

Unmasking bias motives in crimes: selected cases of the European Court of Human Rights

This paper discusses the evolution of European Court of Human Rights case law relating to hate crime, providing an update on the most recent rulings. Approaching hate crime from a fundamental rights perspective, it shows how Member State authorities' duty to effectively investigate the bias motivation of crimes flows from key human rights instruments, such as the European Convention on Human Rights (ECHR).

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This paper discusses the evolution of the case law of the European Court of Human Rights (ECtHR) related to hate crime and provides an update on the most recent rulings. It approaches hate crime from a fundamental rights perspective, as developed by the European Union Agency for Fundamental Rights (FRA) in 2012,¹ and shows how the duty for Member States authorities to effectively investigate and punish bias motivation of a crime flows from key human rights instruments, such as the European Convention for Human Rights (ECHR).²

All EU Member States are party to the ECHR and therefore bound by it. In addition, as noted in the Handbook on European non-discrimination law,³ there are close connections between EU law and the ECHR. According to Article 52(3) of the Charter of Fundamental Rights of the European Union, the meaning and scope of the rights protected by the Charter, such as Article 21 on the right to non-discrimination, are to be interpreted in the same way as the corresponding right enshrined in the ECHR. Therefore, the case law of the European Court of Human Rights (ECtHR) is highly relevant for Member States also when interpreting and applying EU law related to hate crime, such as the Framework Decision on Racism and Xenophobia⁴ and the Victims' Rights Directive.⁵

This paper starts by reviewing the ruling on the *Nachova* case. In this case, the ECtHR first derived from Article 14 ECHR on the prohibition of discrimination a positive duty for State authorities to investigate and unmask the bias motivation of an offence, if there are indications of its existence. The paper then shows how the ECtHR case law further developed this positive duty in four different directions by:

- connecting it to other rights enshrined in the ECHR (Article 3 on the prohibition of inhuman or degrading treatment and Article 8 on the right to respect for private and family life);
- applying its reasoning to cases in which the offence was not committed by State actors, but by private individuals;
- expanding the scope of the positive duty from the initial racist motivation to other bias motivations, such as religious hatred, homophobia, disability, political opinions or gender-based discrimination;
- including under this positive duty cases of discrimination by association.

1. From *Menson to Nachova*: the duty of State authorities to effectively investigate a possible racist motivation under the ECHR

In May 2003, the ECtHR had to decide on a case of a racist murder. The victim was Michael Menson, a black man from Ghana who in 1997 had been set on fire in London by a racist gang

¹ FRA (2013), *Making hate crime visible in the European Union: acknowledging victims' rights*, Luxembourg, Publications Office.

² Since the focus of this paper is the duty for State authorities to unmask hate crime, this paper does not discuss the case law of the ECtHR pertaining to hate speech. A useful summary of this case law can be found in the [factsheet published by the ECtHR in June 2018](#).

³ FRA (2018), *Handbook on European non-discrimination law – 2018 Edition*, p. 17. Luxembourg, Publications Office.

⁴ Council Framework Decision 2008/913/JHA of 28 November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law.

⁵ Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standard on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA.

and later died in a hospital. The culprits were ultimately convicted and received prison sentences. However, as investigations later conducted revealed, the handling of the case by the Metropolitan Police Service (MPS) was marred by serious defects, starting with the false assumption that he had set himself alight. It took the police nearly two years before they finally agreed with what the family of the victim had maintained right from the start – that Mr. Menson was killed by a violent racist gang. The ECtHR analysed the police investigations and found that “there were very serious defects in the handling of the attack on Michael Menson and which were entirely at odds with the requirements of an effective investigation”. In spite of that, since in the end the culprits had been convicted and punished, the Court considered that “the legal system of the respondent State ably demonstrated, in the final analysis and with reasonable expedition, its capacity to enforce the criminal law against those who unlawfully took the life of another, irrespective of the victim’s racial origin”. Therefore, among other reasons, the Court declared the case brought forward by Mr. Menson’s siblings inadmissible.

