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To showcase the best blog entries, short stories, and case notes written by students studying human rights

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BLOG ENTRIES

These blog entries were written by students on the 382CLS Human Rights module as part of their assessment. Students had to construct a blog entry on a recent development in an area of human rights covered in the module. Our thanks go to those students whose blog entries appear in this volume.

Renee Cooper

Ending the cult of virginity: does the Virginity Testing (Prohibition) Bill do enough to protect women?

In a so-called liberal society, the UK still perpetuates harmful misconceptions concerning female sexuality. The European Court of Human Rights clarified in *Yazgul Yilmaz v Turkey*¹ that virginity testing was a violation of article 3 and ‘is not necessary in a democratic society’. Yet, it has taken 15 years for the UK to step forward and tackle its virginity-testing crisis. This blog will explore the background of virginity testing and the catalyst for change. It will then discuss the possible human rights violations, and what the law should do to protect women. It concludes that it is important for the government to address this issue publicly and educate those who perpetuate this sexist practice. Essentially, the government must acknowledge that the law needs to focus on protecting women, rather than simply criminalising the act.

Following a recent BBC investigation, the UK introduced the Virginity Testing (Prohibition) Bill.² The investigation was a result of a 75 per cent increase from 2019/20 to 2020/21 of virginity testing disclosures to Karma Nirvana’s helpline, a charity that deals with Honour Based Abuse.³ The investigation confirmed twenty-one clinics practicing virginity testing and hymenoplasty. At the time of writing, the Bill is still under consideration in the House of Commons, aiming to criminalise and educate on virginity testing. However, it has been referred to as a ‘false victory’.⁴ Arguably, its main focus is to criminalise, rather than to *protect* women.

¹ *Yazgul Yilmaz v Turkey* (Application no. 36369/06), decision of the European Court, 1 February 2011.

² Virginity Testing (Prohibition) Bill 2021.

³ Karma Nirvana, ‘End Virginity Testing’ < <https://karmanirvana.org.uk/campaigns/current-campaigns/end-virginity-testing/> > accessed 16 November 2021.

⁴ Maya Oppenheim, ‘Government’s ‘virginity test’ ban is ‘false victory’ as it does not prohibit hymen surgery, campaigners warn’ (*The Independent*, 15 August 2021) < <https://www.independent.co.uk/news/uk/home-news/virginity-test-hymen-surgery-ban-b1902397.html> > accessed 16 November

First, we must identify the definition of virginity testing and hymenoplasty and explore the human rights it violates. Virginity testing involves an examination of the female genitalia to determine whether the hymen is torn, whilst hymenoplasty is a procedure that stitches the torn hymen. The hymen has very little bearing on proving whether sexual activity has taken place, which is backed by scientific and clinical evidence.⁵ Despite this knowledge, its practice indicates the need to retain family honour and ‘humble’ women to inferior, sexual beings.

Article 3 ECHR

The case of *Ireland v United Kingdom*⁶ established the difference between torture, inhuman and degrading treatment under article 3. It is an absolute right that imposes both a positive and negative obligation upon the state to ensure that their citizens are not exposed to this type of treatment. The nature of virginity procedures undoubtedly raises article 3 issues. Health Minister Edward Arges agrees that the practice causes ‘long-term physical and psychological suffering’.⁷ The procedure itself arouses feelings of fear and extreme humiliation. Failing the test exposes women to ridicule, ostracising and, in some cases, murder. In communities where virginity procedures take place, it can be referred to as ‘honour-based abuse’.

There is currently no statutory definition of honour-based abuse in the UK. This can add weight to the argument that the UK has failed to fulfil the obligations imposed upon it to create a system of justice for victims.⁸ It is referred to as a ‘hidden’ and ‘organised’ crime that ‘protects or defends the honour of the family and community’. Virginity testing fits perfectly into this definition.

Article 8 ECHR

Article 8 refers to the right to private and family life, which cannot be interfered without a valid reason.⁹ Essentially, virginity procedures violate a woman’s desire to enjoy their sexual liberation in private. This also raises issues around consent. Can women really give consent to medical professionals? One young woman stated that she ‘begged’ the doctor not to perform

⁵ Riel Karmy-Jones QC and Alex Benn, ‘Virginity Testing’, hymen surgery and misogyny: what should the law do?’, (*Counsel*, 21 September 2021) <<https://www.counselmagazine.co.uk/articles/-/virginity-testing-hymen-surgery-misogyny-what-should-the-law-do->>

⁶ *Ireland v United Kingdom* (1978) 2 EHRR 25.

⁷ Rajdeep Sandhu, ‘Virginity Testing: MPs back ban on ‘indefensible’ practice’ (*BBC*, 23 November 2021) <<https://www.bbc.co.uk/news/uk-politics-59391610>> accessed 16 December 2021

⁸ CPS, ‘So-Called Honour-Based Abuse and Forced Marriage’ (26 June 2019) <<https://www.cps.gov.uk/legal-guidance/so-called-honour-based-abuse-and-forced-marriage>> accessed 16 November 2021

⁹ Human Rights Act 1998, Article 8; the interference must be, inter alia, necessary in a democracy.

the surgery and it was important for her family to protect their ‘honour’.¹⁰ Section 74 of the Sexual Offences Act 2003 states that a person consents if they have the ‘freedom to make that choice.’ One cannot deny the fact that women are most likely coerced and pressured, therefore their right to private life is greatly restricted. In reality, they lack the freedom, removing their ability to make choices.

The Bill: what should the law do?

Is criminal law the answer?

The first issue recognised by campaigners was that the Bill does not explicitly include hymenoplasty. It is argued that banning virginity testing is inextricably linked with hymenoplasty, and that a commitment to banning virginity testing would be undermined if they were not banned together.¹¹ The Bill must be explicit and unambiguous to create change. They could draft a section as simple as follows:

1. A person is guilty of an offence if they stitch together the edges of another woman’s hymen¹²

A suggestion has been put forward to allow exceptions where it is necessary for a woman’s physical or mental health.¹³ It is important to note that mental health is highly subjective. Who will set the standard? This is likely to open the door to more control. There is a lack of clinical merit to support this view and until further research; the law should not include any exceptions.

Furthermore, its main focus is on criminalising, rather than protecting. Under article 2 ECHR, the UK has a duty to preserve the life of its citizens. If the law decides to ban the procedures, victims could be led underground to undergo treatment. To add to this, popular shopping sites like Amazon sell ‘virginity hymen fake blood’, so that women can protect themselves by showing relatives the blood on their wedding night.¹⁴ Essentially, strictly criminalising would

¹⁰ Ashish Joshi, “‘Treated worse than an animal’: Virginity Testing on women and girls at levels ‘never seen before’” (BBC, 2 July 2021) < <https://news.sky.com/story/treated-worse-than-an-animal-women-and-girls-subjected-to-virginity-testing-at-unprecedented-rates-12347173> > accessed 16 November 2021

¹¹ Hannah Summers, ‘UK MPs urged to ban ‘virginity repair’ surgery as well as virginity testing’ (*The Guardian*, 15 August 2021) < <https://www.theguardian.com/lifeandstyle/2021/aug/14/mps-urged-to-ban-virginity-repair-surgery-as-well-as-virginity-testing> > accessed 16 November 2021

¹² Ibid at 15.

¹³ Ibid.

¹⁴ Sherya Chauhan, ‘Blood For The First Night: Amazon Is Selling Product to Fake Virginity & People Can’t Digest it’ (*IT Trending*, 14 November 2019) < <https://www.indiatimes.com/trending/social-relevance/amazon-is-selling-i-virgin-blood-for-the-first-night-a-pill-to-fake-virginity-500377.html> > accessed 16 November 2021

create a loophole and reinforce a violation of articles 3 and 8. Women will still be forced to either succumb to this culture or surrender their rights to protect themselves.

In addition, the UK should focus on making education accessible. The founder of Middle Eastern Women and Society Organisation agrees that ‘banning without education will do more harm than good’ and that these practices are a result of a ‘backward mentality concerning virginity’.¹⁵ The Bill already states which institutions should receive education; however, it is restricted. It aims to target, *inter alia*, schools, yet it is arguably older generations who hold these views. However, it could be difficult to target education to certain groups without violating article 14. Article 14 states that a person should enjoy ECHR rights free from discrimination, which is reinforced through The Equality Act 2010.¹⁶ It would be more effective if education in this area were carried out nationwide, with no boundaries on age, gender, or culture.

Lastly, the mere fact that men are not subjected to similar procedures unquestionably raises the issue of gender discrimination. Although in countries like South Africa, a man’s virginity is tested through ‘hymen’ examination, men generally do not undergo virginity testing.¹⁷ Altogether, there is clear evidence of structural sexist practices towards women.

Conclusion

In a society where issues surrounding COVID-19 are paramount, it could be difficult to draw public attention to these issues. However, the government should not shy away from publicly advocating and addressing these issues. Ultimately, the UK are aware of this crisis, however points discussed in this blog could be a greater way forward in tackling this issue.

¹⁵ Rachel Stonehouse, ‘Controversial ‘virginity tests’ sold by UK clinics’ (*BBC*, 27 November 2020) < <https://www.bbc.co.uk/news/newsbeat-5507863>> accessed 16 November 2021

¹⁶ The Equality Act 2010

¹⁷ IOL News, ‘Dark knees tell all, says ‘virginity tester’, (31 January 2002) < <https://www.iol.co.za/news/south-africa/dark-knees-tell-all-says-virginity-tester-79957>> accessed 16 November 2021

The decision in *Northern Ireland Human Rights Commission for Judicial Review, Re* [2021] NIQB 91 and the fight to decriminalise abortion

Women in Northern Ireland had limited access to abortion until 2019, when the UK Government reformed the law on abortion.¹ Although it was a significant and long-awaited step towards giving women the necessary abortion rights, the Secretary of State did not provide inclusive abortion services in Northern Ireland. Thus, the Northern Ireland Human Rights Commission (NIHRC) brought a judicial review against the Secretary of State for Northern Ireland for failure to comply with his duties under the Northern Ireland (Executive Formation etc.) Act 2019.

The legal framework

Before examining the decision in the *NIHRC for Judicial Review, Re*,² it is important to provide a legal framework on the issue of abortion. Under the Offences Against the Person Act 1861 (OAPA), having an abortion was considered a criminal offence punishable by life imprisonment.³ Under the same Act, anyone who provided or assisted a woman in performing an abortion risked up to five years in prison.⁴ A second statute regulating abortion in Northern Ireland, the Criminal Justice Act (Northern Ireland) Act 1945, punishes “any wilful act (that) causes a child to die before it has an existence independent of its mother”⁵ with life imprisonment.

Following the decision in *R v Bourne*,⁶ women in Northern Ireland are permitted to have an abortion only if the pregnancy poses a serious risk to their physical or mental health with long-term or permanent effects, or if the abortion will save the mother’s life under the Infant Life (Preservation Act) 1929. However, the restrictive defences available do not prevent women from seeking an abortion in other circumstances, such as fatal foetal abnormality (FFA) or when the pregnancy resulted from rape or incest.

¹ Northern Ireland (Executive Formation etc.) Act 2019, s.9.

² [2021] NIQB 91, [2021] 10 WLUK 150 (QBD (NI)).

³ Offences Against the Person Act 1861, s 58.

⁴ Ibid, s.59.

⁵ Criminal Justice Act (Northern Ireland) 1945, s.25(1).

⁶ [1939] 1 KB 687, [1938] 3 All ER 615.

The Supreme Court's decision *Northern Ireland Human Rights Commission's Application for Judicial Review, Re* and the failure to act

The above was, in fact, the opinion of the UK Supreme Court in 2018.⁷ Therefore, the aforementioned situations in which a woman might seek an abortion were nevertheless prohibited and criminalised under the OAPA 1861 and the Criminal Justice Act (Northern Ireland) Act 1945. In this respect, it was held that they disproportionately interfered with article 8 (right to private life) of the ECHR. The judges' declaration of incompatibility was made *obiter dicta*,⁸ and thus was not binding on Northern Ireland. This was because the NIHRC failed in its application to challenge the abortion laws due to its lack of standing. It can be argued, however, that a declaration of incompatibility "would have placed significant political pressure on the government to facilitate legislative reform" in order to provide women with access to modern abortion services they are entitled to in a democratic society.⁹ However, the UK government considered that it did not breach its domestic obligations as a "change to the law on abortion is a matter for the Northern Ireland Assembly to decide upon".¹⁰

The women were thus forced to continue a pregnancy against their wishes or to travel to England to access abortion services. The restrictive and non-inclusive defences available to women seeking abortion are reflected in the low numbers of termination of pregnancy in Health and Social Care hospitals in Northern Ireland; only 22 lawful abortion took place between 2019 and 2020.¹¹ Although they were allowed to travel outside to terminate a pregnancy, this was not an option available to many women. The financial cost of travelling, and the possible complications of the procedure that could not be treated in Northern Ireland hospitals, led women to carrying their pregnancy to full term. This has multiple human rights implications because, in addition to the right to private life, the Committee on the Elimination of Discrimination against Women (CEDAW) found that the severe stress that women face when being forced to continue the pregnancy might amount to treatment contrary to article 3 of the

⁷ *Northern Ireland Human Rights Commission's Application for Judicial Review, Re* [2018] UKSC 27.

⁸ Human Rights Act 1998, s.4.

⁹ Jane M. Rooney, 'Standing and the Northern Ireland Human Rights Commission' [2019] 82(3) *Modern Law Review* 525.

¹⁰ Observations of the Government of the United Kingdom of Great Britain and Northern Ireland (CEDAW/C/OP.8/GBR/2, 23 February 2018) at [18].

