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Recent case-law of the ECtHR on pregnancy discrimination



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Overview

- *Napotnik v. Romania*, no. 33139/13, 20 October 2020
 - Art 1 Prot 12 ECHR – general prohibition of discrimination
 - Applicant recalled from diplomatic posting abroad after announcing pregnancy
- *Jurčić v. Croatia*, no. 54711/15, 4 February 2021
 - Art 14 (+ Art 1 Prot 1) ECHR - enjoyment of Convention rights without discrimination
 - Applicant entered into an employment contract ten days after she had undergone *in vitro* fertilisation
 - Authority rejected her application for insurance as an employed person, concluding that her employment had been fictitious

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Napotnik v. Romania – facts (I)

- Applicant: diplomat since 2002
- Competition for consular post at ROM embassy in Ljubljana
- Posting started on 2 March 2007
- Staff consisted of Ambassador, two junior diplomats, one economic officer
- Her duties: 70% consular work; other individuals: diplomatic/political/economic cooperation, no consular training
- April 2007: applicant married and became pregnant thereafter
- Nov 2007: health problems, annual leave requested for Dec 2007 and Jan 2008

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Napotnik v. Romania – facts (II)

- Ambassador: internal report on applicant's absence, described as "act of insubordination"
- Replacement requested for December 2007, denied
- Consular section closed during her absence, requests redirected
- Return to work in February 2008
- Maternity leave and annual leave from June to December 2008
- Internal audit in July 2008: deficiencies in consular activity, linked to applicant's pregnancy
- Applicant criticised that she was not invited to give her point of view to auditors

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Napotnik v. Romania – facts (III)

- 19 January 2009: applicant informed ambassador of 2nd pregnancy, due date June 2009
- Same day: ambassador wrote evaluation, stating that she was not best suited for consular activity, as frequently absent due to pregnancy-related issues
- applicant “of little use to embassy”
- 20 January 2009: applicant’s posting terminated; she was requested to return to Bucharest
- Applicant requested suspension of her work contract, which was granted

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Napotnik v. Romania – facts (IV)

- Civil action against termination of post: unsuccessful because of necessity to ensure and maintain functionality of representation abroad
- Applicant appealed, maintaining that the termination of her posting had been based on discriminatory grounds
- Court of appeal:
 - Romanian Labour Code does not limit employer’s right to organise activity of pregnant employees;
 - applicant did not prove discriminatory grounds;
 - termination had been within scope of discretion of MFA with a view to ensuring its functioning

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Napotnik – General Principles

- Scope of protection of Art 1 of Prot 12:
- “any right set forth by law” and beyond, e.g. discrimination by public authority
- Explanatory report: four categories listed:
 - “i. in the enjoyment of any right specifically granted to an individual under national law;
 - ii. in the enjoyment of a right which may be inferred from a clear obligation of a public authority under national law, that is, where a public authority is under an obligation under national law to behave in a particular manner;
 - iii. by a public authority in the exercise of discretionary power (for example, granting certain subsidies);
 - iv. by any other act or omission by a public authority (for example, the behaviour of law enforcement officers when controlling a riot).”
- Applicant’s case: Category iii

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Napotnik – General Principles

- meaning of the notion of “discrimination” in Art 1 of Prot No. 12 intended to be identical to that in Art 14
- Same standards applicable as developed re Art 14
- “[i]n the enjoyment of the rights and freedoms guaranteed by the Convention, Art 14 affords protection against different treatment, without objective and reasonable justification, of individuals in analogous, or relevantly similar, situations” (§ 71)
- Court has acknowledged in its case-law, albeit indirectly, the need for the protection of pregnancy and motherhood
- advancement of the equality of the sexes is a major goal in the member States of the Council of Europe – very weighty reasons would have to be advanced before a difference in treatment on the grounds of sex could be regarded as being compatible with the Convention
- margin of appreciation is narrow

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Poll

- In your view, has there been a violation of Article 1 of Protocol No. 12 in the case of *Napotnik v. Romania*?

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Napotnik – ECtHR's findings

- Government accepted that pregnancy was a factor in termination of applicant's post
- Applicant was considered to be unable to carry out work because of absences for medical appointments and maternity leave
- Decision to recall her to Bucharest mainly because of pregnancy
- Only women can be treated differently on grounds of pregnancy – therefore difference in treatment amounts to direct discrimination on grounds of sex, if unjustified
- Were reasons advanced by domestic authorities for difference in treatment relevant and sufficient?
- Narrow margin of appreciation!