However, what’s most relevant for the purposes of this paper is that the Court recalled that from Article 2 ECHR on the right to life flows a procedural obligation for State authorities to carry out an effective criminal investigation “capable of establishing the cause (...) and the identification of those responsible with a view to their punishment.” It added that, “**where an attack is racially motivated**, it is particularly important that **the investigation is pursued with vigour and impartiality, having regard to the need to reassert continuously society’s condemnation of racism and to maintain the confidence of minorities in the ability of the authorities to protect them from the threat of racist violence.**”⁶ This reasoning prepared the ground for the next step of the process of identifying the duties of State authorities regarding hate crimes under the ECHR: to derive from Article 14 ECHR a separate duty to investigate and unmask racial motives. It did so in 2005, in its ruling on the *Nachova* case.⁷

The *Nachova* case concerned a member of the Bulgarian military police who, during an arrest attempt, killed two Bulgarian nationals of Roma origin. The Court, sitting as a Grand Chamber, found that Bulgaria had failed to comply with its obligations under Article 2 ECHR (right to life) because the legal framework on the use of force was fundamentally flawed and because grossly excessive force had been used by the military police. It went on to analyse if there had also been a violation of Article 14 ECHR (prohibition of discrimination) in conjunction with Article 2, and found that it couldn’t be excluded that the military police officer would have acted the same way in a non-Roma context, so in this substantive sense it found no violation of the prohibition of discrimination.

However, the Court stated that Article 14 ECHR also implied a **procedural duty to adequately investigate** possible racist motives. The investigating authorities had had before them the statement of a neighbour of the victims who said that, immediately after the shooting, the police officer had shouted “you damn Gypsy”, while pointing a gun at him, a statement that had to be seen against the background of many published accounts of the existence of prejudice and hostility against Roma. In spite of this, the authorities had done nothing to verify the neighbour’s statement or the reasons it had been considered necessary to use such a degree of force. Therefore, the Court concluded that the failure to investigate a possible causal link between alleged racist attitudes and the killing of the two men constituted a violation of Article 14 in its procedural dimension, in conjunction with Article 2.

⁶ ECtHR, *Menson and Others v. UK*, No. 47916/99, decision as to the admissibility, 6 May 2003, p. 13-14.

⁷ ECtHR, *Nachova and Others v. Bulgaria*, No. 43577/98 and 43579/98, judgment of 6 July 2005.

What does the duty to unmask racist motive imply

On the content of this procedural duty, the Grand Chamber endorsed the previous analysis done by the Chamber, which had stated that “the State’s obligation to investigate possible racist overtones to a violent act is an obligation to use best endeavours and not absolute [...]. The authorities must do what is reasonable in the circumstances to collect and secure the evidence, explore all practical means of discovering the truth and deliver fully reasoned, impartial and objective decisions, without omitting suspicious facts that may be indicative of a racially induced violence.”⁸

What triggers this procedural duty to investigate a possible causal link between alleged racist attitudes and the crime committed is the existence of facts or elements pointing to a possible role of racial prejudice in the events, as was the case with the uttering of words and the excessive use of force in the *Nachova* case. This also means that, in principle, where there are no such specific facts or elements suggesting this connection, authorities are not obliged under Article 14 ECHR to carry out investigations in this regard. In a number of similar cases to *Nachova*, resulting in the death of Roma people through ill-treatment by the police, the ECtHR concluded that there was a violation of the obligation under Article 2 ECHR to conduct an effective investigation into the victim’s death, but did not find that the authorities “had before them information which was sufficient to alert them to the need to investigate possible racist overtones in the events”,⁹ and therefore did not find a violation of Article 14 ECHR. This was the common outcome of the cases *Ognyanova and Choban v. Bulgaria* (2006)¹⁰, *Vasil Sashov Petrov v. Bulgaria* (2010)¹¹ and *Mižigárová v. Slovakia* (2010).¹²