¹¹ Department of Health, 'Northern Ireland Termination of Pregnancy Statistics 2019/20' (20 January 2021) <<https://www.health-ni.gov.uk/news/northern-ireland-termination-pregnancy-statistics-201920>> accessed 2 December 2021.

ECHR, i.e. inhuman and/or degrading treatment.¹² States have an obligation to protect Convention rights, as well as to take any necessary steps to guarantee and promote the health of their citizens. The abortion laws in Northern Ireland have consistently violated women's freedom of choice and autonomy and the UK government has therefore taken the responsibility of reforming the legislation in order to ensure the protection of human rights.

Following the CEDAW report and its recommendations for the repeal of ss.58 and 59 of OAPA 1861, the UK Government legalised abortion under s.9 of the Northern Ireland (Executive Formation etc.) Act 2019 and ordered the Secretary of State to provide and fund abortion services. However, no substantive measures have been taken in this regard, and in 2021, the NIHRC brought a judicial review before the Belfast High Court in the case of *NIHRC for Judicial Review, Re*. In that case, Colton J held that there was “no doubt”¹³ that the Secretary of State did not act ‘expeditiously’, as required by s.9, to “provide women with access to high quality abortion and post abortion care in all public health facilities in Northern Ireland”.¹⁴ The Secretary of State acknowledged that he failed to act and thus the court did not issue an order of mandamus to compel him to set out a timeframe. This was because the judge noted that the term ‘expeditiously’ has no statutory definition and that the provision of abortion services is, therefore, an ongoing development.¹⁵ Nevertheless, the Secretary of State claimed that he ordered the relevant institutions in NI to provide abortion services by March 2022.¹⁶

Conclusion

The Belfast High Court's decision is a necessary development in respect of the “archaic and harsh” abortion laws in NI, which have violated human rights¹⁷ and subjected women to mental and physical suffering for too long. In addition, the NIHRC's efforts to decriminalise abortion and to ensure that the state upholds women's freedom of choice and reproductive rights, ultimately has a positive outcome for the women in Northern Ireland – access to high-quality abortion services in hospitals in Northern Ireland.

¹² CEDAW, 'Report of the inquiry concerning the United Kingdom of Great Britain and Northern Ireland under article 8 of the Optional Protocol to the Convention on the Elimination of All Forms of Discrimination against Women' (CEDAW/C/OP8/GBR/1, 23 February 2018) at [65].

¹³ Ibid 28, at [113].

¹⁴ Ibid 28, at [115].

¹⁵ Ibid 28, at [110].

¹⁶ Ibid 41.

¹⁷ Sally Sheldon and others, “Too Much, too Indigestible, too Fast? The Decades of Struggle for Abortion Law Reform in Northern Ireland” [2020] 83(4) Modern Law Review 761.

Free Julian Assange: is the UK court ruling on extradition striking at press freedom?

On 10 December 2021, the High Court ruled that the WikiLeaks founder Julian Assange can be extradited from the UK to the US to face criminal espionage charges, overturning a previous judgment and sparking controversy among press freedom advocates.¹ Article 10 of the European Convention on Human Rights (ECHR) protects freedom of expression, including the right to receive information and communicate ideas without public authorities' interference.² The High Court decision is potentially in breach of Article 10 and raises issues as to whether and when free speech and press freedom can be restricted, and whether the UK is upholding respect for democracy.

Background: US versus Assange

The US government accuses Assange of hacking US military databases, disclosing national security materials and sensitive secret information, and publishing hundreds of thousands of leaked documents about the Afghanistan and Iraq wars on the WikiLeaks website between 2009 and 2011.³ The US brought a claim to the High Court against the district judge's decision that Assange should not be sent to the US.⁴ Lords Burnett and Holroyde explained that the district judge based her decision on the risk of Assange being held in highly restrictive US prison conditions. The US authorities argued that Assange would not face strict measures, although his actions allegedly endangered lives.⁵ The judges stated that "that risk is in our judgment excluded by the assurances which are offered."⁶ Assange's lawyers affirmed that "it

¹ [2021] EWHC 3313 Admin). Becky Morton, 'Julian Assange can be extradited to the US, court rules' (*BBC News*, 10 December 2021) <<https://www.bbc.com/news/uk-59608641>> accessed 15 December 2021.

² Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR) art 10.

³ David Leigh, 'US embassy cables leak sparks global diplomatic crisis' (*The Guardian*, 28 November 2010) <<https://www.theguardian.com/world/2010/nov/28/us-embassy-cable-leak-diplomacy-crisis>> accessed 15 December 2021.

⁴ Sky News, 'Julian Assange: US begins High Court bid to overturn ban on extraditing WikiLeaks founder' (*Sky News*, 27 October 2021) <<https://news.sky.com/story/julian-assange-cannot-be-extradited-to-the-us-uk-judge-rules-12178901>> accessed 15 December 2021.

⁵ Sam Shead, 'U.S. wins appeal to extradite Wikileaks founder Julian Assange from the UK' (*CNBC News*, 10 December 2021) <<https://www.cnn.com/2021/12/10/us-wins-appeal-over-extradition-of-wikileaks-founder-assange.html>> accessed 15 December 2021.

⁶ Ben Quinn, 'Julian Assange can be extradited to US to face espionage charges, court rules' (*The Guardian*, 10 December 2021) <<https://www.theguardian.com/media/2021/dec/10/julian-assange-can-be-extradited-to-us-to-face-espionage-charges-court-rules>> accessed 15 December 2021.

is highly disturbing that a UK court has overturned a decision not to extradite Julian Assange, accepting vague assurances by the US government.”⁷ They promised to “seek review of this decision by the UK Supreme Court.”⁸

The High Court decision

The High Court allowed the US appeal, quashing the district judge’s decision. The judges decided that the Court should respect the assurances offered by the US, which undermined the district judge’s decision that Assange’s extradition would be “oppressive.”⁹ The US authorities assured that Assange would not be subject to special measures before or after trial unless he committed further condemnable acts.¹⁰ Following the European Convention, the US guaranteed that, if convicted, Assange could be transferred to an Australian prison, and that he would receive psychological support if extradited and held in custody.¹¹

The US affirmed that it “values its extradition relationship with the UK and would take any concern raised very seriously.”¹² Assange’s lawyer argued that “the US is trying to change its case” at a very late stage,¹³ without meeting the criteria in *Municipal Court of Szombathely v Fenyvesi*.¹⁴ Assange’s lawyer argued that the court should not admit new evidence which should have been brought to the lower court and which intends to “repair holes”¹⁵ that the US should raise any issue at the extradition hearing.¹⁶ He further argued that Assange is very likely to be subject to strict measures while detained in the US due to the CIA’s influence in decision-making and the US’s serious approach to the alleged conduct against Assange.¹⁷ Assange’s lawyer stated that the court should “doubt the trustworthiness of the assurances.”¹⁸

⁷ Chantal Da Silva, ‘WikiLeaks founder Julian Assange could be extradited to the U.S. after U.K. ruling’ (NBC News, 10 December 2021) <<https://www.nbcnews.com/news/world/uk-court-reverses-decision-not-extradite-wikileaks-founder-julian-assa-rcna8331>> accessed 15 December 2021.

⁸ Ibid.

⁹ *The Government of the United States of America v Julian Paul Assange* [2021] EWHC 3313 [29].

¹⁰ *The Government of the United States of America v Julian Paul Assange* [2021] EWHC 3313 [30].

¹¹ Ibid.

¹² Ibid, [31].

¹³ Ibid, [34].

¹⁴ [2009] EWHC 231.

¹⁵ *The Government of the United States of America v Julian Paul Assange* [2021] EWHC 3313 [35].

¹⁶ *Satkunas v Lithuania* [2015] EWHC 3962.

¹⁷ *The Government of the United States of America v Julian Paul Assange* [2021] EWHC 3313 [35].

¹⁸ Ibid, [37].

Nevertheless, the judges affirmed that they “see no merit in the criticisms made of the individual assurances,”¹⁹ referring to *Babar Ahmad v USA*,²⁰ where the court said that the US “is a state with which the UK has entered into substantial treaties on extradition, and there is no instance of any assurance given by the US having been dishonoured.”²¹ Indeed, the UK and the US have a “continued and uninterrupted history of extradition relations.”²² They signed the Extradition Treaty, which provides for more effective cooperation between the States on extraditable offences.²³

A decision undermining press freedom in the UK?

The High Court ruling on Assange’s case is a contentious decision that might bring several challenges to freedom of expression, and other rights, and cause a substantial shift in the way States embrace their duties under international law. The European Court of Human Rights (ECtHR) emphasised the necessity of democratic societies to have a free press and incentivise free speech.²⁴ The ECtHR considers freedom of expression a pillar of democracy, serving progress and development.²⁵ Pluralism also demands application of Article 10 in circumstances that may shock the State.²⁶ Freedom of expression is a conditional right that can be interfered with in certain circumstances,²⁷ provided that infringement is prescribed by law,²⁸ and necessary in a democratic society for the protection of a legitimate aim.²⁹ The ECtHR has attributed great significance to public interest speech,³⁰ and to press freedom.³¹

Assange’s partner, Stella Moris, claimed that the decision to extradite Assange to the US goes against “fundamentals of press freedom and democracy.”³² The WikiLeaks editor-in-chief, Kristinn Hrafnsson, said that it is not only Assange’s life that is at risk, but also “the right of

¹⁹ Ibid, [51].

²⁰ [2006] EWHC 2927.

²¹ Ibid, [75].

²² *The Government of the United States of America v Julian Paul Assange* [2021] EWHC 3313, [52].

²³ Extradition Treaty (2003) Cm. 5821

²⁴ https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/243246/7146.pdf

²⁵ *Lingens v Austria* [1986] 8 EHRR 407.

²⁶ Steve Foster, *Human Rights and Civil Liberties* (Longman, 3rd ed, 2011), 31.

²⁷ *Handyside v United Kingdom* [1976] 1 EHRR 737.

²⁸ Steve Foster, *Human Rights and Civil Liberties* (Longman, 3rd ed, 2011), 32.

²⁹ *Malone v United Kingdom* [1984] 7 EHRR 14; *Silver v United Kingdom* [1983] 5 EHRR 347.

³⁰ Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as amended) (ECHR) art 10.

³¹ *Sunday Times v United Kingdom* [1979] 2 EHRR 245.

³² *Jersild v Denmark* [1994] 19 EHRR 1.

³³ Amar Mehta, ‘Julian Assange: High Court reverses decision not to extradite WikiLeaks founder to the US’ (*Sky News*, 10 December 2021) <<https://news.sky.com/story/julian-assange-high-court-reverses-decision-not-to-extradite-wikileaks-founder-to-the-us-12491646>> accessed 15 December 2021.

journalists to publish material that governments, corporations find inconvenient.”³³ He stressed that “this is about the right of a free press to publish without being threatened by a bullying superpower.”³⁴

Amnesty International Australia described the ruling as a “travesty of justice” based on “politically motivated” charges, and on “inherently unreliable” assurances.³⁵ Rebecca Vincent, from *Reporters Without Borders*, affirmed that the decision was a “bleak moment” for journalists worldwide.³⁶ The journalist Matthias von Hein wrote that the day the High Court decided on Assange’s extradition is “a bad day for journalists worldwide, a bad day for press freedom, a bad day for transparency and the oversight of governments.”³⁷ The journalist explained that “it is a stain on the world's democracies.”³⁸

The *Guardian*’s view is that the attempt to extradite Assange “is an assault on the press freedom that the Biden administration promises to promote,”³⁹ referring to the US president’s speech at the Summit for Democracy.⁴⁰ Biden stated that the threatened press freedom is “the bedrock for democracy, how the public stay informed and how governments are held accountable.”⁴¹ Australian MPs have asked for the Australian PM intervention, supporting the Australian citizen.⁴² Bandt affirmed that “the PM must get Assange home” and that the ruling is a “critical moment in the fight against suppression of press freedom.”⁴³ Wilkie stated that “journalism is

³³ Sam Shead, ‘U.S. wins appeal to extradite Wikileaks founder Julian Assange from the UK’ (*CNBC News*, 10 December 2021) <<https://www.cnn.com/2021/12/10/us-wins-appeal-over-extradition-of-wikileaks-founder-assange.html>> accessed 15 December 2021.

³⁴ *Ibid.*

³⁵ Ben Quinn, ‘Julian Assange can be extradited to US to face espionage charges, court rules’ (*The Guardian*, 10 December 2021) <<https://www.theguardian.com/media/2021/dec/10/julian-assange-can-be-extradited-to-us-to-face-espionage-charges-court-rules>> accessed 15 December 2021.

³⁶ *Ibid.*

³⁷ Matthias von Hein, ‘A blow for Julian Assange and for press freedom’ (*DW*, 10 December 2021) <<https://www.dw.com/en/opinion-a-blow-for-julian-assange-and-for-press-freedom/a-60084575>> accessed 15 December 2021.

³⁸ *Ibid.*

³⁹ *The Guardian*, ‘The Guardian view on the US pursuit of Julian Assange: set him free’ (*The Guardian*, 10 December 2021) <<https://www.theguardian.com/commentisfree/2021/dec/10/the-guardian-view-on-the-us-pursuit-of-julian-assange-set-him-free>> accessed 15 December 2021.

⁴⁰ Julian Borger, Sam Levine, Shah Meer Baloch, ‘An urgent matter: Biden warns democracy is under threat at summit’ (*The Guardian*, 9 December 2021) <<https://www.theguardian.com/us-news/2021/dec/09/joe-biden-summit-for-democracy>> accessed 15 December 2021.

