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ECHR LAST DECADE CASE LAW ON DISCRIMINATION OF WOMAN

(Conference Paper) [78]

JURISPRUDÊNCIA DA ÚLTIMA DÉCADA SOBRE DISCRIMINAÇÃO DE GÉNERO NO TEDH

(Notas de Conferência)

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Introduction

Looking at ECHR's last decade case law on discrimination of women, one can be astonished with its very little number. In fact, of all the ECHR selection of its key cases, only two are directly related to discrimination of women.

It looks like, in this point, there is some true on that saying that human rights are protected and enforced where they are less needed…

Facing such a short number of key cases, another one was added. It is not exactly about women rights – in fact it's about men's rights (on the difference in treatment between male and female military personnel, regarding rights to parental leave). Anyway, you will see that this case states fundamental doctrine on difference in treatment on grounds of sex.

Look into the non-key cases of the last three years, it was possible to find another two cases that came up with interesting conclusions.

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Key cases of the last decade

***1. Jurčić v. Croatia* - 54711/15 - Judgment February 4th, 2021 [Section I]**

This first case is about unjustified, direct sex discrimination by refusing employment-related benefit to pregnant woman who underwent *in vitro* fetilization shortly before employment.

The applicant entered into an employment contract ten days after she had undergone *in vitro* fertilization. When she subsquentely went on sick leave (on account of pregnancy-related complications), relevant domestic authority re--examined her health insurance status and concluded that, by signing the contract shortly after *in vitro* fertilization, the applicant had only sought to obtain pecuniary advantages related to employments status and that her employment was therefore ficticious.

The applicant had been refused the status of an insured employee on grounds of employment which had been declared fictitious due to her pregnancy. Such a decision could only be adopted in respect of women. It therefore had constituted a difference in treatment on grounds of sex.

The Government had argued that the decision to revoke the applicant's insurance status had pursued the legitimate aim of protecting public resources from fraudulent use, and the overall stability of the healthcare system. The Court stressed that a woman's pregnancy as such could not be considered fraudulent behavior, and that the financial obligations imposed on the State during a woman's pregnancy by themselves could not constitute sufficiently weighty reasons to justify difference in treatment on the basis of sex.

Even assuming that the Court had been generally prepared to accept the aim of the protection of public funds as legitimate, it had to be established whether the impugned measure had been necessary to achieve it, taking into account the narrow margin of appreciation afforded to States in cases where difference in treatment was based on sex.

The fact that the applicant had entered into new employment such a short time before seeking the employment-related benefit in question, was the reason why the national authority had initiated review of the applicant's health insurance status, under suspicion that her employment agreement had been concluded only for her to be able to claim that benefit. Such review in practice had frequently targeted pregnant women, and women who had concluded an employment contract at an advanced stage of their pregnancies. Such an approach was considered as generally problematic.

The authorities had concluded that the applicant had been unfit to work on the date of concluding her contract because her doctor had recommended her rest, following her in vitro fertilization, ten days before. In particular,

they had relied on the fact that the applicant had been expected to work at the employer's headquarters, located far from her place of residence, and that travel in her condition might reduce her chances of a favorable outcome of the fertilization.

By concluding that, due to the in vitro fertilization, the applicant had been medically unfit to take up the employment in question, the domestic authorities had implied that she had to refrain from doing so until her pregnancy had been confirmed. That conclusion had been in direct contravention to both domestic and international law.

The foregoing was sufficient to conclude that the applicant had been discriminated against on the basis of her sex.