However, in the latter case there was a partly dissenting opinion of judge Björgvinsson, who considered that there was enough objective evidence available to the authorities to suggest a racist motive, such as reports that “show that police brutality in respect of persons of Roma origin was, at the relevant time, systemic, widespread and a serious problem in Slovakia.” The majority of judges had indeed noted with concern these reports¹³ and stated that they “would not exclude the possibility that in a particular case the existence of independent evidence of a systemic problem could, in the absence of any other evidence, be sufficient to alert the authorities to the possible existence of a racist motive.” In this case, however, they were not persuaded that “the objective evidence is sufficiently strong in itself to suggest the existence of such a motive.”¹⁴ Hence, they left open the possibility that in future cases the mere existence of independent evidence of a systemic problem, even if there are no further indications of racism in the case at hand, could be enough to trigger the authorities’ duty to investigate a possible racist motivation.

2. The application to violations of rights beyond Article 2 of the ECHR

All cases discussed so far concerned Article 2 ECHR, on the right to life, in conjunction with Article 14, on the prohibition of discrimination. But the same duty to investigate and unmask a racist or bias motive also applies to the violation of other rights enshrined in the ECHR, such

⁸ ECtHR, *Nachova and Others v. Bulgaria*, Nos. 43577/98 and 43579/98, 26 February 2004, para. 156-159.

⁹ ECtHR, *Ognyanova and Choban v. Bulgaria*, No. 46317/00, 23 February 2006, para. 148.

¹⁰ ECtHR, *Ognyanova and Choban v. Bulgaria*, No. 46317/99, 23 February 2006.

¹¹ ECtHR, *Vasil Sashov Petrov v. Bulgaria*, No. 63106/00, 10 June 2010.

¹² ECtHR, *Mižigárová v. Slovakia*, No. 74832/01, 14 December 2010.

¹³ See for example ECRI report, ECtHR, *Mižigárová v. Slovakia*, No. 74832, 14 December 2010, para. 59.

¹⁴ ECtHR, *Mižigárová v. Slovakia*, No. 74832, 14 December 2010, para. 122.

as Articles 3 (prohibition of torture and inhuman and degrading treatment) and 8 (right to respect for private and family life).

The ECtHR applied this reasoning in connection with Article 3 in the *Bekos and Koutropoulos* case (2005),¹⁵ which regarded police ill-treatment of two Greek nationals of Roma origin. The Court first concluded that the applicants had been subjected to inhuman and degrading treatment within the meaning of Article 3 ECHR.¹⁶ It then analysed if there was also violation of Article 14 in conjunction with Article 3 in that the authorities failed to investigate possible racist motives behind the incident. It found that in spite of having before them the sworn testimonies of one of the applicants that he had been subjected to racial abuse by the police, in addition to statements from international organisations and national human rights groups, the authorities had not investigated the issue of possible racist motives of the police officers. The ECtHR therefore concluded in a violation of the procedural aspect of Article 14.¹⁷

In the *Balázs* case (2015)¹⁸ the applicant complained that the authorities had failed to conduct an effective investigation into a racist attack by a penitentiary officer against him and in particular that they had not taken sufficient action to establish a possible racist motive for the assault. Although the prosecution had started an investigation into the offence of violence against a member of a group, it discontinued it on the grounds that the racist motives could not be established “unequivocally and beyond doubt”. The ECtHR, however, found that the comment posted on a social network by the accused the day after the event boasting of his actions and using explicit racist language were “powerful hate crime indicators” that should have been regarded as an evidence of the racist motivation. In this sense, it considered that the failure to do so “impaired the adequacy of the investigation to an extent that it is irreconcilable with the State’s obligation in this field to conduct vigorous investigations.” It therefore concluded that there had been a violation of Article 14 read in conjunction with Article 3 ECHR.¹⁹