⁴¹ *The Guardian*, ‘The Guardian view on the US pursuit of Julian Assange: set him free’ (*The Guardian*, 10 December 2021) <<https://www.theguardian.com/commentisfree/2021/dec/10/the-guardian-view-on-the-us-pursuit-of-julian-assange-set-him-free>> accessed 15 December 2021.

⁴² Lane Sainty, ‘Scott Morrison urged to end ‘lunacy’ and push UK and US for Julian Assange’s release’ (*The Guardian*, 11 December 2021) <<https://www.theguardian.com/australia-news/2021/dec/11/scott-morrison-urged-to-end-lunacy-and-push-us-and-uk-to-release-julian-assange>> accessed 15 December 2021.

⁴³ *Ibid.*

not a crime.”⁴⁴ Melzer, a UN rapporteur, emphasised that “this is a shortcoming for the British judiciary” that reached a “politically motivated verdict.”⁴⁵

The International Federation of Journalists expressed that it “strongly opposes this decision and will support any effort Assange's legal team may take to appeal the ruling.”⁴⁶ It called for the US president “to end the years of politically motivated prosecution of Julian Assange by dropping the charges against him.”⁴⁷ In addition, IFJ reiterated that “the criminalization of whistle blowers and investigative journalists like Assange has no place in a democracy.”⁴⁸

⁴⁴ Ibid.

⁴⁵ Ibid.

⁴⁶ Russian News Agency, ‘International Federation of Journalists slams court’s decision on Assange’s extradition’ (*Tass Russian News Agency*, 10 December 2021) <<https://tass.com/world/1373879>> accessed 15 December 2021.

⁴⁷ Ibid.

⁴⁸ Ibid. In a further development, the High Court has ruled that Assange may have the right to bring the case before the Supreme Court/ Whilst the High Court refused him permission for a direct appeal to the Supreme Court, it said his case raised an issue of legal importance that he could ask the UK top court to rule on.

Investigating threats of violence, the duty to protect and human rights claims

Introduction

What is the legal position when the police or other authorities fail to prevent an attack, possibly fatal, by one private individual against another? The attack itself will obviously give rise to criminal action taken by the state, and possible civil actions taken by the victim. Nevertheless, can the state be held legally responsible for that attack, or failure to prevent it? Domestic law was, and still is, reluctant to place liability on the police or other authorities for failure to prevent attacks or abuse,¹ but human rights law can be used to protect the victim's rights under Article 2 (right to life) and Article 3 (freedom from torture etc.).

This blog will explain the legal framework for these claims and examine the problems of success. In particular, it will examine the recent European Court decision in *Tkheldidze v Georgia*,² a case concerning the Georgian State's failure to take reasonable protective measures to combat domestic violence due to gender-based discrimination.

Facts and decision in *Tkheldidze*

The case concerns MT who was continuously threatened and physically abused by her partner, LM.³ During April and September 2014, LM's parents made a formal report to the police of their son's violent behaviour and threats towards MT. MT requested that LM be given a restraining order, but the police did not take any restrictive measures and deemed the situation a 'minor' 'family altercation'. Despite MT moving to her mother's house, ML continued his abusive behaviour towards the applicant's daughter, which involved him sending threatening messages, stalking her, threatening to detonate a hand grenade at her workplace and nearly crashing into her car. The applicant and MT continued to inform the police and visited the police station to report the events and LM's threatening behaviour. However, on none of the

¹ It is not in general possible to bring a claim in tort in such cases: *Hill v Chief Constable of Yorkshire* [1990] 1 WLR 946, but a claim can be made using Article 2 of the Convention: *Michael v Chief Constable of South Wales* [2015] UKSC 2.

² Application No. 33056/17 [2021] ECHR.

³ The applicant was Ms Taliko Tkheldidze and MT was her daughter

occasions did the police implement an investigation or impose a restrictive measure. Subsequently, on 17 October 2014, MT was shot dead by LM, who then committed suicide.

On behalf of her daughter, the applicant submitted to the ECHR that the police had full knowledge of the dangerous situation, but failed to take preventative measures and to open an investigation. The applicant argued this was due to discrimination and that there was thus a breach of Articles 2 (right to life) and 14 (freedom from discrimination in the enjoyment of Convention rights).

The European Court acknowledged that the police had sufficient information of the real and immediate threat to her safety, and that the applicant had on numerous occasions asked for help from the police. Further, the Court found that under Article 2 the authorities demonstrated a failure to take appropriate steps to safeguard MT.⁴ The Court cited the case of *Talpis v. Italy*,⁵ which highlighted that the authorities were under a positive obligation to assess risks to life and to take preventive operational measures. The Court also found that the authorities breached Article 2 by their inadequate and incomplete evidence gathering, and by reporting the incident as a ‘minor family altercation’. Moreover, the Court observed that Georgia had high reports of victims of domestic violence due to discriminatory gender stereotypes and patriarchal attitudes, together with a lack of protection of vulnerable women. The Court concluded that the authorities’ inaction ‘could be considered a systematic failure, whereby gender-based discrimination had culminated in MT’s death. Thus, the state was in breach of its obligations under Article 2 in conjunction with Article 14.

Analysis

It is evident from the ruling that the Court applied the principle underlying Article 2 very strictly and showed little of its deference towards the state. The Court stressed that it will not tolerate the authorities’ ignorance and incompetence in preserving the fundamental right to life, specifically when dealing with cases of domestic abuse, where considerable importance is placed on the necessity of protecting individuals from violence.⁶

States continuously deal with domestic violence issues very passively with no appropriate measures provided and no regard for the impact on the victims. This is evident from the three

⁴ *LCB v United Kingdom*, Application No. 23413/93 (1998) EHRR.

⁵ *Talpis v Italy*, Application No. 41237/14 [2017] ECHR

⁶ See *Kurt v Austria*, decision of the Grand Chamber, Application No. 62903/05.

Moldovan domestic violence cases,⁷ where the Court expressed concern that the authorities did not fully appreciate the seriousness and extent of the problem of domestic violence and its discriminatory effect on women in Moldova. The Court criticised the authorities for claiming that the applicant's 'bodily injuries inflicted were not serious enough to take action. Furthermore, 'systematic gender discrimination'⁸ was emphasised in cases such as, *Talpis v Italy*⁹ and *Opuz v Turkey*,¹⁰ where the authorities treated the issues 'as a family matter' and 'convinced women to drop their complaints'.¹¹ This is a clear indication of the severe deficiency in some states' domestic law and its implementation of Articles 2 and 14. Moreover, it indicates the authorities' lack understanding and acknowledgment of gender discrimination, suggesting its inability to condemn the practice and its systematic failure in dealing with it. Further, this approach contributes to the discriminatory attitudes towards violence against women, to the extent that in some cases it becomes normalised.

The Domestic Abuse Act 2021 provides some means to protect women from discrimination and prevent domestic abuse. Authorities understand their duty to respond effectively to VAWG,¹² and the importance of tackling this issue. The UK recognises the grave effect domestic violence has on women and the importance for authorities to provide immediate protection, and the government has provided the authorities with further powers to implement protective provisions which involve 'the DVPO and DVPN'¹³ under the Crime and Security Act 2010. These provisions give authorities the power to apply restrictive conditions on a notice to prevent the perpetrator from molesting the person protected by the notice.¹⁴ Moreover, when in breach of these requirements, authorities can arrest without a warrant. Further, the police can detain the perpetrator in custody when they are in breach of an order. The UK also introduced Clare's law,¹⁵ whereby police can disclose information about previous violent offending.¹⁶ This demonstrates the government's determination to uphold the rights of women against violence, and the right not to be discriminated against.

⁷ *T.M and C.M v the Republic of Moldova*, Application No. 26608/11 [2014] ECHR, and *Mudric v The Republic of Moldova* Application No. 74839/10 [2013] ECHR

⁸ *Rumor v Italy*, Application No. 72964/10 [2014] ECHR

⁹ *Talpis v Italy*, Application No. 41237/14 [2017] ECHR

¹⁰ *Opuz v Turkey*, Application No. 33401/02 [2009] ECHR

¹¹ *Ibid*

¹² Violence against Women and Girls.

¹³ Domestic Violence Protective Order and Domestic Violence Protective Notice

¹⁴ Richard Griffith, 'Government implementation of domestic violence protection measures nationwide' (2014)

19 *British Journal of Community Nursing* 302.

¹⁵ The Domestic Violence Disclosure Scheme 2014

¹⁶ *Ibid*

On the other hand, this successful application is a rare success in this field, most cases failing to satisfy the strict test of liability – that there was a real and immediate risk to life, and the authorities failed to do all that was reasonable in the circumstances to avert the risk.¹⁷ This test was applied in the recent Grand Chamber judgment in *Kurt v Austria*,¹⁸ where a majority held that the strict *Osman* test applied in determining liability under Article 2 was not satisfied, despite the domestic violence context of the claim. Equally, in the UK the courts have shown caution in finding authorities liable under Article 2.¹⁹ Unfortunately, the decision in *Tkheldze v Georgia* should not be seen as a departure from this approach, both under the Convention or domestic law, as the decision was clearly influenced by the systemic failings of the Georgian authorities, together with their acceptance of discriminatory practices.

Conclusion

The case indicates the deficiencies in Georgia's criminal procedural law in failing to provide an effective system to protect and investigate domestic abuse. The decision also demonstrates that the Court will scrutinise the effectiveness of investigations and procedures in this area, particularly where it finds that the authorities have disregarded their powers, and where their conduct goes beyond an error of judgement. In general, however, it is still difficult to establish state liability under human rights law.

¹⁷ See *Osman v United Kingdom* (2000) 29 EHRR 245, and *Van Colle v United Kingdom*, Application No 7678/09

¹⁸ Decision of the Grand Chamber, Application No. 62903/05

¹⁹ *Van Colle v Chief Constable of Herefordshire* [2008] 3 WLR 593.

Extradition and Life Imprisonment: a violation of Article 3?

Introduction

It is firmly established in the jurisprudence of the European Court of Human Rights (ECtHR) that states are not only prohibited from subjecting individuals to treatment contrary to Article 3,¹ but are also barred from sending (extraditing or deporting) the individual to another state where they may be subject to such treatment.² This blog is inspired from the recent opportunity given to the Grand Chamber to decide whether extraditing individuals to states such as the U.S.A where they may be sentenced to life imprisonment (without parole) constitutes infringement of article 3 of the European Convention.³ The blog will discuss the previous jurisprudence of the ECtHR on life imprisonment, and extradition and whether the U.K domestic courts have followed the guidelines set down by the European Court of Human Rights. The main question, however, seems to be whether the Grand Chamber will avail itself of this opportunity to clarify its position on this hugely controversial area.

The position of the European Court on life imprisonment and extradition

The ECtHR is relatively clear in its position that irreducible life imprisonment is in breach of Article 3.⁴ The Strasbourg Court is of the view that any sentence of life imprisonment must include a review mechanism that explains to life prisoners what they have to do to become eligible for early release.⁵ However, despite this clear stance, when the ECtHR was confronted with extradition (involving life imprisonment) cases, the jurisprudence had not been straightforward.⁶ In fact, prior to *Vinter*, the Court was reluctant to find an infringement of article 3 in cases of irreducible life imprisonment.⁷ After *Vinter*, in the case of *Trabelsi v. Belgium*,⁸ the Court made it clear that extraditing individuals to states that impose life imprisonment without parole is contrary to article 3. Furthermore, the ECtHR clearly stated

¹ Article 3 of the ECHR provides that 'no one shall be subjected to torture or to inhuman or degrading treatment or punishment.'

² *Soering v United Kingdom* (1989) 11 EHRR 439.

³ *Sanchez-Sanchez v. United Kingdom* (application no. 22854/20), the Chamber has relinquished jurisdiction in favour of the Grand Chamber of the ECtHR on 19 October 2021.

⁴ *Vinter v United Kingdom* (2016) 63 E.H.R.R. 1.

⁵ *László Magyar v. Hungary* (App. no. 73593/10).

⁶ Lewis Graham, 'Extradition, life sentences and the European Convention' 2020 *Judicial Review* 25(3), 228, 234.

⁷ Lewis Graham, 'From *Vinter* to *Hutchinson* and Back Again? The Story of Life Imprisonment Cases in the European Court of Human Rights' (2018) 3 EHRLR 258, at 260–262.

⁸ (2015) 60 EHRR 21.

that as U.S law provided no adequate mechanism for reviewing the type of sentence concerned in the instant case, it was contrary to article 3 and therefore extradition was not allowed.

The UK courts' approach to extradition and life imprisonment

The recent cases of *Hafeez*⁹ and *Sanchez*¹⁰ made it clear that the High Court was not interested in following the reasoning in *Trabelsi*. In the former case, the High Court dismissed *Trabelsi* by stating that it was decided without 'any proper reasoning'.¹¹ According to the Court, it was wrongly decided,¹² stating that regardless of *Trabelsi*, life imprisonment without a parole regime in the U.S was compliant with the Convention as it offered 'a prospect of release'.¹³ Subsequently, in *Sanchez*, the High Court again dismissed the claim by stating that *Trabelsi* was not binding upon it,¹⁴ as it was an 'unexplained departure' from existing jurisprudence.¹⁵

The High Court's approach seems to find its basis in the decision of the House of Lords in *Wellington*,¹⁶ where a relativist approach was introduced. Here, the House of Lords stated that in order for the extradition arrangements to function, article 3 should be taken into account in an attenuated form, taking into account the desirability of arrangements for extradition.¹⁷ The approach has been described as 'problematic'.¹⁸

A divergence from Strasbourg jurisprudence: is it justified?

