

Domestic Abuse, Post Separation Contact and the ECHR – Progress and Challenges

Professor Shazia Choudhry



1

How is the safety of victims of DA being compromised across family Law jurisdictions?

Research has demonstrated the phenomena of domestic abuse perpetrators using family law proceedings as a tool to continue the abuse and coercion

A culture of disbelief culture towards victims and a lack of knowledge of the dynamics of domestic abuse

The minimization of domestic abuse within family court processes – the ‘good enough father’ approach

Evidence of gender- based discrimination against female victims in family law proceedings complicated by gender neutral approaches such as joint custody

A ‘contact at all costs’ culture.

An increasing use of the concept of “parental alienation” to undermine the wishes of child victims of domestic abuse who fear contact with their father. The use of PA is highly gendered.

2

Parental Alienation

Specific judicial guidance against its usage e.g. Spain

Use of legal precedent to prohibit its usage e.g. the UK and Italy

Prohibition against its use in legislation e.g. Croatia and Spain

European Parliament Resolution in 2021 specifically discourages its usage

the Special Rapporteur on Violence against Women and Girls report on PA in 2023

3

The Role of the European Court of Human Rights

Following on from *Osman v UK* recognised domestic abuse as falling within the scope of a number of rights guaranteed by the ECHR and developed a range of positive obligations that Member States must comply with in this regard – *Opuz v Turkey*

Key Principles

- The State has a responsibility to ensure that ECHR rights for victims of DA are protected within both criminal and civil proceedings. This includes the need for State authorities to undertake effective investigations and risk assessments to protect victims from DA and to strive to protect children's dignity, which, in practice, requires an adequate legal framework to protect children against DA.
- With respect to absolute rights there are no circumstances in which it is permissible for the State to infringe on those rights.
- A recognition that domestic abuse disproportionately affects women, a State's failure, even if unintentional, to protect women against DA will breach their rights to equal protection under the law under Article 14, in conjunction with claims made in other articles of the Convention.

4

The Development of Positive Obligations and the Osman Test within the Specific Context of Domestic Abuse

Kontrová v. Slovakia; Branko Tomašić and Others v. Croatia; Valiulienė v. Lithuania; Talpis v. Italy; Volodina v. Russia

“Realistically speaking, at the stage of an “immediate risk” to the victim it is often too late for the State to intervene. In addition, the recurrence and escalation inherent in most cases of domestic violence makes it somehow artificial, even deleterious, to require an immediacy of the risk. Even though the risk might not be imminent, it is already a serious risk when it is present. Thus, the emerging due diligence standard in domestic violence cases is stricter than the classical Osman test, in as much as the duty to act arises for public authorities when the risk is already present, although not imminent. If a State knows or ought to know that a segment of its population, such as women, is subject to repeated violence and fails to prevent harm from befalling the members of that group of people when they face a present (but not yet imminent) risk, the State can be found responsible by omission for the resulting human rights violations. The constructive anticipated duty to prevent and protect is the reverse side of the context of widespread abuse and violence already known to the State authorities.” Judge Pinto de Albuquerque - *Valiulienė v. Lithuania*

5

“the risk of a real and immediate threat must be assessed, taking due account of the particular context of domestic violence. In such a situation, it is not only a question of an obligation to afford general protection to society, but above all to take account of the recurrence of successive episodes of violence within a family.”

Volodina v Russia para 122 .

6

Kurt v Austria

“the authorities must assess the reality and immediacy of any risk to life by taking due account of the particular context of domestic violence. If the outcome of the risk assessment is that there is a real and immediate risk to life, the authorities’ obligation to take preventive operational measures is triggered. Such measures must be adequate and proportionate to the level of the risk assessed.”

- Clarified the meaning of “imminence” as “the common trajectory of escalation in domestic violence cases” and specified that other factors adhering to the specific context of domestic violence must be considered.
- The requirement that authorities dealing with victims of domestic violence must receive regular training, especially on risk assessment tools, in order to understand the dynamics of domestic violence.
- Since applied in *Y and Others v. Bulgaria* and *Landi v. Italy*

7

Positive Obligations, Risk Assessment and Civil Proceedings for Child Custody and Access

“... [T]he issue of domestic violence, which can take various forms ranging from physical to psychological violence or verbal abuse ... is a general problem which concerns all member States, and which does not always surface since it often takes place within personal relationships or closed circuits, and it is not only women who are affected. The [European] Court [of Human Rights] acknowledges that men may also be the victims of domestic violence and, indeed, that children, too, are often casualties of the phenomenon, whether directly or indirectly. ...” *Opuz v Turkey*

- *Bevacqua and S. v. Bulgaria*
- *Eremia and Others v. the Republic of Moldova*
- *Levchuk v. Ukraine*
- *I.M. and Others v. Italy*

8

Future Challenges, Child Custody, Access and Domestic Abuse



Article 31 of the Istanbul Convention asks parties “to ensure that the exercise of any visitation or custody rights does not jeopardise the rights and safety of the victim or children”



Article 51 directs parties “to ensure that an assessment of the lethality risk, the seriousness of the situation and the risk of repeated violence is carried out by all relevant authorities in order to manage the risk and if necessary to provide coordinated safety and support”



The ECtHR has yet to make any specific observations on a number of concerning trends that have emerged in civil proceedings for custody and access – parental alienation and the gendered nature of the experiences of victims of family law proceedings