In the more recent *M.F.* case (2017)²⁰ the applicant contended that he had been ill-treated by police officers and that there had not been an effective investigation into the related complaint on account of his Roma origin. The Court first found that the authorities did not provide any plausible explanation for the cause of the applicant’s injuries, which therefore had to be attributed to the treatment while in police custody, in violation of Article 3 ECHR.²¹ The ECtHR then analysed whether the ill-treatment had been due to his Roma ethnic origin, but here the Court considered it had not been established beyond reasonable doubt that racist attitudes played a role in the applicant’s ill-treatment and in this sense found no violation of Article 14 taken together with Article 3 ECHR in its substantive aspect.²² However, it then turned to the separate question of whether the authorities had complied with their obligation to investigate possible racist motives and found that, despite the applicant’s allegations, they did not carry out any examination of this question. The Court therefore concluded that there had been a violation of Article 14 taken together with Article 3 ECHR in its procedural aspect.²³

¹⁵ ECtHR, *Bekos and Koutropoulos v. Greece*, No. 15250/02, 13 December 2005.

¹⁶ ECtHR, *Bekos and Koutropoulos v. Greece*, cited above, para 52.

¹⁷ ECtHR, *Bekos and Koutropoulos v. Greece*, cited above, para 55.

¹⁸ ECtHR, *Balázs v. Hungary*, No. 15529/12, 20 October 2015.

¹⁹ ECtHR, *Balázs v. Hungary*, cited above, para 76.

²⁰ ECtHR, *M.F. v. Hungary*, No. 45855/12, 31 October 2017.

²¹ ECtHR, *M.F. v. Hungary*, cited above, para. 56.

²² ECtHR, *M.F. v. Hungary*, cited above, para. 69.

²³ ECtHR, *M.F. v. Hungary*, cited above, para. 77.

In the *R.B.* case (2016),²⁴ the ECtHR linked the duty to investigate a possible racist motivation to Article 8 ECHR (right to respect for private and family life). The case regarded a number of marches organized by two right-wing paramilitary groups and a Civil Guard Association in a Roma neighbourhood of a village in Hungary, in the course of which the applicant, a Roma person who was in her garden with her child, was subjected to racist insults and threats. The applicant contended that the authorities had failed in their obligations to prevent her from being subjected to racist insults and threats and to conduct an effective investigation into the incident.

The ECtHR first analysed if there had been a violation of the prohibition of inhuman and degrading treatment under Article 3 ECHR, and concluded that the facts of the case did not have the minimum level of severity required to qualify as a degrading treatment.²⁵ It then analysed whether, even if the threshold of Article 3 was not reached, there had been a violation of the right to respect for private and family life under Article 8 and found that, since the abuse suffered was directed against the applicant for her belonging to an ethnic minority, this conduct necessarily affected the applicant's private life, in the sense of ethnic identity, within the meaning of Article 8 of the ECHR.²⁶ It further stated that when a person makes credible assertions that he or she has been subjected to harassment motivated by racism, the State authorities have a similar obligation to take all reasonable steps to unmask any racist motive and to establish whether or not ethnic hatred or prejudice may have played a role in the events. In the view of the Court these positive obligations required an even higher standard of States to respond to alleged bias-motivated incidents in situations where there is evidence of patterns of violence and intolerance against an ethnic minority.²⁷ The Court then noted that the criminal-law mechanisms in the Hungarian legal system, as in force at the material time, provided no appropriate legal avenue for the applicant. It concluded therefore that the respondent State's criminal-law mechanisms as implemented in the case "did not provide adequate protection to the applicant" and were "defective to the point of constituting a violation of the respondent State's positive obligations under Article 8 of the Convention."²⁸