As seen above, the UK courts have more or less decided not to follow the case of *Trabelsi* by terming it as a 'departure'. However, *Trabelsi* is not a departure from the 'existing jurisprudence'. *Trabelsi* has been cited by the ECtHR in subsequent decisions, thereby confirming its authority. For instance, in the case of *Murray v the Netherlands*,¹⁹ *Trabelsi* was approved. Later in the case of *GS v Bulgaria*,²⁰ the principles stated in *Trabelsi* were determined as guiding factors in extradition cases. Further, the cases of *Findikoglu*²¹ and *López*

⁹ *Hafeez v US* [2020] EWHC 155 (Admin).

¹⁰ *Sanchez v US* [2020] EWHC 508 (Admin).

¹¹ *Hafeez*, at para 57.

¹² *Ibid.* at para 56.

¹³ *Ibid.* at para 58.

¹⁴ *Sanchez*, at para 61.

¹⁵ *Ibid.*

¹⁶ *R. (on the application of Wellington) v Secretary of State for the Home Department* [2008] UKHL 72 [2009] 1 A.C. 335.

¹⁷ *Ibid.* at para 28.

¹⁸ Marko Milanović, 'Extradition and life imprisonment' 2009 Cambridge Law Journal 68(2), 248, 251.

¹⁹ (2017) 64 EHRR 3.

²⁰ Application No. 36538/17

²¹ *Findikoglu v Italy* (Application No. 20672/15)

*Elorza*²² had similar facts to *Hafeez* and *Sanchez*, and confirmed the *Trabelsi* principles, but were not cited by the High Court.

The question arises that whether the insistence of the UK courts to set its own precedent in extradition cases in the context of article 3 is justified. Although, a degree of deviation is expected from the ECtHR on the pretext of margin of appreciation, a straightforward departure from clear decisions of the ECtHR cannot be termed as reasonable.²³

Conclusion

The European Court of Human Rights is quite clear on its position on whole life imprisonment and extradition. However, the U.K courts persist in following their own precedent and have largely dismissed the decisions of the ECtHR. This has created a gap in the approach of both courts. Now with the case of *Sanchez*, which is now pending hearing at the ECtHR, the European Court must embrace this opportunity to further clarify its position on the matter. Only then can it be expected that the UK courts will follow in the footsteps of the ECtHR.²⁴

²² *López Elorza v Spain* (Application No. 30614/15)

²³ *Ibid* (n 6) at 234.

²⁴ Unless, of course, plans go ahead to repeal or amend s.2 of the Human Rights Act 1998, to allow courts to depart from decisions of the Court.

Emerging Rights, the battle for transgender rights in 21st century Britain.

Introduction

Transgender individuals make up roughly an estimated 200,000-500,000 of individuals within the UK;¹ to put that into context, the UK population is estimated at 67.22 million.² Despite making up less than one per cent of the population, there have been multiple incidents in recent months thrusting transgender rights into the public consciousness. One such incident was the *Bell* case,³ which has been ongoing for several months.⁴ We have also seen the Bristol University litigation regarding their Feminist Society who are challenging the Student Union over their policy regarding Gender Identity and Sex, maintaining that women only spaces are protected by the Equality Act 2010, while gender identity is not.⁵ Another incident has been the harassment and eventual resignation by a Sussex University Academic who was subjected to a campaign of abuse due to her gender critical views.⁶ Evidently, the issue of transgender rights is a heated one, with individuals vocal on both sides of the debate.

The decision in *Bell*

The issues presented in all these examples were at their height in the *Bell* case. The Tavistock clinic works primarily with children and young adults, and there are many parents and other individuals who have strong feelings about the extent of medical autonomy children should be allowed to express. This is especially the case when it concerns something as significant as their gender and lifelong fertility.

¹ Stonewall, 'The Truth about Trans' (Stonewall, 2017) <<https://www.stonewall.org.uk/truth-about-trans#trans-people-britain>> accessed 28 November 2021.

² ONS, 'United Kingdom population mid-year estimate' (Office For National Statistics, 25 June 2021) <<https://www.ons.gov.uk/peoplepopulationandcommunity/populationandmigration/populationestimates/timeseries/ukpop/pop>> accessed 9 December 2021

³ *Bell v Tavistock and Portman NHS Trust and others* [2021] EWCA Civ 1363.

⁴ Eleanor Lawrie, 'Ruling limiting under-16s puberty blockers overturned' (BBC News, 17 September 2021) <<https://www.bbc.co.uk/news/uk-58598186>> accessed 9 December 2021.

⁵ Women talk back, 'Women Talk Back! Statement on the Bristol SU' (Women Talk Back, 12 March 2021) <<https://www.womentalkback.org/post/women-talk-back-statement-on-the-bristol-su>> accessed 9 December 2021

⁶ Richard Adams, 'Sussex professor resigns after transgender rights row' (The Guardian, 28 October 2021) <<https://www.theguardian.com/world/2021/oct/28/sussex-professor-kathleen-stock-resigns-after-transgender-rights-row>> accessed 9 December 2021

The Tavistock clinic houses GIDS - the Gender Identity Development Service - which acts as a pre-screening assessment facility for potential patients, do not prescribe any medication or treatments, but assess possible patients and determine who may best benefit most from the treatments available. The treatment is then provided by either of the two NHS trusts involved with the clinic.⁷ Bell challenged the clinic, arguing that it was not possible for minors to provide informed consent to the treatment being provided.⁸ Initially the High Court agreed with Bell, providing an extensive declaration outlining what precisely an individual must be able to consent to in very specific terms.⁹ This caused significant confusion; so much so that that Tavistock shut down all future applications until the legal position was clarified.¹⁰ Thus, the High Court had effectively required their intervention in every case based on the guidance they provided. In the Court of Appeal, it was held that the divisional court had imposed an improper restriction on the *Gillick* test of competence, below, and that it had been inappropriate for the court to provide the guidance. Tavistock were, therefore, successful in having the declaration overruled and could continue as before.

Analysing *Bell*

Bell has now expressed a desire to take the case to the Supreme Court so it seems unlikely that the issue will remain settled for long.¹¹ Currently, referrals to GIDS continue and children will be assessed as they were before the High Court's declaration, but the confusion and emotions raised by this case highlight just how sensitive and controversial an issue it is to many.

The major confusion in the High Court's decision is that under English law it has been a long-established principle that a child under the age of 16 can consent to medical treatment so long as they can display sufficient understanding of the procedure in question. This was decided in *Gillick*,¹² where it was made clear that so long as the child concerned was 'Gillick-competent',¹³ then medical professionals could progress with their consent to the treatment. It was also made clear that their consent needed to show understanding and sufficient intelligence to properly appreciate the procedure they were consenting to.

⁷ *R v Tavistock and Portman NHS Trust and others* [2021] EWCA Civ 1363, [2020] CO.

⁸ *Ibid*, at 8.

⁹ Eleanor Lawrie, 'Ruling limiting under-16s puberty blockers overturned' (BBC News, 17 September 2021) <<https://www.bbc.co.uk/news/uk-58598186>> accessed 9 December 2021.

¹⁰ *R v Tavistock and Portman NHS Trust and others* [2021] EWCA Civ 1363, [2020] CO.

¹¹ Eleanor Lawrie, 'Ruling limiting under-16s puberty blockers overturned' (BBC News, 17 September 2021) <<https://www.bbc.co.uk/news/uk-58598186>> accessed 9 December 2021.

¹² *Gillick v West Norfolk and Wisbech Area Health Authority* [1986] 1 AC 112.

¹³ *Ibid*.

The significance of *Bell* is that transgender rights are an emerging body of legal rights and there are interested parties; both in favour of transgender rights and those opposing them. This is combined with the fact that this case explicitly deals with young children aiming to find themselves, and this can result in an exceptionally fierce debate. Bell herself began transitioning but realised that she did not want to transition after all; unfortunately, this was after she had begun transitional surgery deciding she wished to remain female.¹⁴ While Bell is unlikely to be alone in regretting her transition, there is little statistical evidence to assess whether the current provisions are effective at supporting individuals with dissociative identities to their physical selves. The Cass Review is the only major review considering how the NHS handles treatment for young individuals with gender dysphoria and other similar conditions, but that is still a long way from being completed.¹⁵ It is worth noting that criticism of GIDS was not isolated to the *Bell* case; there was also a whistle blower who highlighted that a private GP was prescribing puberty blockers - the medication which patients would usually receive after an assessment by GIDS - to patients who were still on the waiting list for assessment.¹⁶ This is a major concern, particularly as the whistle blower was a psychoanalyst whose role was critical to ensuring the safety of patients at the clinic.¹⁷

The issues surrounding transgender rights are not just limited to children, as there are also extensive issues in the workplace, in wider society and indeed in academic and professional settings. There have been difficulties in workplaces in managing the rights of transgender staff, while also managing the views of gender critical colleagues. This is particularly surprising given that an Employment Appeal Tribunal held that gender critical views were in fact a protected characteristic under the Equality Act 2010,¹⁸ while gender identity is not listed as a protected characteristic. Elsewhere, barristers have been involved in disputes concerning certain speakers at events held at the Middle Temple,¹⁹ with gender critical views being deemed

¹⁴ Eleanor Lawrie, 'Ruling limiting under-16s puberty blockers overturned' (BBC News, 17 September 2021) <<https://www.bbc.co.uk/news/uk-58598186>> accessed 9 December 2021.

¹⁵ H Cass, 'Cass Review' (Cass Review, September 2020) <<https://cass.independent-review.uk/>> accessed 9 December 2021.

¹⁶ D Connett, 'NHS gender identity clinic whistle blower wins damages' (The Guardian, 4 September 2021) <<https://www.theguardian.com/society/2021/sep/04/gender-identity-clinic-whistleblower-wins-damages>> accessed 9 December 2021.

¹⁷ D Connett, 'NHS gender identity clinic whistle blower wins damages' (The Guardian, 4 September 2021) <<https://www.theguardian.com/society/2021/sep/04/gender-identity-clinic-whistleblower-wins-damages>> accessed 9 December 2021.

¹⁸ *Maya Forstater v CGD Europe and Others* [2021] 0105 JOJ 20 (UKEAT).

¹⁹ C Bakshi, 'Barristers rebel against 'anti-trans' speaker at LGBTQ event' (The Times, 16 November 2021) <<https://www.thetimes.co.uk/article/barristers-rebel-against-anti-trans-speaker-at-lgbtq-event-nd8t8tfff>> accessed 9 December 2021.

inappropriate for an event that was concerned with conversion therapy. Before the European Court of Human Rights, the UK has faced challenges regarding its treatment of transgender individuals.²⁰ However, how these issues are to be addressed in the coming years is unclear without any direction from Parliament themselves.

Conclusions

Transgender rights are here to stay, regardless of the heated opinions in either side of the debate. The difficulty in the coming years is going to be for policy makers to achieve a sensible balance that appeals to the vast majority of society. Transgender individuals are still human after all, and they deserve the same basic respect and fundamental freedoms as anybody else in society. The difficulty is how policy acts in such a way as to provide an agreeable balance for a society that has built itself on a biological sex-based theology. Our society has been built along the male/female divide, and it will certainly take time for legislative provisions to achieve some degree of balance that is favourable to all. The present provisions provide very little, allowing individual institutions and businesses to select their own rules, which only adds uncertainty and discomfort for both transgender and cisgender individuals. Parliament needs to intervene and iron out the emergent wrinkles in these attempts to legislate internally for a matter that really does justify national attention. Without clear legislation specifying what precise legal position transgender individuals assume, it is likely that little progress will be made. In the meantime, pressure groups continue to frustrate one another in drawn out debates.

²⁰ *Christine Goodwin v The United Kingdom* App no 28957/95 (ECtHR, 11 July 2002).

SHORT STORIES

These stories were written by students on the 382CLS Human Rights' module as part of their assessment. Students had to construct a short story inspired by a case involving human rights decided in 2020. Our thanks go to those students whose stories appear in this volume.

Eliza McKindley

Stockholm Syndrome

This story is loosely inspired by the case of *Fairhurst v Woodard*, where Jon Woodard was sued by Dr Mary Fairhurst after it was discovered that he had installed a number of security cameras and a "Ring" doorbell on his property capturing video and audio recordings of his neighbour. This story explores the narrative of why Jon Woodard installed the cameras within the context of a dystopian setting. Although the names of the characters are the same, the story is entirely fictitious.

7 November 2133: 16.00 *Mary*

I always remember my great grandad banging on about some 'coronavirus' and how surreal it was for him to watch it unfold on his 'television'. I never understood what it would be like to live through such a critical time in history, until now. The teleprojector beams live holograms from the capital into my living room, depicting scenes no one could have conceived a couple of years ago. Government HQ a mere mound of rubble, drones grounded and set alight, the revolution had come.

'... and we are receiving intel to confirm that the omniscientist party have been overthrown and the rebels have taken the HQ' exclaimed a projection of the news reporter.

The teleprojector showed swarms of uniformed soldiers dismantling the omniscientist's surveillance cameras in the city and destroying the data of millions contained inside.

'We're free' I said quietly, a moment we'd all only dreamt of. The oppressive regime's fetter loosened its grip on me. Free to think, free to feel, free to do anything without the fear of an omniscientist agent arriving in the night.

There was a time like this before, apparently. Where our phones were not tapped, where every movement or word was not scrutinised for dissident thought. I couldn't ever imagine it, not now anyway, not without him there by my side.

7 November 2133, 16.11 *Jon*

'SHIT, no, no no' I cried, manically pulling my hair out.

'....Yes, we can confirm the Peoples Libertarian Party have assumed control...' a presenter blared in my face. How could this happen? How could anyone be so blind to what the omniscientist's have done for our country? A safe state, free from crime, all criminals 'dealt' with. They always told us 'there's no fear of being watched if you have not done anything wrong'.