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Napotnik – ECtHR's findings

- Government: legitimate aim was protection of rights of others (Romanians in need of consular assistance)
- Was measure proportionate to this aim?
- Absence jeopardised functioning of consular section
- Domestic law does not prevent early termination of diplomatic posting, and allows employer to organise activity of pregnant employees (but contract may not be terminated)
- Applicant's work conditions changed – but was not dismissed
- No long-term setbacks in career (two promotions, one in 2007 during pregnancy, another in 2016)
- Termination of posting not disciplinary measure – no unfavourable position

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Napotnik – ECtHR's findings

- “86. In the light of the above findings, the Court considers it established that the early termination of the applicant's diplomatic posting abroad was necessary for ensuring and maintaining the functional capacity of the diplomatic mission, and ultimately the protection of the rights of others. Notwithstanding the narrow margin of appreciation afforded to them, the domestic authorities provided relevant and sufficient reasons to justify the necessity of the measure.
- 87. There has accordingly been no breach of Article 1 of Protocol No. 12 to the Convention.”
- Thoughts?

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Jurčić v. Croatia – facts (I)

- Applicant entered into employment contract ten days after she had undergone *in vitro* fertilisation (IVF)
 - Subsequently: sick leave because of pregnancy-related complications
 - Applicant applied for registration as insured employee and request for salary compensation during sick leave
 - Expert report confirmed she was well on date of signing contract
 - No way of knowing if IVF successful
 - Authorities re-examined health insurance status and concluded that by signing contract shortly after IVF, applicant had sought to obtain pecuniary advantages
- Employment was considered fictitious

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Jurčić v. Croatia – facts (II)

- Job was far away (though telework possible), required travelling – doctors had recommended rest after IVF
- Under particular circumstances, authorities considered that applicant took up employment solely for benefits
- Applicant appealed, arguing she had been discriminated as a woman who had undergone IVF
- High Administrative Court: "...Pregnancy is not an obstacle to taking up employment ... if that pregnancy does not affect the pregnant woman's ability to work However ... at the time of the conclusion of the employment contract [the applicant] had been unfit for work. ..."
- Gender Equality Ombudsperson: issued warning to Pension Fund – applicant's case constituted discrimination based on sex

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Poll

- Has there been a violation of Article 14 ECHR, read in conjunction with Article 1 of Prot. 1 in the case of *Jurčić v. Croatia*?

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Jurčić – Court's reasoning

- Government argued that decision to revoke insurance status had pursued legitimate aim of protecting public resources from fraudulent use, and stability of health care system
- Court: a woman's pregnancy as such cannot be considered fraudulent behaviour!
- Financial obligations of State during pregnancy cannot constitute weighty reason to justify difference in treatment based on sex
- Narrow margin of appreciation where difference of treatment is based on sex
- Authorities entitled to review suspicious cases – however, case-law showed that pregnant women frequently targeted

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Jurčić – Court's reasoning

- "...even where the availability of an employee is a precondition for the proper performance of an employment contract, the protection afforded to a woman during pregnancy cannot be dependent on whether her presence at work during maternity is essential for the proper functioning of her employer or by the fact that she is temporarily prevented from performing the work for which she has been hired. Moreover, the Court is of the view that introducing maternity protection measures is essential in order to uphold the principle of equal treatment of men and women in employment ..." (§ 76)
- Authorities' conclusion that applicant was medically unfit to work because of IVF was in direct contravention of national and international law
- Sufficient to find discrimination based on sex

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Jurčić – Court's reasoning

- Further considerations:
- Applicant had paid into health insurance scheme for fourteen years
- She had no way of knowing whether IVF had actually worked, or whether there would be pregnancy-related complications
- Applicant had not been obliged to report pregnancy at time of concluding contract – therefore not conceivable how signing could have been fraudulent
- Authorities had not assessed whether applicant had actually taken up duties for employer
- No indication that women who underwent IVF would generally be unfit to work during fertility treatment or pregnancy
- Court expressed concern about overtones of domestic decisions, which implied that pregnant women should not work or seek employment

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Poll

- Which judgment did you find more convincing?
- A) *Napotnik v. Romania*
or
- B) *Jurčić v. Croatia*?

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ECtHR Factsheets

- Cases concerning gender equality:
- https://www.echr.coe.int/Documents/FS_Gender_Equality_ENG.pdf
- Cases concerning violence against women:
- https://www.echr.coe.int/Documents/FS_Violence_Woman_ENG.pdf
- Cases concerning reproductive rights:
- https://www.echr.coe.int/Documents/FS_Reproductive_ENG.pdf

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Thank you for your interest in
the ECtHR!

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