3. Hate crimes committed by private persons

With its ruling on the *Šečić* case (2007),²⁹ the ECtHR started to apply the same positive duty to effectively investigate possible bias motivations in criminal cases in which private persons, rather than State authorities, were involved. The *Šečić* case concerned an attack by a skinhead group on the applicant resulting in severe bodily harm and hospitalisation. The applicant alleged that the Croatian authorities had failed to undertake a thorough investigation of this attack and that this failure related to his Roma origin. Recalling his ruling on *Nachova*, the Court insisted that, when investigating violent incidents, State authorities have the additional duty to take all reasonable steps to unmask any racist motive and stated that this was "true also in cases where the treatment contrary to Article 3 of the Convention is inflicted by private individuals".³⁰ The ECtHR first examined the case under the procedural aspect of Article 3, which imposes upon State authorities the duty to investigate allegations of severe ill-treatment thoroughly, effectively, and promptly. It noted that the criminal

²⁴ ECtHR, *R.B. v. Hungary*, No. 64602/12, 12 April 2016.

²⁵ ECtHR *R.B. Hungary*, cited above, para. 51-52.

²⁶ ECtHR, *Balázs v. Hungary*, cited above, para. 80.

²⁷ ECtHR *R.B. Hungary*, cited above, para. 84.

²⁸ ECtHR, *R.B. v. Hungary*, cited above, para. 91.

²⁹ ECtHR, *Šečić v. Croatia*, No. 40116/02, 31 May 2007.

³⁰ ECtHR, *Šečić v. Croatia*, cited above, para. 67.

proceedings had been pending in the pre-trial phase for almost seven years and the police had still not brought charges against anyone.³¹ The Court therefore established a breach of Article 3 ECHR. In addition, the Court considered it “unacceptable that, being aware that the event at issue was most probably induced by ethnic hatred, the police allowed the investigation to last for more than seven years without taking any serious action with a view to identifying or prosecuting the perpetrators.”³² It therefore concluded that there had also been a violation of Article 14 in conjunction with the procedural aspect of Article 3 ECHR.

A similar case of protraction of criminal proceedings and hence failure to adequately investigate a racist attack by private individuals which had resulted in the death of the victim was *Angelova and Iliev (2007)*.³³ Here, the ECtHR concluded in a violation of Article 2 and, in addition, of Article 14 ECHR in conjunction with the procedural aspect of Article 2 for failing to make the required distinction from other, non-rationally motivated offences.³⁴ A further, more recent example was the *R.B. case (2016)*³⁵, which was already discussed under the section on the application to violations of Article 3 and 8 ECHR.

4. The expansion to bias motives besides racism

All cases discussed so far involved a racist bias motivation. Yet, the same duty to investigate is applicable when other bias motivations come into play, such as bias related to religious hatred, disability, political opinions, sexual orientation or gender-based discrimination.

Religious hatred

The *Milanović case (2010)*³⁶ concerned religious hatred. Mr. Milanovic was a leading member of the Vaishnava Hindu religious community in Serbia, otherwise known as Hare Krishna. He had suffered several physical attacks resulting in bodily injuries during a number of years in a wider context of acts of hostility against religious minorities conducted by far-right groups. Despite this context and the real, immediate and predictable risk of a reproduction of these assaults, which often happened in advance of or shortly after a major religious holiday, the authorities had not been able to identify any perpetrator, nor to prevent the repetition of such attacks. The ECtHR therefore concluded that they “did not take all reasonable measures to conduct an adequate investigation” and also failed “to prevent the applicant’s repeated ill-treatment” and found a breach of Article 3 ECHR.

The Court then analysed if there was additionally a breach of Article 14 in conjunction with Article 3. Applying the reasoning developed in *Nachova*, it stated that “just like in respect of racially motivated attacks, when investigating violent incidents State authorities have the additional duty to take all reasonable steps to unmask any religious motive and to establish whether or not religious hatred or prejudice may have played a role in the events. [...] Treating religiously motivated violence and brutality on an equal footing with cases that have no such overtones would be turning a blind eye to the specific nature of acts that are particularly destructive of fundamental rights.”³⁷ The Court concluded that the failure to take

³¹ ECtHR, *Šečić v. Croatia*, cited above, para. 55.