Paranoia flowed through my mind, in a matter of moments my safety net, my anchor in life, ripped away from me. Who was going to protect me now? Those leftist bastards have taken it all. Don't they understand? Haven't they seen in the history books what the omniscientist's saved us from? Chaos, lawlessness, and corruption. Society as we know it will fall apart without them. If it wasn't for their state-of-the-art Omniscient Surveillance Programme, those thugs who took my Madeline from me...well, they would have never caught them.

The thoughts now roared in my brain even louder. What if they came back? Looking for me? Knowing damn well they could get away with it this time. What would happen to me? There's no way these 'libertarians' are going to put any measures in to keep me safe, no system like the omniscientists had.

I raced upstairs to the attic, my secret weapons; they had to still be here, somewhere. Our Madeline moaned at me for being a 'hoarder', but lodged between boxes of books and photos from the pre-digitalisation age was my backup protection. A dusty collection of 'Ring Doorbells', relics from the past. These were prototypes that the government sold at the start of their administration. Not one home was without one back then, 'course all those crazy conspiracy theorists started to think the government was using them to spy on us in our own homes. God, people really can be so ignorant.

7 November 2133: 18.00 *Mary*

It wasn't long until the residents of area 1342 poured out into the street, embracing, and celebrating the birth of a new era. I couldn't celebrate, not really.

Of course, I was overjoyed to see the omniscientists usurped, but I will never be fully rid of them after what they took from me. ‘Dissident speech contrary to government doctrine’ is what they called it. We received the dreaded knock in the early hours of the morning. I never even got to say goodbye, vaporised from my life because of a stupid joke he’d made at work. We all knew we had to be careful with what we said, we heard all sorts of stories of people vanishing into the night, we could never really be sure of who was listening and when. Suppose it doesn’t matter anymore.

I peered out of the window, over to Jon’s house next door, he wasn’t out partying either. It’s a shame, I never really see too much of him anymore, not since he lost his wife. Terrible shame.

7 November 2133. 1804 *Jon*

What on earth is she staring out? That nosey bitch next door.

I bet she’s in on it, I bet all of them out there are in on it. I don’t have much time; it won’t be long until someone comes for me. I must do something to protect myself. In a matter of moments, I had all the camera’s working, glad I held on to one of those antique ‘iPhones’, albeit archaic technology, it displayed the picture just fine.

8 November 2133: 0349 *Jon*

I waited until the twilight claimed the sky before making my next move. I crept out and placed the ‘doorbells’ around the house, making sure that I had them pointed at whatshername next door, I can’t trust her, can’t trust any of them. Satisfied with my work, I retreated indoors.

20 December 2133: 1301 *Mary*

Over a month has passed since the revolution and everyone had settled into the new regime. Well, maybe not everyone, I still don’t feel right. Although I know the cameras have gone, I still feel scrutinised. I can’t shake off the feeling that I’ve carried for the last 37 years, of being watched. I still censor myself without reason.

The trauma of losing Michael haunts me and it feels like I’m going insane. I wonder if that feeling will ever leave, like it has for everyone else. Hell, I even started to believe old Jon next door was spying on me...

The Unfortunate Demise of Arete

This story is inspired by the case of *Cambridge University Hospitals NHS Foundation Trust v AH*, a case concerning the death of a Coronavirus patient because of healthcare complications. The story uses Greek mythology to depict the events in the case, and the story has a section that discusses the moral obligations (human rights) in the case from which this short story is inspired. Below, a list with a short description of the characters.

- Persephone: Goddess of Death/Diseases. Personifies Covid-19.
- Arete: “Excellence of any kind”, Strength, Bravery and Wit. The victim, mother of Nausicaa. Personifies the victim in the case.
- Hygieia: Goddess of Health and Healing. Personifies the doctors/nurses who took care of her during her time in hospital.
- Zeus: God of the Sky, ‘Father’ of the Gods and God of Thunder. Personifies the argument in the case as to whether the life support offered should be stopped or not. Part of the ‘Council of Nine’ (personifies the court structure).
- Nausicaa: Daughter of Arete. Personifies the victim’s daughter from the case.
- Aphrodite: Goddess of Beauty. Part of the ‘Council of Nine.’
- Apollo: God of Archery, Music and Dance, Poetry, Truth and Prophecy etc. Part of the ‘Council of Nine.’
- Athena: God of Wisdom. Part of the ‘Council of Nine.’
- Demeter: Goddess of Agriculture. Part of the ‘Council of Nine.’
- Hephaestus: God of Fire. Part of the ‘Council of Nine.’
- Hera: Queen of Heaven, Goddess of Marriage and of the Life of Women. Part of the ‘Council of Nine.’
- Hermes: Herald of the Gods. Part of the ‘Council of Nine.’
- Poseidon: God of the Sea. Part of the ‘Council of Nine.’
- Enyo: Goddess of War. Used as an allusion.
- Aether: personification of the bright upper sky. Used as an allusion.
- Ichor: the blood that flows from Greek Gods and Goddesses.

Persephone

Persephone meticulously strode down her crimson, cataclysmic and corrosive stairs, ready to explore the *enfer* of someone new today.

Juicy...no...juicier...no...juiciest- yes!

Ripe, festering with malady, and ready for her never-ending desire: to torment, to slaughter and to devour!

This femme fatale also goes by the alias of Covid-19 - a glacial, dazzling, and lethal ethereal being.

Arete

The bravest Goddess to conquer Terra; with her luminous, bright blue, piercing eyes and her sublime, delicate white skin, she won many battles and helped save the world from eternal destruction.

Struck with Persephone's poison, she became known as the "most complex victim in the world." Persephone's poisonous tentacles seemed to have an everlasting effect on Arete's delicate skin; heart beating faster than 1,000 titans marching into battle, blood boiling faster than Enyo's perfect combat finishers, and breath trembling harsher than Aether's control.

Hang on Arete... for your sons... your daughter... your family!

Arete kept spitting ichor; unwittingly Persephone's venomous poison will spread to other hosts and infect them too, ultimately leading to their demise.

Hygieia:

Sweet Zeus, I call upon thee to heal sister Arete and make her the strong, ferocious warrior she once was - purge her of the agony she's under. O' mighty Zeus, I call upon you, cut that serpent Persephone's tentacles, cut them all to prevent such catastrophe from occurring, O' please Father of the Gods, do something!

Hygieia, the Goddess of Health and Healing stayed by Arete's side from dawn 'till dusk, preparing incantations for Father Zeus so he would come to her assistance and make her well - the only cure was by dissolving Persephone's tentacles with his enchanted, strong bolts of lightning.

Compressors, respiratory equipment, and heartbeat monitors - the only thing Hygieia could do was pray for Arete's recovery whilst awaiting Zeus' response to her appeals.

Zeus

My sweet Hygieia, Arete has been my greatest child to ever have lived. As you know, you are all my children, which is why I cannot fulfil your request. Exterminating Persephone's tentacles would lead to her demise, which is immoral and unfair. Arete has served a great deal to Olympus, and perhaps this is her time. All that can help her now are the machineries that are attached to her, they will only be functional for a certain period, because they will need to be removed and attached to other people who have been affected by this plague that Persephone is carrying. I am a man of reason, I cannot fathom losing Arete, but I also cannot fathom losing the rest of this nation. I will allow you to keep her in the emergency chamber, but shall I hear or see no improvements, I will have to impose upon you to remove her immediately and unplug the machinery. Take good care of her child; try to make her demise as painless as possible.

This monologue was the hardest one Zeus had ever made; his unconditional love for Arete was apparent, but he could not intervene in this matter as the worlds would collide and havoc would erupt on Terra. With water trickling down his mature cheeks, it was painful for Hygieia to see that she was stuck between light and darkness. Should she save Arete, her greatest companion and the bravest warrior to ever exist, or should she save the world from ultimate destruction by not intervening and trying to make her demise the most painless one?

Nausicaa

O' mother, cursed be the damned serpent, look what she did to you! O why Zeus, why do you deny helping my mother? Is a poison-tentacled ethereal more precious to you than a fierce warrior? Remember, I brought Odysseus back home, do not deprive me of the only thing I cherish - restore my mother to the health she had before this impudent serpent's tentacle touched her - kill the monster, not my mother!

And so, Nausicaa endlessly cried out to Zeus, but got no response; she was in agony when she saw her mother's condition deteriorating day-by-day... there were signs of hope, but the poison has protruded so deep within her body, even the ichor failed to combat it. The idea of health was not looking so promising for our dear Arete.

The Council of Nine: formed of: Aphrodite, Apollo, Athena, Demeter, Hephaestus, Hera, Hermes, Poseidon, and Zeus.

“I called this meeting to discuss the case that pains me the most – Arete - fellow brothers and sisters, what should we do? How do we act in such a situation? Should we truly kill Persephone and unplug Arete?” inquires Zeus.

The rest of the eight Gods and Goddesses look in awe - they were truly speechless, until...

“I don’t think the human fate would see that as fair, Mighty Zeus - take a life to save another - for what reason? She meant no harm; she was cursed with this poisonous component!” exclaims Demeter.

Aphrodite and Apollo, both in agreeance reply: “I don’t think that question was addressed to you specifically out of all of us Demeter, after all, you are her mother. This should remain an unbiased decision, not driven by emotion. We truly believe that Arete would have more use when dealing with humanity, but in real essence, it would indeed be unfair and unjust to kill Persephone, because as Demeter mentioned, in a surprisingly unsentimental manner, she was cursed, she did not intend to cause harm to Arete.”

Demeter nods with a grin of confidence and satisfaction on her face, as well as Hera, Hephaestus and Hermes.

“But clearly you would not want a danger to be cut loose into Terra, right? Cursed or not cursed, we must take precautions to protect humanity at all costs - we’ve already punished them before, why should we carry on?” Poseidon nobly asserts.

“I hope that’s a joke!” Athena scoffs.

“Enough! I asked you here for help, not for arguments and jokes!” Zeus angrily shouts, thunder bolts and storm clouds forming outside the Grand Meeting Chamber.

He resumes by asking for a vote...

“All those in favour of Arete living and Persephone dying...”

No Gods put their hands up.

With disappointment in his face, “So that’s it... Arete is to be unplugged tomorrow and Persephone is to remain alive... ruled!” The hammer strikes.

Dear humanity, treasure everything you have, I hope I have served you well whilst I have lived and fought countless battles for you and alongside you. It has been the best experience of my life, and I will cherish it even upon and after death. Treasure those you love and show them they are cared for. Until next time, because into the darkness I go...

Gift Yusuf

Death, a Relief?

This story is inspired by the case of *Kurt v Austria*, where the applicant claimed that the Austrian authorities failed to protect her and her children from her abusive husband, who then murdered their son. It was held that there was no violation of Article 2, as the authorities appeared to have contained any further violence held against the children. The story is told from the point of view of the applicant, Ms. Senay Kurt, but is otherwise fictional.

“Good choice, that one will leave you in shock” a voice said. Perplexed, I looked up to see who had just spoken and there he was, with his deep brown eyes and curly hair that stopped exactly at the top of his shoulders. He walked to my table, sat and said, “The book you’re reading, it’s a good one”.

He was right, I really was left in shock in the end.

Josh and I met at a small cozy café in the corner of the street, just a few minutes away from the university campus. On the day we met, I had just finished my last lecture so I ordered a coffee and sat reading, *The Girl on the Train* by Paula Hawkins. We went from discussing our favorite books over coffee every other week, to getting married. We were too excited to wait, eager to spend the rest of our lives together. I didn’t really know Josh, but at the same time, it felt like I had known him forever. I guess love truly is blind.

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The first year of marriage was perfect. We travelled a lot and soon after came our precious baby girl, Lily. I had never seen a man so in love in my entire life. Josh would hold her from sunrise ‘till sundown without letting go; as though he was scared someone would take her away.

When Lily turned three, our marriage took a different turn. Josh’s mom had just passed away from cancer and as far as I know, she was all he knew. He hated to talk about his father.

Then, the drinking started. For as long as I had known Josh, he never touched alcohol. Not even when we were out with friends. I didn’t think too much of it. I just thought I had bagged one of the good ones. Now that he was drinking, it was out of control. He would come home really late, pass out on the front steps and shout at me. I put up with all of it because I felt sorry for him, I knew how close he was to his mom and it hurt me to see him hurting. I stayed because I didn’t want our little girl to be away from her dad. It was obvious that he loved her because even in his pain, I could tell that all she brought him was joy.

The shouting turned to violence. Sometimes he would grab me and shake me so hard that I would feel dizzy. I soon became fed up and just couldn't put up with all of his bullshit anymore, so I left. I took Lily and I left to go to my parents' house. He begged me to come home; it was the first time I ever saw him cry. He even went to therapy and was consistent with his AA meetings. I missed him, he was my husband and we had vowed to live "for better, for worse".

After a year of separation, I came back home and we were happy...at least it seemed so. He was even happier to see Lily, and so was she. Soon after, I got pregnant and we had our son, Jeremy. Jeremy was the spitting image of his dad, and the older he got, the more he resembled Josh.

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"Once an alcoholic, always an alcoholic" they say. Josh had relapsed, he started drinking again. He started coming home late and passing out at the front door. When I tried to talk about it, he would slap and push me. Once, he even said that Jeremy wasn't his and that he never wanted to have a son. I couldn't stop thinking why he would say such a horrible thing. Why would he question whether Jeremy was his? Why would he say that he never wanted a son? Did he not love him the way that he loved Lily?