The Court pointed out some additional factors:

- The applicant had regularly paid contributions to the compulsory health insurance scheme during her fourteen years of prior work experience. It could not thus be argued that she had failed to contribute to the insurance fund;
- When entering into her employment, the applicant had had no way of knowing whether the in vitro fertilization procedure had been successful or whether it would result in her becoming pregnant. Moreover, she could not have known that her future pregnancy, if any, would have resulted in complications which would have required her to be issued sick leave for a prolonged period of time;
- When reviewing the applicant's case, the authorities had failed to provide any explanation of how she could have consciously concluded a fraudulent employment contract, without even knowing whether she would actually become pregnant, particularly bearing in mind that she had not been under any legal obligation to report the fact that she had undergone the in vitro fertilization procedure or that she might be pregnant while concluding the contract.
- The authorities had reached their conclusion in the applicant's case without assessing whether she had ever actually taken up her duties and started performing her work assignments for the employer; nor had they sought to establish whether the in vitro fertilization procedure she had undergone had necessitated her absence from work due to health reasons.
- Finally, the Court expressed concern about the overtones of the domestic authorities' conclusion, which had implied that women should not work or seek employment during pregnancy or possibility thereof. Gender stereotyping of that sort presented a serious obstacle to the achievement of real substantive gender equality.

So, a refusal to employ or recognize an employment-related benefit to a pregnant woman based on her pregnancy amounted to direct discrimination on grounds of sex, which could not be justified by the financial interests of the State. The Court also noted a similar approach in the case-law of the Court of Justice of the European Union and in other relevant international standards. Accordingly, the difference in treatment to which the applicant, as a woman who had become pregnant through in vitro fertilization, had been subjected, had not been objectively justified or necessary.

2. *Carvalho Pinto de Sousa Morais* v. *Portugal* - 17484/15 – Judgment – July 25, 2017 [Section IV]

The second key case is about the reduction in damages award on grounds of sex and age of claimant.

The applicant, a Portuguese woman who had been diagnosed with a gynecological disease, brought a civil action against a hospital for clinical negligence following an operation for her condition. The Administrative Court ruled in her favor and awarded her compensation. On appeal the Supreme Administrative Court upheld the first-instance judgment but reduced the amount of compensation due to the damages.

The applicant complained that the Supreme Administrative Court's judgment in her case had discriminated against her on the grounds of her sex and age. She complained, in particular, about the reasons given by the court for reducing the award and about the fact that it had disregarded the importance of a sex life for her as a woman.

References to traditions, general assumptions, or prevailing social attitudes in a particular country were insufficient justification for a difference in treatment on the grounds of sex. The issue with stereotyping of a certain group in society lay in the fact that it prohibited the individualized evaluation of their capacity and needs.

The Supreme Administrative Court considered that the applicant's physical and mental pain had been aggravated by the operation. It relied on the fact that the applicant was *already fifty years old at the time of the surgery and had two children, that is, an age when sexuality is not as important as in younger years, its significance diminishing with age* and the fact that she *probably only needed to take care of her husband*, considering the age of her children.

The question at issue was not considerations of age or sex as such, but rather the assumption that sexuality was not as important for a fifty-year old woman and mother of two children as for someone of a younger age. That assumption reflected a traditional idea of female sexuality as being essentially linked to child-bearing purposes and thus ignored its physical and psychological relevance for the self-fulfillment of women as people. Apart from being judgmental, it omitted

to take into consideration other dimensions of women's sexuality in the concrete case of the applicant. The Supreme Administrative Court had, in other words, made a general assumption without attempting to look at its validity in the concrete case.

The wording of the Supreme Administrative Court's judgment could not be regarded as an unfortunate turn of phrase. The applicant's age and sex appeared to have been decisive factors in the final decision, introducing a difference in treatment based on those grounds.

The Court noted the contrast between the applicant's case and the approach that had been taken by the Supreme Court of Justice in two judgments of 2008 and 2014 in which two male patients aged 55 and 59 respectively had alleged medical malpractice. In those judgments the Supreme Court of Justice found that the fact that the men could no longer have normal sexual relations had affected their self-esteem and resulted in a "tremendous shock" and "strong mental shock". In assessing the quantum of damages, it took into consideration the fact that the men could not have sexual relations and the effect that had had on them, regardless of their age, of whether or not the plaintiffs already had children, or of any other factors.