³² ECtHR, *Šečić v. Croatia*, cited above, para. 70.

³³ ECtHR, *Angelova and Iliev v. Bulgaria*, No. 55523/00, 26 July 2007.

³⁴ ECtHR, *Angelova and Iliev v. Bulgaria*, cited above, para. 118.

³⁵ ECtHR, *R.B. v. Hungary*, cited above.

³⁶ ECtHR, *Milanović v. Serbia*, No. 44614/07, 14 December 2010.

³⁷ ECtHR, *Milanović v. Serbia*, cited above, para. 96-97.

adequate action in spite of the likelihood of religious hatred being the motivation for the attacks was a violation of Article 14 taken in conjunction with Article 3.³⁸

Harassment related to disability

The *Dordevic* case (2012)³⁹ concerned bias motivation related to disability. A mother and her son with mental and physical disabilities had suffered physical and verbal harassment by children living in their neighbourhood for four years and contended that the authorities had failed to protect them. The ECtHR first clarified that because the alleged perpetrators were mostly children below 14 years of age the case did not concern the State's procedural obligations under criminal law, but a possible lack of adequate response to a situation of serious harassment and even violence directed against a person with physical and mental disabilities. The Court then found that no relevant action to combat the problem had been taken by the competent authorities, despite their knowledge of the situation and that future abuse was likely to follow. It therefore concluded that Article 3 and 8 ECHR had been violated.⁴⁰ However, the Court could not analyse in depth the applicant's additional complaint that the lack of an adequate response of the competent authorities was discriminatory in itself and hence in breach of Article 14 ECHR, because internal remedies available had not been exhausted. The complaint was therefore rejected in this respect.⁴¹ This case is somewhat different to the ones analysed previously in that it involves minors falling outside of the criminal law system and does not regard the duty of authorities to investigate a case, but rather to adequately react and protect the victim. However, it is mentioned here to illustrate the willingness of the ECtHR to consider the bias motivation related to disability.

Violence related to political opinions

The *Virabyan* case (2012)⁴² concerned bias motivation related to ideology. The applicant contended that he had been subjected to torture by the police and that the authorities had failed to carry out an effective investigation into this because of his belonging to the political opposition. The ECtHR first found that the applicant had indeed suffered torture and therefore concluded that there was a breach of Article 3 ECHR.⁴³ It then analysed if the ill-treatment could be related to the political opinions of the applicant and hence be discriminatory and a violation of Article 14 ECHR. Similarly to the analysis done in *Nachova* and in *M.F.*, it concluded that it could not be ruled out that the violent behaviour of the police could have other reasons, and therefore did not find a violation of Article 14 ECHR in its substantive limb.⁴⁴ However, it then turned to the question of whether the authorities had complied with their procedural duty under Article 14 ECHR to investigate a possible bias motivation of the perpetrators. It found that the authorities had before them plausible information which was sufficient to alert them to the need to carry out an initial verification and, depending on the outcome, an investigation into possible motives for the ill-treatment. They had failed to do so. Therefore, the Court concluded in a violation of Article 14 ECHR in its procedural limb, in conjunction with Article 3 ECHR.⁴⁵

³⁸ ECtHR, *Milanović v. Serbia*, cited above, para. 98-1017. Another case concerning religious hatred in which the ECtHR found a violation of Article 14, in conjunction with Articles 3 and 9 ECHR, was *97 Members of the Gldani Congregation of Jehova's Witnesses and 4 Others v. Georgia* (No. 71156/01), 3 May 2007, para. 138-142.

³⁹ ECtHR, *Dordevic v. Croatia*, No. 41526/10, 24 July 2012.