I should've left him then, but I thought, he's just drunk, he doesn't even know what he's saying. I didn't want our kids to be away from their father. It felt horrible keeping Lily away from her dad for an entire year. I can deal with this, as long as he doesn't hurt the kids...he couldn't, he loved them, I thought to myself. I guess I thought too soon.

One night, Josh and I were having what I'd call one of our 'episodes' after we put the kids to bed. It started from a silly argument about a book to him grabbing me by the neck and pushing me against the wall. I couldn't breathe, I was screaming and pushing him away when our kids walked in shouting and crying, "MUMMY! LET GO, YOU'RE HURTING HER!"

He immediately let go of me and grabbed them both roughly, trying to take them back to their room. Jeremy sat there crying while Lily was trying to fight her dad with tears in her eyes. It was as if in that moment all the love and adoration she had for him had disappeared. As I was still trying to catch my breath, I saw Lily fall down the stairs. I truly cannot describe the fear that gripped me. Thankfully, she only bruised her arm. I still don't know if he pushed her or if she tripped, but all I know is he had laid his hands on my children and he was a monster. I immediately called the police and he was locked up for 6 months. I managed to get a restraining order against him and he wasn't allowed near our house or my parents' house. I couldn't believe that I was going through all of this, especially not with Josh.

• • •

1 year later

It was the morning of my Jeremy's birthday and I couldn't believe he was turning 11...my little boy. I had promised to take him and Lily to see the new Marvel movie after school and celebrate afterwards with family and friends. As usual, I gave them goodbye kisses before dropping them off. I didn't know then that it was the last kiss I would share with my son.

At pick-up time, I got to the school and saw two police cars, an ambulance parked at the gate and police ribbons at the main entrance of the school. I started panicking and looking for my kids when I saw Lily's teacher walking towards me with a distraught look on her face. I screamed at her, "WHERE ARE MY KIDS?" She pointed at the ribbons and as I ran towards them, I saw my baby boy in a pool of his own blood...I was numb. I fell to the floor crying. My whole world had come crashing down.

Josh had come to the school and lied that I had asked him to surprise Jeremy for his birthday. The teachers let him in, and he took my baby outside and shot him. The coward shot an 11-year-old, MY 11-year-old in the stomach and left the gun there! Days later his filthy body was found in his apartment, he had hanged himself.

• • •

Present Day

I'm sat here in a mental hospital after two years, still feeling as worthless as the first day I came in. I'm still haunted by the fact that I failed my son and I'm failing my daughter...my baby boy should've turned 13 today. I should've known that the bastard never wanted my son. He made it clear, he told me. But I was stupid. Stupidly in love with a monster. I should've protected my son but I didn't and I can never forgive myself for what a horrible mother I was.

Sharleen Zonke

Subject K

This story was inspired by the facts of *Kate Wilson v The Commissioner of Police of the Metropolis*, where an undercover police officer, Mark Kennedy, entered into a sexual relationship with the claimant in order to obtain intelligence pertaining to her political activities. The story is set in the counselling room of a therapy clinic two months after the judgment. Although Kate Wilson is a real person, the scenario and narrator are entirely fictitious.

The room was silent. Between Kate and me sat a table lamp with a clear glass body atop a mahogany coffee table. I observed quietly her from my armchair, as she lay still, reclined on the chaise lounge. Kate's eyes were fixed on the small gap between the pair of drawn curtains through which a narrow beam of light from the afternoon sun crept. She seemed lost in thought, almost as if entranced by the dust that danced in the streak of light.

"Kate?" I spoke quietly so as not to startle her, "We're fifteen minutes into your session and you haven't spoken. Is there anything in particular you'd like to discuss today?" Kate had been visiting me as a patient for cognitive behavioural therapy for the past two months. She'd been diagnosed with depression following her decade long legal battle against the Met. Our previous sessions had gone well. However, today I noticed she'd been slightly off.

"The paranoia." she said, blinking rapidly to bring her mind back into the room. "It's the *shame*... the anxiety... the... the *embarrassment*, Tim. I've started reliving my years with Mark in my dreams recently and the memories are *crippling* me."

"Well, we can go over the positive association exercises I taught you a few weeks back, remember? They may not stop the dreams, but if you do them properly they can help you cope with..."

"I *can't* cope with *anything*, that's the problem," Kate uttered with irritation as she suddenly sat up and ran her fingers aggressively through her wispy blonde hair. She stopped mid-scalp and gripped her hair tightly – forcing her knuckles to turn a ghostly white. She then made direct eye contact with me. "Why was *I* the one who was targeted for my beliefs, Tim? I was made a... a laughing stock of by all those... *men*... those *officers*."

"Kate..."

"What did I do to them?" I could see a hot stew of anger boil behind her eyes, "*WHY ME?*" Before I could say anything, in one quick motion she'd stood and grabbed the lamp. The air was suddenly rent

by a sound that never heralds anything good – smashed glass. Kate had thrown the lamp onto the floor and broken glass had scattered everywhere.

“KATE!” I sprang from my chair in shock and watched her visibly tremble as she picked up a large piece of glass from the floor. My mind struggled to think of ways to calm her down. “Look, we can deal with your emotions in a more productive way.” I then began to inch closer to her as she held the shard to her throat.

“Can I ever trust anyone again? The man I loved and planned to share my whole life with *never existed* and I’m just supposed to pretend like I don’t doubt all my life’s memories now? Act like I’m not suspicious of everyone?” I had now managed to get so close to her that I could see that her eyes were glazed with tears. She was visibly shaking as she continued, “You know, a strange man walks past my house every Wednesday morning... I *know* they’re all still watching me.” I saw the pain and trauma that this innocent woman was drowning in as I looked into her blue eyes. For a second, I felt sorry for Kate. I’m a professional man with a job to do but, goddamn it, I’m not an emotionless robot. I suddenly enveloped her in a warm embrace. This was *very* out of character for me, but I didn’t know what else to do.

“Paranoia is a common symptom of depression. I don’t want you to do anything stupid because there might not be anybody watching you at all. I’m here to help you, Kate. You *will* be able to trust again, do you understand?”

There was a long pause.

“Yes.” She exhaled deeply. I relaxed as I heard the glass drop from her hand and felt her head flop onto my shoulder as she melted into a pool of tears. We stood in silence for a minute or so until I remembered the nature of our relationship.

“You’ve cut yourself.” I said as I cleared my throat and quickly stepped back. I noticed she’d been holding the glass so tightly it had slit her palm. “Pasha from reception can patch you up and call someone to take you home. I don’t think you’re fit to continue with our session today. Go home and rest.”

There was another long, awkward pause.

“Alright,” Kate tugged at her sleeve, “Thank you.” She then used it to wipe her damp cheeks. “I’m sorry for acting like this. It seems that every day I’m surprised by just how many deep mental scars I’ve been left with. I really do hope this therapy works.” I responded with an awkward nod and what I felt was a reassuring smile before she turned and let herself out. I then sat back in my armchair to re-evaluate what had just happened.

Half an hour had elapsed when the sudden violent vibration of my phone on the coffee table wrenched me out of my thoughts. I picked it up and was greeted by the cold raspy voice of my handler, “Any updates on Subject K?”

“A few.” I sat up and collected my thoughts. “Today, Subject K displayed some suicidal ideation and indicated their suspicion of remaining the subject of covert police surveillance.”

“Any chat about activism or politics?”

“Not today.”

“Alright. Anything else?”

“Yes, erm... I believe I initiated inappropriate physical contact with Subject K today.”

“YOU *WHAT*? Have you forgotten how much *shit* we got in when Mark tried that one? He’s the reason you’ve been given a cover as her therapist, Tim. The one rule was not to get too close. Do I need another man for the job?”

“No. It was just a short hug. I reasserted the professional boundary before we concluded the session.” I said as convincingly as I could, “It won’t happen again.”

“It fucking better not. The last thing I need is the Commissioner on my arse about bloody misconduct again.” With that, he hung up.

I felt a small prick of guilt as I remembered what I’d seen in Kate’s eyes that day. Unluckily for her, I quickly forgot about it when I looked over to the curtains and saw that streak of light shining into the room. It reminded me that I was a proud Intelligence Officer. My job was vital for national security. Who cares if one woman’s rights get trampled on along the way?

Paige Evans

Falling to deception

The following story is a fictional piece inspired by the events in *Wilson v Commissioner of Police of the Metropolis*. This case concerns the surveillance of a political activist by an undercover police officer whilst he was engaged in a long-term sexual relationship with her. Although the human rights issue in the case are the same, the majority of events in this story are fictional. This is told through a series of journal entries by the applicant detailing the progression of their relationship.

23 August 2003, 19:12

I finally understand why they call it falling. The rush, adrenaline flooding your veins - although I have never been the girl to leap out of a plane with only the security of a parachute on my back, I know how it would feel now. Derek has taught me how to fall. My heart is too large for my chest, I feel like I am drowning in emotion. With happiness and without warning I stumbled upon my soulmate. Falling is fast, it happens all at once. One minute you are leaning over the edge and the next you are gone, tumbling head over heels for a man with a smile that takes your breath away. I, Aubrey West, have fallen desperately in love with Derek Lockwood.

16 January 2004, 22:46

That's the thing about falling, isn't it? You can't stop it; you can't slow it down. You are at the mercy of gravity as it pulls you towards earth. There are no brakes, no emergency stops.

And yet Derek has been...different. I did not see him for some time; he told me work was keeping him busy... But something feels wrong. There are things I am beginning to notice, niggling suspicions, more questions than there used to be. He knows me as much as I know myself, my thoughts, my hopes and dreams for the future. I do not know what he is looking for, but I cannot shake the feeling that he is searching for something, some answer or perhaps some direction to follow. I don't know...maybe I am just being paranoid. Maybe I should just ask him, I have every faith he would be completely honest with me.

30 September 2004, 08:11

Derek has been asking more and more about my opinions on politics. Things seem to have shifted between us; I think he is hiding something from me. My friends have noticed it too, they ask me if everything is okay between us, but I cannot bring myself to face the truth. I plan to confront him. It's getting harder to believe that he is the man that I thought him to be...

2 February 2005, 00:12

That is the thing about falling; you can't stop when you start. One minute you are free falling into a future that seems uncertain yet promising. Next, the ground is speeding towards you – and what is it you do then? I find myself reaching for a parachute only to find my back bare. I am hurtling downwards at unimaginable speed and all that is left to do now is close my eyes and brace myself for the impact.

Derek Lockwood. My best friend, my partner, the other half of my soul. No – Derek Lockwood is fictional, a man from the pages of a romance novel that I so easily let myself fall for. Derek is nothing but a façade, a charming smile meant to draw in prey. Derek Lockwood, Ryan Jackson, I don't know anymore. All I know is this man played me, led me to trust him, led him to share myself with him entirely, gathered information to use against me - all whilst pretending to love me. I have been deceived, betrayed, taken for a fool and left confused, heartbroken and ashamed, all in the name of my political standpoints. How is it that I could bring myself to trust this man when I never knew his true name? How is it that I still feel the jagged shattered pieces of my heart trying to break through my chest when I also feel so angry that it paints my vision crimson? I am flooded with a hurt and anger so strong I cannot find the words to describe them. Livid, enraged, furious; they pale in comparison to the feeling locked in my chest. I hate you Ryan Jackson, Derek Lockwood, does it even matter? I loathe you in a way I never thought possible.

12 March 2005, 01:16

Oh god what have I done... What the hell have I done?

12 March 2005, 4:32

He deserved it – didn't he?

He lied to me. He cheated on me. He deserved it.

He brought this on himself. I never meant for it to go this far. I didn't want to do this. I was angry; I had every right to be. I didn't deserve what he did to me. He brought this on himself...

**

The courtroom was silent. Not a shuffle of feet nor a rustle of papers. A few members of the jury cast uncertain glances to the woman in the box, although her face remains void of emotion. The barrister for the prosecution cleared his throat as he lowered his papers.

“This last journal entry appears to be written less than two hours after the estimated time of death reported by the medical examiner's office, shortly before Officer Jackson's body was found – these extracts are included in the Juror's trial bundles so that they may refer back to them when making their decision.”

A woman in the gallery fails to stifle a sob, attracting the jury's attention. She is Ryan's wife - that much alone can be taken from her reaction. Her face is tearstained, a stark contrast to the woman's in the box, which has remained emotionless throughout the entirety of the trial. The amount of evidence against her is staggering, she ought to be worried, but she isn't. As her gaze wanders to the woman in the gallery, her expressionless mask shifts to one of mild amusement, but the change doesn't last long.

The jury, as most juries, consists of a variety of people. It is rare for a group of such different people to reach a decision as fast as these particular twelve. They retire to the jury room for a matter of minutes. When the foreperson stands, attention is fixed on him. "The jury holds, unanimously, Aubrey West guilty of the murder of Ryan Jackson." A wave of murmurs ripple through the gallery, as Ryan's wife once again struggles to restrain her emotions. Behind the glass of the defendant's box, a smirk spreads across the woman's face.

Harry Love

The Truth Hurts

This short story is based, very loosely, on the case of *Ömür Çağdaş Ersoy v. Turkey*, which concerned the criminal conviction of a student charged with insulting a public official – the Prime Minister - during a rally in support of students who had been placed in police custody for having protested against the Prime Minister’s visit.

The central character in the story – Horace Johnston, Prime Minister of the Divided Kingdom – is fictional, as is the entire story, which follows Horace’s efforts to present a new law on insulting public figures to Parliament.

Horace entered his private study, clearly agitated and even more dishevelled than normal. His personal secretary, Sir Colin Campbell, sat at his desk, hunched over some important looking papers.

‘That bloody Keith Harmer has just called me a lying sleazebag,’ Horace spluttered. ‘And he muttered the c bomb as he disappeared.’