3. *Constantin Markin v. Russia* – 30078/06 – Judgement 22 March 22, 2012 [Grand Chamber]

In this third and last key case, the applicant complained of the domestic authorities' refusal to grant him parental leave because he belonged to the male sex.

On 27 March 2004 he signed a military service contract as a radio intelligence operator.

On 30 September 2005 the applicant's wife gave birth to their third child. On the same day a court granted her petition for divorce, on which both agreed their three children would live with the applicant.

On 11 October 2005 the applicant asked the head of his military unit for three years' parental leave. His request was rejected because three years' parental leave could be granted only to female military personnel. The applicant challenged the decision. The last internal court to decide (the Russian constitutional court) stated, *inter alia* that *the law in force does not give a serviceman the right to three years' parental leave. Accordingly, servicemen under contract are prohibited from combining the performance of their military duties with parental leave.*

The ECHR took due notice of the article 5 of the Convention on the Elimination of All Forms of Discrimination against Women, where it imposes *all appropriate measures to modify the social and cultural patterns of conduct of men and women, and to ensure that family education includes a proper understanding of maternity as a*

social function and the recognition of the common responsibility of men and women in the upbringing and development of their children.

It also reminded article 3 § 1 of ILO Convention No. 156 concerning Equal Opportunities and Equal Treatment for Men and Women Workers, the European Social Charter (ratified by the Russian Federation in 2009) that stated that opposes gender stereotypes and insists that *the balanced participation of women and men in professional/public life and in private/family life is, therefore, a key area for gender equality and is essential for the development of society.*

Turning then to the special military context of the case, the Chamber reiterated that a system of military discipline, by its very nature, implied the possibility of placing limitations on certain of the rights and freedoms of the members of the armed forces which could not be imposed on civilians. Thus, a wide margin of appreciation was afforded to States wishing to impose restrictions on the rights of military personnel. The States, however, had a narrower margin of appreciation in the sphere of family and private life.

Meanwhile, the Chamber was not convinced by the Government's argument that the extension of the parental leave entitlement to servicemen, where servicewomen already had such entitlement, would have a negative effect on the fighting power and operational effectiveness of the armed forces.

The Court further reiterates that the advancement of gender equality is today a major goal in the member States of the Council of Europe and very weighty reasons would have to be put forward before such a difference of treatment 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. For example, States are prevented from imposing traditions that derive from the man's primordial role and the woman's secondary role in the family.

Being a serviceman, the applicant had no statutory right to three years' parental leave, while servicewomen were entitled to such leave. The Court had therefore to consider whether the applicant was in an analogous situation to servicewomen. In so far as parental leave and parental leave allowances are concerned, men are in an analogous situation to women.

The special armed forces context of the present case were, nevertheless, in due attention. Military service is intimately connected with the nation's security and is, accordingly, central to the State's vital interests. A wide margin of appreciation is afforded to the States in matters relating to national security in general and the armed forces in particular. In fact, given the importance of the army for the protection of national security, certain restrictions on the entitlement to parental leave may be justifiable, provided they are not discriminatory.

The Court concluded that the reference to the traditional distribution of gender roles in society cannot justify the exclusion of men, including servicemen,

from the entitlement to parental leave. It agreed that gender stereotypes, such as the perception of women as primary child-carers and men as primary breadwinners, cannot, by themselves, be considered to amount to sufficient justification for a difference in treatment, any more than similar stereotypes based on race, origin, color, or sexual orientation.

Non key cases

4. *Tkhelidze v. Georgia* - 33056/17 - Judgment July 8th, 2021 [Section V]

This first [non key] case is about failure to take preventive action to protect domestic violence victim and to investigate police inaction, against backdrop of systemic failures and gender-based discrimination.

