Grounds for the Strict Scrutiny Test

Not always clear but these may include:

- *Gender* – see *Konstantin Markin v. Russia* (GC)
- *Ethnic origin* – see *Orsus and others v. Croatia* (GC)
- *Sexual orientation (?)* – see *P.B. and P.S. v. Austria*
- *Health status/disability (?)* – see *Kiyutin v. Russia*
- *Gender identity (?)*
- *Religion (??)*
- *Disability (??)*

The focus is placed on:

- innate personal characteristics, *or*
- core choices that are fundamental for a person's or a group's identity

For other grounds, no strict scrutiny test applies: for instance, language, age, residence...



Recent ECtHR case law

Years 2017-2018

– Gender:

- *Domestic violence*: Talpis v. Italy (2 March 2017) and Balsan v. Romania (23 May 2017)
- *Imprisonment*: Khamtokhu and Aksenchik v. Russia (GC, 24 January 2017) and Alexandru Enache v. Romania (3 October 2017)
- *Sexuality*: Carvalho Pinto de Sousa Morais v. Portugal (25 July 2017)
- *Parents' role and residence*: Leonov v. Russia (10 April 2018)

– Ethnic origin:

- *Racial abuses by private agents*: Skorjanec v. Croatia (28 March 2017) and Alkovic v. Montenegro (5 December 2017)

While addressing new issues, this cases also confirms and specifies relevant previous case law: see Opuz v. Turkey (domestic violence) and Secic v. Croatia (racial abuses).



Recent ECtHR case law

Years 2017-2018

– *Sexual orientation:*

- *Civil unions:* Ratzenbock and Seydi v. Austria (26 October 2017)
- *Procreation:* Charron and Merle-Montet v. France (16 January 2018)
- *Parental authority:* Bonnaud and Lecoq v. France (6 February 2018)
- *Parental leave:* Hallier and others v. France (12 December 2017)
- *Ban on homosexual expression:* Bayev and others v. Russia (20 June 2017)

– *Religion:*

- *Symbols:* Belcacemi and Oussar v. Belgium (11 July 2017) and Dakir v. Belgium (11 July 2017)

This confirms relevant case law in each field:

- the freedom of CoE Member States to differentiate between couples' status (*Schalk and Kopf v. Austria*) and the application of strict scrutiny test (*Alekseyev v. Russia*)
- a wide margin of appreciation in allowing or not the display of religious symbols (*S.A.S. v. France*)...



Recent ECtHR case law

Years 2017-2018

Other grounds and rights and reasonable justifications:

- *Being employed in public/private sector and the right to property:*
 - *Pension related issues: Fabian v. Hungary (GC) (5 September 2017)*
- *Being a representative of a political party and political freedoms:*
 - *Impossibility to run for legislative elections: Cernea v. Romania (27 February 2018)*
- *Disability and right to education:*
 - *Impossibility to attend University: Enver Sahin v. Turkey (30 January 2018)*

In Enver Shain, the Court stressed the need to read Art. 14 ECHR in light of: the development of international law and the consensus on the States' obligations to adopt "reasonable accommodations" for correcting "factual inequalities" and "granting a dignified and autonomous life" to PWD...



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Attention to cases where Article 14 has not been applied/considered (but potentially could):

- *Gender identity: A.P., Garçon and Nicot v. France* (6 April 2017)
- *Ethnic origin: Kiraly and Domotor v. Hungary* (17 January 2017) and *Balta v. France* (16 January 2018)
- *Sexual orientation: Orlandi and others v. Italy* (14 December 2017)
- *Religion: Hamidovic v. Bosnia and Herzegovina* (5 December 2017)

This case law brings us back to Article 14's own limits...



Final remarks

The recent case law:

- does not reveal, overall, substantive changes
- confirms the application of the strict scrutiny test to the «usual» grounds
- discloses increasing attention to other grounds and factual inequalities, such as in relation to disability...

Taken as a whole, recent trends confirm the key aspects for moving towards significant changes in non-discrimination:

- the need for consensus
- the specific right involved
- the identification of situation of «clear inequality»
- the ECtHR as the best placed authority to decide...





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