‘He called you a clot, Sir?’

‘No, you lemon, the other one!’

‘Oh dear, Prime Minister’ how unfortunate.’

‘More than bloody *unfortunate*, it’s bloody libellous!’

‘The lying bit or the sleazebag bit, Prime Minister?’

‘Well both, you arse, both!’

‘Well, Prime Minister, that could be a moot point...you see there is a defence of truth...’

Horace looked displeased so Colin discontinued that line

‘Not that you *are* a liar, Prime Minister, or indeed a sleazebag, but there is a defence of honest opinion, and Harmer might argue that there is evidence to think you are both, and that he is entitled to hold that opinion, based on the fact that...’

‘That people think I am a liar and a sleazebag?’

‘Well yes, Prime Minister. You might not be either as a fact, but Harmer may have an honest opinion that you are. And what he called you is not necessarily defamatory; it could amount to what they call mere vulgar abuse.’

‘Now I’m totally confused.’

More than usual? Colin thought, but said nothing.

‘Let me explain, Sir. Harmer has called you a lying sleazebag (Horace nodded). Being called a sleazebag is not necessarily defamatory; although it might be hurtful (Horace nodded again, clearly still hurt). Now, being called a *lying* sleazebag is different; that implies that you are deceitful – a lying sleazebag as it were. Harmer would have to *prove* that you are a lying sleazebag, which might be very difficult to do (Horace beamed shortly). But Harmer would say that what he called you was a mere statement of opinion, honestly held and based on some reasonable evidence that you are, or rather could be taken, as a lying sleazebag.’ Is that clear Prime Minister?’

‘You mean that although I am not *actually* a lying sleazebag, most people would agree that I could be taken as a lying sleazebag, and that Harmer can say what most people are thinking?’

‘Exactly, Sir, now you’re getting the hang of it.’

‘But why would people think that, Colin?’

Because you are a lying sleazebag, thought Colin. ‘Well...it’s just that lots of people think that you might have misled them in the past, and that you have a propensity to mislead them; the sleazebag bit is merely a vulgar way of expressing that opinion.’

‘Well, bollocks to all that. I have been insulted, and I won’t stand for it!’

‘There is no law protecting one from being insulted, Prime Minister.’

‘Well there bloody well will be, and very soon. Get the lawyers in here, now!’

Horace entered his room with an added air of belligerence. The Cabinet lawyers and parliamentary drafters were seated rustling papers, but raised their heads as he crashed into the room.

‘Right, let’s get going. The Protection of Public Figures Bill 2022. Clause 1, it shall be an offence for any person to ridicule or make an insulting remark to or against a public figure with the intention of causing distress to, or lowering the public’s perception, of that figure.’

‘*Super*, said Simon, a junior lawyer ‘but do you want the intention bit or should we just go with the effect of the remark?’

Horace thought of the recent Petal affair – where his darling Home Secretary had been accused of harassment, but Horace had excused her because the dear little thing hadn’t intended to make a civil servant commit suicide - and said that we should include the intention bit.

‘*Great*’, said Nigel, ‘good idea, Prime Minister, but what of the Bill of Rights?’

‘Didn’t know we had one’, said Horace. Colin closed his eyes and mumbled to himself.

‘The Bill of Rights 1689, Sir, in which freedom of speech in Parliament is maintained. Do you want to get rid of members’ immunity when they make the remark?’

‘Yes, especially if it’s made by that bloody Harmer, the squirmy little grammar kid! Bloody little oik!’

‘Very well sir’, said Nigel resignedly, ‘and will the clause apply to things said by you, Sir, as Prime Minister?’

‘Of course not you tit, I’m the bloody Prime Minister!’

‘Very well Sir. So you will be exempt from this offence? And will that be for both inside the House and outside?’

‘Both, yes.’

Sir Colin closed his eyes again.

‘Now in terms of the injured party as it were, who will be protected by this new law Prime Minister? *Any* public figure?’

‘Or just *you* Prime Minister?’ interjected Sir Colin slyly.

‘Of course, not just *me* Colin, you bloody arse. What would people think if I made the law just for me?’ Colin remained silent, but raised an eyebrow. ‘No, it will be for *all* public figures, to protect their dignity and public profile.’

‘Including celebrities, Prime Minister?’ offered Sir Colin.

‘No, of course not, Colin, you peanut; you’re deliberately making a mockery of the whole thing. Just *political* public figures...apart from Harmer of course.’

‘Right’, resumed Nigel, ‘so it will be an offence to ridicule or insult a political figure, apart from the Leader of the Opposition, in any place, including Parliament, but the offence cannot be committed by the current Prime Minister?’

‘You have it in one’ beamed Horace.

‘*Super*’ sighed Simon. ‘*Great*’ said Nigel between gritted teeth.

‘Sorry for interfering Prime Minister’, said Sir Colin, ‘but do you seriously think you are going to get this through the Human Rights Act?’

‘Oh bollocks to that, we’re getting rid of that soon anyway.’

‘Are we?’ shouted Simon and Nigel in unison.

‘Yes, time to get rid of human rights’ shouted Horace, ‘too many bloody human rights.’

‘Apart from politicians’ privacy and honour’ whispered Sir Colin to one of the drafters. Horace heard the remark and shot a glare at Sir Colin.

‘Well, I suppose we can go with that, Nigel said with resignation...unless you want some form of defence, just to make it more palatable?’

‘Truth, perhaps, or honest opinion?’ suggested Sir Colin mischievously.

‘Look, Colin, I am just about getting fed up with you, if there is any more of your bloody...’

Horace’s rant was cut short by his phone going off. Horace glared at it and his features softened.

‘Hello sweetness, how are you?’ Horace gushed. ‘Oh, I see...bloody hell...well, call you back. Horace had gone a deep shade of purple and hurriedly told the lawyers and drafters to leave.

‘Anything wrong Prime Minister?’ cooed Sir Colin

‘Yes, I’m bloody pregnant again!’

Con-grat-u-lations, Sir, your *current* wife will be delighted.

‘Well, bloody thing is, it’s not her who is pregnant’

‘Oh my goodness, Sir. Then who *is* pregnant?’

Horace went silent and his head hit the desk. Raising it slowly he whimpered ‘Colin, do you think Charlie Davenport-Carruthers would make a decent Home Secretary?’

Colin closed his eyes, again. ‘And I’ll cancel the non-party, shall I Sir?’

CASE NOTES

These case notes were written by students on the 382CLS Human Rights' module as part of their assessment. Students had to construct a case note on a human rights case decided in 2021 by the European Court of Human Rights, against a country other than the United Kingdom. Our thanks go to those students whose case notes appear in this volume.

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Fedotova and Others v. Russia, Application Nos. 40792/10, 30538/14 and 43439/14

Introduction

The case of *Fedotova and Others v. Russia* concerned a legal dispute over the refusal to register marriage notices of three same-sex couples. It raised the issue of whether Russia had gone beyond its margin of appreciation enjoyed by disallowing the formal recognition of same-sex marriages, and whether this was in breach of articles 8 and 14 of the European Convention.

Facts, claims and decision

The applicants, three same-sex couples, notified their local Register Office of their intention to marry. According to Article 1 of the Russian Family Code, marriage is a "voluntary marital union between man and woman." Therefore, all notices were rejected, and domestic proceedings failed. Relying on Article 8 (right to respect private and family life) alone and Article 14 (Prohibition against discrimination) together with Article 8, the applicants complained to the European Court of Human Rights (ECtHR) of the lack of opportunity to have their relationships formally registered. It was now for the ECtHR to determine whether Russia failed to respect the applicant's right to private and family life by no legal framework recognising and securing their relationship.

It was the applicants' claim that they should receive global legal recognition, if not for marriage, then at least something "lesser", such as civil partnership, to close the legal gap and to provide protection for same-sex couples. The Russian government claimed that acknowledging same-

sex relationships created a conflict between the applicants' social reality and the law. They stated that 80 per cent of Russians were opposed to same-sex marriage.¹

Despite the interests of the community, the Court rejected the Government's argument that same-sex couples should be denied the right to formalise their relationships. The Court concluded that by denying same-sex couples' access to formal recognition of their status Russia went beyond the margin of appreciation it enjoyed. Further, Russia's arguments that the applicants' complaints were manifestly ill founded, and that the domestic courts denied the applicants' requests to protect 'the interests of a family unit of traditional forms' protected by the State, was also rejected.²

Consequently, the Court ruled that the refusal of Russia to grant legal recognition to same-sex couples violated the applicants' Article 8 rights. However, the Court emphasised that it did not require the State to impose an obligation to recognise same-sex marriage under Article 8. It indicated the need to create a fair balance between same-sex couples and the community. Additionally, a positive obligation to create a legal framework was required to guarantee the effective enjoyment of the rights outlined in article 8.

Analysis

Article 8 has been read alongside Article 14 many times. Concerning same-sex couples, the Court, in *Schalk and Kopf v Austria*,³ placed a high priority on the international movement towards recognising same-sex marriage,⁴ but the Court in *Fedotova* controversially allows states to deny access to marriage to same-sex couples. The Court stated the Convention does 'not explicitly impose on the Contracting States an obligation to formally acknowledge same-sex unions'.⁵ The Court's back and forth here is quite puzzling.⁶ Why, having placed an international movement on same-sex marriage, has it not followed Article 46 of the ECHR to uphold the binding force of its judgment? Surely, by virtues of your fundamental right to personal autonomy and dignity, you are entitled to make your own choices without undue interference from the state through legislation or other means.

¹ *Fedotova and Others v. Russia* App no 40792/10 30538/14 43439/14 (ECtHR, 13 July 2021) para 35.

² *Fedotova and Others v. Russia* App no 40792/10 30538/14 43439/14 (ECtHR, 13 July 2021) para 32.

³ *Schalk and Kopf v. Austria* App no 301414-04 (ECtHR, 20 December 2002).

⁴ *Oliari v. Italy* App no 18766/11 36030/11 (ECtHR, 11 January 2018).

⁵ *Fedotova and Others v. Russia* App no 40792/10 30538/14 43439/14 (ECtHR, 13 July 2021) para 49.

⁶ Claire Popplewell-Scevak, 'Here we go again? Is Fedotova and Others just splitting hairs when it comes to sex-sex couples?' (October 5th 2021) <<https://strasbourgobservers.com/2021/10/05/here-we-go-again-is-fedotova-and-others-just-splitting-hairs-when-it-comes-to-same-sex-couples/>> accessed 22nd November 2021

As of June 2021, sixteen states are compliant with the ECHR and legally recognise same-sex marriage. This includes countries such as France, Germany and the United Kingdom (UK). In the UK, the Civil Partnership Act 2004 was introduced to allow same-sex couples to register civil partnerships. Although this provided some protection for same-sex couples, it was insufficient. ‘Civil partnerships will never be seen as a sufficient recognition of their unions’⁷. Several pressure groups, including Stonewall, helped to secure same-sex marriage in the UK.⁸ As a result, the Marriage (Same-Sex Couples) Act 2013 was introduced to finally allow same-sex marriage in the UK upholding Article 12 of the ECHR, the right to marry. The UK recognised ‘marriage is a great institution that belongs to society as a whole’⁹.

As part of UK domestic law, the Human Rights Act 1998 (HRA) incorporates the rights found within the ECHR. Because of the HRA, domestic courts must interpret the law within the context of the Convention rights, considering the jurisprudence of the ECtHR, including the judgment in *Fedotova*. As the UK finally struck ‘a fair balance between the competing interests of same-sex couples and of the community as a whole’¹⁰ and upheld their positive obligation by creating a legal framework to allow the enjoyment of rights found within Article 8, UK domestic law appears compatible with the ruling in *Fedotova*.

Alongside the Civil Partnership Act and the Marriage (Same-Sex Couples) Act, the Equality Act 2010 also complies with the *Fedotova* decision and the ECHR by protecting the rights within Articles 8 and 14 for same-sex couples. The protected characteristic states ‘you must not be discriminated against in employment because you are married or in a civil partnership’,¹¹ showing protection in the workplace as well. This shows the dramatic societal difference in Russia and the UK. Although it has been proven that ‘laws increasing LGBTQ+ rights *do* cause

⁷ Frances Hamilton, ‘The Case for Same-Sex Marriage Before the European Court of Human Rights’ (2017) 65 *Journal of Homosexuality* 1582.

⁸ Stonewall, ‘Stonewalls History’ (10th June 2015) <<https://www.stonewall.org.uk/stonewalls-history>> accessed 27th November 2021.

⁹ Baroness Noakes, ‘Marriage (Same-Sex Couples) Bill Debate’ (4th June 2014) <[https://hansard.parliament.uk/lords/2013-06-04/debates/13060477001047/Marriage\(SameSexCouples\)Bill](https://hansard.parliament.uk/lords/2013-06-04/debates/13060477001047/Marriage(SameSexCouples)Bill)> accessed 29th November 2021

¹⁰ *Fedotova and Others v. Russia* App no 40792/10 30538/14 43439/14 (ECtHR, 13 July 2021) para 49

¹¹ Equality and Human Rights Commission, ‘Marriage and Civil Partnership Discrimination’ (19th February 2020) <<https://www.equalityhumanrights.com/en/advice-and-guidance/marriage-and-civil-partnership-discrimination>> accessed 29th November 2021

a positive change in people's attitude'¹², some countries are not ready to accept that times are changing.