The applicant's daughter was domestically abused by her partner and eventually killed by his hand, in a murder-suicide. Afterwards, the applicant filed several unsuccessful and/or unanswered criminal complaints, requesting that an investigation be opened into the alleged negligence of police officers who had dealt with her daughter's domestic violence.

Remarkably, the Court was satisfied that there existed an adequate legislative and administrative framework designed to combat domestic violence against women in Georgia, in general. It was rather the manner of implementation of this deterrent mechanism by the law-enforcement authorities, that is to say the issue of compliance with the duty to take preventive operational measures to protect the applicant's life, which raised serious concerns in this case.

Within a very tight frame of some six months, the victim and the applicant had requested help from the police on at least *eleven occasions*. They had always clearly conveyed the level of violence of the victim's husband behavior. Moreover, the police knew that he had suffered from pathological jealousy and had other mental instabilities, had difficulties in managing his anger and had a criminal record and history of drug and alcohol abuse. The police had also been aware that the victim had carried various defense weapons with her all the time and experienced extreme fear and anxiety at seeing her partner approaching either her flat or workplace. Furthermore, the violence to which the victim had been subjected could not be seen as individual and separate episodes but had instead to be considered a lasting situation.

Thus, the police had known or certainly ought to have known of the real and immediate threat to the safety of the applicant's daughter.

As regards the requirement of special diligence, the Court discerned several major failings on the part of the law-enforcement authorities. Firstly, there were indications of inaccurate or incomplete evidence-gathering by po-

lice officers. There was a constant underestimation of the level of violence actually committed, with deleterious effects on opening a criminal investigation and even discouraging victims of domestic abuse from reporting an abusive family member to the authorities in the future. It was also significant in that connection that, when recording the incidents, the police officers had not attached sufficient importance to potential trigger factors for the violence and had failed to take into account the victim's own perceptions of danger, downgrading the classification of an incident to a "minor family altercation".

Furthermore, whilst the domestic legislative framework had provided for various temporary restrictive measures in respect of the abuser, the relevant domestic authorities had not resorted to them at all. What was more, neither the applicant nor her daughter had been advised by the police of their procedural rights and of the various legislative and administrative measures of protection available to them.

The inactivity of the domestic law-enforcement authorities had been reported to be a major systemic problem affecting society in the country at the material time.

Therefore, all in all, there had been a persistent failure to take steps that could have had a real prospect of altering the tragic outcome or mitigating the harm and the police inaction in the present case could be considered a systemic failure.

5. *Yocheva and Ganeva* v. *Bulgaria* - 18592/15 and 43863/15 – Judgment May 11th, 2021 [Section IV]

This last case is about discriminatory denial of surviving parent allowance to single mother of minor children of unknown father.

The first applicant, a single mother whose minor children had not been recognized by their father, was refused a monthly allowance provided to families in which children had one living parent only. She unsuccessfully brought judicial review proceedings for discrimination before the domestic courts.

On whether the first applicant was in a relevantly similar or analogous situation to the groups who were entitled to the benefit – The Court replied in the affirmative.

First, *vis-à-vis* fathers of children whose mothers had died, as with parental leave allowances, men and women were in an analogous situation with regard to family allowances which were meant to support families with children with one surviving parent.

Second, the first applicant was in "a relevantly similar situation" vis-à-vis widows whose children had been born in wedlock and single mothers whose children's fathers had recognized them before dying, taking into account that the benefit scheme aimed to provide ongoing monthly support for families with

children, who for a variety of reasons were in a vulnerable position, and the role of these groups of mothers in acting as their children's sole carer.

On whether there was a difference in treatment the court noticed that the first applicant had been refused the allowance as she could not produce documents certifying that the father had died and the children were his legal heirs, unlike the other groups of families which could claim the allowance, being able to produce those documents as their children had established legal ties to both parents. There had thus been a difference in treatment between the first applicant's family and the other groups.