⁴⁰ ECtHR, *Dordevic v. Croatia*, cited above, para. 150.

⁴¹ ECtHR, *Dordevic v. Croatia*, cited above, para. 159-163.

⁴² ECtHR, *Virabyan v. Armenia*, No. 40094/05, 2 October 2012.

⁴³ ECtHR, *Virabyan v. Armenia*, cited above, para. 157-158.

⁴⁴ ECtHR, *Virabyan v. Armenia*, cited above, para. 216-217.

⁴⁵ ECtHR, *Virabyan v. Armenia*, cited above, para. 223-225.

Homophobic violence

The *Identoba* case (2015)⁴⁶ regarded acts of homophobic violence in the context of a peaceful demonstration in Tbilisi in May 2012 to mark the International Day against Homophobia. The demonstration was violently disrupted by counter-demonstrators with a hostile attitude towards the LGBT community outnumbering the marchers. The thirteen individual applicants contended that the authorities had failed to protect them from the violent attacks and to investigate effectively the incident by establishing, in particular, the discriminatory motive of the attackers.

The Court found that the violence suffered was severe enough to reach the relevant threshold under Article 3 ECHR. It further stated that, in light of existing reports about negative attitudes towards sexual minorities in some parts of the society and the warnings expressed to the police by the organisers of the march about the possibility of conflicts, “the law-enforcement authorities were under a compelling positive obligation to protect the demonstrators”, which they failed to do. And it also found that the authorities did not comply with their procedural obligation to investigate the incident, “with a particular emphasis on unmasking the bias motive and identifying those responsible for committing the homophobic violence”.⁴⁷ The court therefore concluded a violation of Article 3 taken in conjunction with Article 14 ECHR.

M.C. and A.C. (2017)⁴⁸ was a very similar case concerning homophobic violence following an annual gay pride march. The applicants complained that the authorities had failed to conduct an effective investigation into their allegations that the violence perpetrated against them had had homophobic overtones. The ECtHR found that indeed the authorities had protracted the investigation and, more importantly, had not taken reasonable steps to examine the role played by possible homophobic motives behind the attack. It concluded that accordingly there had been a violation of Article 3 in its procedural aspect in conjunction with Article 14 ECHR.⁴⁹

Gender-based discrimination

The *B.S.* case (2012)⁵⁰ involved bias motivation intersecting on the grounds of gender and skin colour. It concerned a woman of Nigerian origin who, while walking on a public highway near to the place where she worked as a prostitute, had allegedly been ill-treated and insulted on account of her skin colour and activity by patrolling police officers on two occasions. The applicant contended that she had suffered ill-treatment and had been discriminated on account of her skin colour and her gender, whereas women with a “European phenotype” carrying out the same activity in the same area had not been approached by the police. She further complained that the domestic court’s investigation had been ineffective. The Court found that the domestic court had failed to effectively investigate different several aspects of her complaint and therefore concluded that there had been a violation of Article 3 ECHR under its procedural aspect.⁵¹ It then analysed as a separate question if there had been a failure to investigate a possible causal link between the alleged racist attitudes and violent acts the victim had suffered. On this aspect it concluded that “the decisions made by the domestic courts failed to take account of the applicant’s particular vulnerability inherent in her position as an African woman working as a prostitute. The authorities thus failed to comply with their duty under Article 14 of the Convention taken in conjunction with Article 3 to take all possible steps to ascertain whether or not a discriminatory attitude might have

⁴⁶ ECtHR, *Identoba and Others v. Georgia*, No. 73235/12, 12 May 2015.

⁴⁷ ECtHR, *Identoba and Others v. Georgia*, cited above, para. 80.

⁴⁸ ECtHR, *M.C. and A.C. v. Romania*, No. 12060/12, 12 July 2016.

⁴⁹ ECtHR, *M.C. and A.C. v. Romania*, cited above, para. 123-126.

