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:

• 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...
Recent E CtHR case law

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

– Gender identity: A.P., Garcon and Nicot v. France (6 April 2017)


– Sexual orientation: Orlandi and others v. Italy (14 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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