On whether the difference in treatment was based on a 'status' the court noticed that the first applicant had been treated differently on two grounds:

(i) her sex: as maternity was determined by the act of birth, in the vast majority of cases it was only children's paternity that could be unknown; as a mother of children with an unknown father, she could not provide the required documents under the law, while a single father whose children's mother had died would normally be able to do so, and
(ii) her family status, that is, a single mother, with the identity of her children's father not having been established. This had resulted from the application of the relevant domestic law covering only families with one surviving parent and as confirmed and clarified by the Constitutional Court, requiring one of the parents to have died.

On whether the difference in treatment was objectively justified the Court held that the government had not provided a reasonable or objective justification for excluding the first applicant's family from receiving the benefit. It took into account, *inter alia*, the following:

- The difference in treatment which emanated from the applicable law itself was based on a very traditional, outdated and stereotypical understanding of a family. This could not amount to sufficient justification for differential treatment, any more than similar stereotypes based on race, sex, color or sexual orientation.
- Making receipt of the allowance conditional on the first applicant's disclosure of intimate information and/or taking legal steps for paternal recognition – all of which fell squarely in her private life sphere and which she did not wish to do – amounted to making the full exercise of her right to respect for her family life conditional upon her relinquishing the exercise of her right to respect for her social and personal identity and psychological integrity.

- Children whose father was unknown, in objective terms, had been deprived of the care and protection of one of their parents in the same way as children one of whose parents had died. It could not be said that they required less care and protection than the latter or that they were in a better position, without accounting for a whole range of surrounding and relevant other circumstances which inevitably varied greatly from case to case.
- Neither the lack of a common standard in social benefit systems nor the wide margin of appreciation in the sphere of economic or social policy absolved States which adopted family allowance schemes from the obligation to grant such benefits without discrimination or justify the adoption of discriminatory laws or practices.

In view of all the above, the Court concluded that the first applicant had suffered discrimination on the grounds of both her family status and her sex.

Conclusion

The five cases we've seen do show where we Europeans are in matter of women discrimination. One can easily agree that a long way has been done. Nevertheless, looking at individual situations, one can still find traditional stereotypes that (mostly) harm women. And that seems to be the main origin of gender discrimination.

(RESUMO EM PORTUGUÊS)

Resumo: O presente texto corresponde, com ligeiros ajustamentos formais, à comunicação feita na sessão sobre "Power, Alienation and Human Rights" do *Global Meeting on Law and Society program*: "Rage, Reckoning & Remedy" (2022).

Nele se analisam os três acórdãos-chave do Tribunal Europeu dos Direitos do Homem, da última década, sobre a discriminação de género, aos quais se acrescentaram dois outros, que, muito embora não tenham merecido essa classificação pelo tribunal, pareceram merecer essa atenção.

Essa análise revela o relativo nível de pormenor das questões levantadas.

No primeiro caso, aborda-se a questão da discriminação de uma grávida - na sequência de uma fertilização *in vitro* – a quem é retirado o seguro de saúde por se considerar que o emprego teria sido obtido apenas para conseguir acesso ao dito seguro. No segundo caso, analisam-se os fundamentos da redução de uma indemnização por negligência médica em relação que afetou a sua condição ginecológica (em que o tribunal entendeu desvalorizar o dano face à idade da paciente). No terceiro caso analisa-se o pedido de um soldado russo, que ficou com filhos a cargo, sendo-lhe, todavia, negado o direito a dispensa por maternidade.

Entrando nos acórdãos não considerados marcantes pelo próprio TEDH, o primeiro incide sobre uma situação de violência doméstica em que as autoridades da Geórgia, na aplicação do regime jurídico vigente (que, enquanto tal, não merece reparos), desconsideram de forma grave os indícios e as queixas, vindo a vítima a morrer em consequência dessa violência. No último caso, analisa-se a recusa das autoridades búlgaras em concederem um subsídio destinado a famílias monoparentais, face ao não reconhecimento da paternidade por parte do pai.

Palavras-chave: Direitos das mulheres; Discriminação.