⁵⁰ ECtHR, *B.S. v. Spain*, No. 47159/08, 24 July 2012.

⁵¹ ECtHR, *B.S. v. Spain*, No. cited above, para. 47.

played a role in the events.”⁵² Though the Court did not use the word ‘intersectionality’, its approach was clearly intersectional.⁵³

Bias motives by association

In the *Škorjanec* case (2017)⁵⁴ the ECtHR clarified that the duty to effectively investigate and prosecute possible bias motivations does also apply in cases where the victim of an offence is targeted not because of his/her actual or perceived personal status or characteristics but because of the presumed association or affiliation with another person with this actual or perceived personal status. The case concerned two perpetrators of a racist attack who were prosecuted and convicted for a hate crime against the applicant’s partner, who was of Roma origin. However, although the applicant had also been beaten and suffered bodily injury, the perpetrators were not charged for a racially motivated crime against her, since the prosecuting authorities argued that, not being a Roma herself, there was no indication that they had attacked her because of racial hatred. The ECtHR stated that the obligation to seek a possible link between racist attitudes and a given act of violence does also include “acts of violence based on the victim’s actual or perceived association or affiliation with another person who actually or presumably possesses a particular status or protected characteristic. This connection may take the form of the victim’s membership or association with a particular group, (...) through, for instance, a personal relationship, friendship or marriage”.⁵⁵ The Court therefore concluded that the authorities had failed to comply with their duty to take all reasonable steps to uncover any possible racist motives behind the incident and had breached Article 3 under its procedural aspect in conjunction with Article 14 ECHR.⁵⁶

Conclusion

The paper aims to assist EU Member States’ authorities when dealing with hate crime. The reviewed case law shows that whenever there is an indication of a possible bias motivation for a criminal offence, Member States’ authorities are obliged to do whatever is reasonable in the circumstances to collect and secure the evidence, explore all practical means of discovering the truth and deliver fully reasoned, impartial and objective decisions, without omitting suspicious facts that may be indicative of a bias motivation.

The paper shows how the ECtHR developed the positive duty of State authorities to investigate bias motivations of an offence when there are indications for its existence, and how this duty was then applied to cases involving different provisions of the ECHR, different actors and different bias motivations, including when the discriminatory motive is by association. The outcome is a well-established case law of the ECtHR providing clear standards for the effective investigation of any possible hate crime, regardless of the specific bias motivation or the actors involved.

⁵² ECtHR, *B.S. v. Spain*, cited above, para. 62-63.

⁵³ Another case in which the ECtHR found a violation of Article 3 and of Article 14 in conjunction with Article 3 ECHR on the basis of gender discrimination was *Mudric v. the Republic of Moldova*, No. 74839/10, 16 July 2013. It involved domestic violence.

⁵⁴ ECtHR, *Škorjanec v. Croatia*, No. 25536/14, 28 March 2017.

⁵⁵ ECtHR, *Škorjanec v. Croatia*, cited above, para. 66.

⁵⁶ ECtHR, *Škorjanec v. Croatia*, cited above, para. 66-72.

Further information:

The following FRA publications and Opinion offer further information on the themes explored in this paper:

- *Fundamental Rights Report 2018*, <http://fra.europa.eu/en/publication/2018/fundamental-rights-report-2018>
- *Handbook on European non-discrimination law - 2018 edition*, <http://fra.europa.eu/en/publication/2018/handbook-european-law-non-discrimination>
- FRA Opinion on the Framework Decision on Racism and Xenophobia – with special attention to the rights of victims of crime, October 2013, <http://fra.europa.eu/en/opinion/2013/fra-opinion-framework-decision-racism-and-xenophobia-special-attention-rights-victims>
- *Making hate crime visible in the European Union: acknowledging victims' rights*, November 2012, <http://fra.europa.eu/en/publication/2012/making-hate-crime-visible-european-union-acknowledging-victims-rights>

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