'It is the Government's fundamental job to reflect society and to shape the future, not stay silent where it has the power to act and change things for the better.'¹³ Because of this, many people have recently 'welcomed the decision that civil partnership is incompatible with UK Human Rights law and the ECHR because it excluded heterosexual couples'¹⁴ as seen in the decision of *Steinfeld v Secretary of State for Education*.¹⁵ This goes against the ruling in *Fedotova* and the ECHR because the UK had failed to justify this lack of opportunity for heterosexual couples. Although UK law is compatible with the *Fedotova* ruling and the ECHR regarding same-sex couples, the refusal to recognise civil partnerships for heterosexual couples contravened Articles 8 and 14 of the ECHR until the law (the Civil Partnership Act 2024) was changed on 21 December 2019.

¹² Helena Vieira, 'Same-sex marriage legislation can change attitudes towards gay and lesbians' (4th February 2019) <<https://blogs.lse.ac.uk/businessreview/2019/02/04/same-sex-marriage-legislation-can-change-attitudes-towards-gays-and-lesbians/>> accessed 27th November 2021

¹³ Lynce Featherstone, 'Church Does Not Own Marriage' (25th February 2012) <<https://www.express.co.uk/news/uk/304344/Church-does-not-own-marriage>> accessed 29th November 2021

¹⁴ OTS Solicitors. 'Civil Partnership Act incompatible UK human rights law' (17th July 2018) <<https://www.otssolicitors.co.uk/news/civil-partnership-act-incompatible-uk-human-rights-law/>> accessed 29th November 2021

¹⁵ *R (on the application of Steinfeld and Keidan) (Appellants) v Secretary of State for the International Development* [2018] UKSC 32, [2018] UKSC 32.

Adelina Drug

A.M. and Others v Russia, Application No. 47220/19

A recent case of the European Court of Human Rights (ECtHR) addressed the right to respect for private and family life under Article 9 of the European Convention on Human Rights in respect of the deprivation of parental rights. The issue in *A.M. and Others* was whether the restriction issued by the Russian District Court on the exercise of her visiting rights was necessary in a democratic society in order to protect the psychological health and development of her children.

Factual background and decision

AM had two biological children with N before beginning the process of transition from male to the female gender. The marriage was dissolved in June 2015 and it was agreed that the children would live with N and a monthly maintenance allowance would be paid by AM.¹ In July 2015, A.M.'s transition was legally recognised by the Russian Court and new identification documents reflecting her belonging to the female gender were issued.² However, during visits to her children, A.M. would disguise herself as a male because N did not wish for the children to see the true self of who they believed to be their father.³ N began refusing meetings after December 2016 and commenced legal proceedings to restrict AM's parental rights.⁴

N argued that AM's gender transition "caused irreparable harm to the mental health and morals of the children" due to its capacity to distort their perspective on the traditional family and make them vulnerable to bullying.⁵ AM claimed that she could only be deprived of her parental rights if she put the children's safety in danger.⁶ She then asked the court to establish "rules on visiting rights and communication between parents".⁷

The decision of the Lyublinskiy District Court of Moscow

The judgment was delivered based on an expert report that stated that AM's intention to communicate with her children as a transgender woman and parent would harm their mental

¹ *A and M v Russia*, at [10].

² *Ibid*, at [11].

³ *Ibid*, at [12].

⁴ *Ibid*, at [13]-[14].

⁵ *Ibid*, at [14].

⁶ The Family Code of 1995, Article 73(2) (RU).

⁷ *A and M*, at [15].

health and development.⁸ Given the children's young age and the social challenges to which the family would be exposed following the disclosure of information regarding her transition, the District Court ruled that the contact between AM and her children should be restricted until the level of their mental development changes. AM sought another expert opinion, but both the Moscow City Court and the Supreme Court of the Russian Federation dismissed her case on grounds that the negative impact on her children's psychological wellbeing had been proven.⁹

The decision of the European Court of Human Rights

The case reached the ECtHR where it was decided that Russia infringed the Applicant's Convention rights, namely Article 8 – the right to respect for family life – and Article 14 – the prohibition of discrimination – taken in conjunction with Article 8.

In regard to Article 8, the domestic courts had not conducted a balanced examination of the family situation, instead relying solely on the experts' findings who admitted the lack of evidence on the matter.¹⁰ The District Court erred in depriving AM of her parental rights since no harm to the children could be demonstrated as a result of the contact between them.¹¹ Moreover, the decision violated article 14 because her gender transition was "a decisive factor leading to the decision to restrict her contact with her children".¹² Instead of thoroughly examining the danger to the mental health and development of her children and the impact that the restriction would have on the Applicant, the domestic court placed AM's gender identity at the heart of its decision, which is prohibited under the Convention.¹³ Therefore, this amounted to discrimination, as there was no justified reason for the differential treatment.

Analysis

The judgment in *AM and Others v Russia* demonstrates the ECtHR's willingness to challenge stereotypical attitudes towards transgender families by holding public authorities accountable for unlawful, unnecessary and disproportionate interferences with their right to private and family life. The same approach is taken by the UK courts, as the Human Rights Act 1998 gives further effect to the rights and freedoms of the Convention.

⁸ Ibid, at [22].

⁹ Ibid, at [25].

¹⁰ Ibid, at [54].

¹¹ Ibid, at [57].

¹² Ibid, at [75].

¹³ Ibid, at [77].

The UK government adopted various legal instruments to secure the rights of transgender people and to ensure their fair treatment. The Gender Recognition Act 2004 protects the parental rights of people who have children before the transition,¹⁴ and thus they are not required to prove their status in family law disputes.¹⁵ Moreover, given that gender reassignment is a protected characteristic of the Equality Act 2010,¹⁶ a transgender person should not be treated differently from a cisgender individual, unless it is “a proportionate means of achieving a legitimate aim”.¹⁷

In terms of child arrangements, the UK courts are governed by the paramountcy principle,¹⁸ which highly resembles the ECtHR’s approach to the ‘best interests of the child’. Judges, therefore, have a duty to give priority to the children’s welfare when deciding on issues that will affect them by “viewing the legislation from the point of view of children”.¹⁹ The case of *AM and Others* is closely related to *A (Children) (Contact: Ultra-Orthodox Judaism: Transgender Parent)*,²⁰ in which the High Court initially deprived a Trans woman of direct contact with her children, and the Court of Appeal subsequently overturned that decision.²¹ This was because the court emphasised that the UK has a positive duty to promote contact, which “is almost always in the interests of the child”.²² Moreover, even if a restriction on Article 8 rights might be justified, “it does not automatically follow that it will be justified under Article 14”.²³

Comparing the decision in *AM* with that of the Court of Appeal, the Applicant’s gender transition was the focus of discussions in Russian legal proceedings and thus, was biased; which is prohibited under the Convention and regarded as an unnecessary and disproportionate interference with Article 8. Although the Russian court pursued a legitimate aim, i.e. to protect the children’s psychological health and development, Chang noted that “the best interest of the child is served when the court accepts that child’s reality, instead of adhering to an artificial

¹⁴ Gender Recognition Act 2004, s 12.

¹⁵ Susanne Lilian Gössl, 'Legal Gender Beyond the Binary' [2019] 33(3) International Journal of Law, Policy and the Family 403.

¹⁶ Equality Act 2010, s.7.

¹⁷ Equality Act 2010, sch 3, pt 7, para 28.

¹⁸ Children Act 1989, s.1.

¹⁹ John Eekelaar, 'The Law, Gender and Truth' [2020] 20(4) Human Rights Law Review 797.

²⁰ [2017] EWFC 4, [2017] 4 WLR 201.

²¹ *A (Children) (Contact: Ultra-Orthodox Judaism: Transgender Parent)*, Re [2017] EWCA Civ 2164, [2018] 3 All ER 316.

²² *C (A Child) (Suspension of Contact)*, Re [2011] EWCA Civ 521, [2011] 2 FLR 912.

²³ Daniel Monk, 'Muscular liberalism and the best interests of the child' [2018] 77(2) Cambridge Law Journal 261.

family model”.²⁴ Similar to the ECtHR, UK courts will not attach decisive weight to a person’s transsexualism. Instead, they will consider all alternatives before resorting to the most restrictive measure in order to eliminate the risk of parents being discriminated against based on their gender identity.

A close relationship between children and their parents offers substantial benefits to their psychological development and thus, the transphobic attitude of the justice system or former partners should not be an impediment for LGBT parents in exercising this right. The ECtHR’s decision in the present case emphasises, therefore, the importance of balancing the rights of transgender parents against the needs of their children in order to reach an appropriate outcome for their family situation.

²⁴ Helen Y. Chang, 'My Father is a Woman, Oh No!: The Failure of the Courts to Uphold Individual Substantive Due Process Rights For Transgender Parents Under the Guise of the Best Interests of the Child' [2002-2003] 43(3) Santa Clara Law Review 649.

Introduction

Article 2 of the European Convention on Human Rights 1950 (ECHR) imposes on the State a positive obligation to protect the lives of citizens within its jurisdiction.¹ The European Court of Human Rights (ECtHR) was confronted with the issue of the positive obligation to protect life in *Tkheldze v Georgia*, where it was alleged that Georgian police had failed to protect the applicant's daughter from an abusive partner and to conduct an effective investigation into the matter, which resulted in her death.² The ECtHR ruled that the Georgian police's inaction amounted to a violation of Article 2's positive obligation and the right to life in conjunction with Article 14 ECHR.³

Facts and Decision

From April to October 2014, the applicant's daughter (MT) was subjected to various forms of domestic violence at the hands of her partner (LM).⁴ During a police interview in September 2014, LM admitted to repeatedly physically and verbally abusing MT and threatening her life. LM also had a criminal record.⁵ Despite this, and even after MT, her mother, and LM's parents reported to the police numerous incidents of domestic violence, the police did not open criminal investigations, nor did they issue restrictive measures against LM on all reported occasions. The reason stated by the police was that they had not witnessed LM's violent behaviour; instead, they simply filed police reports.⁶ LM eventually killed MT with a gun at her workplace in October 2014, and then committed suicide.⁷

MT's death prompted the applicant to file a complaint with the ECtHR. The applicant claimed that, despite being aware of the danger posed to MT's life by LM's violent behaviour, the police officers' discriminatory and negligent responses to the domestic violence allegations, and decision not to conduct an investigation because MT was a woman, (as well as their failure to take the necessary preventive measures), contributed to MT's death. She also claimed that the

¹ *Calvelli and Ciglio v Italy* Application No. 32967/96 (ECtHR, 2002), 48.

² Application No. 33056/17 (ECtHR, 8 July 2021).

³ Prohibition of Discrimination in the enjoyment of Convention rights.

⁴ *Tkheldze v Georgia* Application No. 33056/17 (ECtHR, 8 July 2021), 7-17.

⁵ *Ibid* 8.

⁶ *Ibid* 11.

⁷ *Ibid* 19.

police officers had gathered insufficient and inaccurate evidence when dealing with MT's domestic violence allegations. According to the applicant, this constituted a violation of Article 2's positive obligation to protect M.T's life in conjunction with Article 14 ECHR.⁸

In order to reach a decision, the ECtHR applied the *Osman* test for a State's positive obligation,⁹ which also requires an effective investigation when private individuals kill other individuals.¹⁰ The *Osman* test requires the police officers to prevent harm where there is a 'real and immediate risk' to the victim's life, which they knew or ought to have known at the time. Based on the facts, the ECtHR found that the police officers failed to satisfy the *Osman* test. The ECtHR found that there can hardly be any doubt that the several incidents of domestic violence reported to them amounted to a 'real and immediate risk' of the danger posed to MT's life, which the police knew or certainly ought to have known at the time.¹¹ Concerning the second claim, the ECtHR found that the police officers gathered insufficient and inaccurate evidence, which hindered their special diligence because they failed to open an investigation, to take into account MT's perception of danger, to issue restrictive measures provided by Georgian law, and to inform the applicant and her daughter of their procedural rights.¹² As a result, the ECtHR decided that the police officers' negligent conduct and systemic failure, which resulted in MT's death, constituted a violation of the substantive positive obligation to protect life under Article 2 ECHR read in conjunction with Article 14 ECHR.¹³

Comparable domestic UK Law and the impact on UK Law and ECHR

This section of the case note will examine case laws whereby an Article 2 positive obligation to protect life has been claimed in the domestic courts and against the UK in the ECtHR. It should be noted that the Human Rights Act 1998 gives effect to Article 2 ECHR in the UK. In the case of *Osman v United Kingdom*, a schoolchild's father was murdered by his obsessed teacher.¹⁴ The boy and his mother filed a negligence action before the Court of Appeal, but it was dismissed because there can be no negligence claims against the police.¹⁵ As a result, they filed a complaint with the ECtHR claiming that the UK authorities violated Article 2 ECHR by failing to protect the life of the victim murdered by the teacher. The ECtHR found that there

⁸ Ibid 44.

⁹ *Osman v United Kingdom* (2000) 29 EHRR 245, [1998] 10 WLUK 513.

¹⁰ *Mazepa and Others v Russia* Application No. 15086/07 (ECtHR, 17 July 2018), 69.

¹¹ *Tkheldze* (n 4) 53.

¹² Ibid 54.

¹³ Ibid 57.

¹⁴ (2000) 29 EHRR 245, [1998] 10 WLUK 513.

¹⁵ *Hill v Chief Constable of South Yorkshire* [1989] AC 53.

was no violation of Article 2 ECHR because the police took reasonable precautions to prevent harm and there was no real and immediate risk to the victims' lives that the police knew or ought to have known at the time.¹⁶ The decision established what is now known as the *Osman* test, which must be satisfied before there can be a violation of the State's positive obligation to protect life under Article 2 ECHR.

It could be argued that the aspect of a "real and immediate risk" to life in the test is crucial because the UK should not owe a positive obligation to protect against all risks, including risks of death, as this would impose an impossible and disproportionate burden on UK authorities,¹⁷ resulting in an unreasonable use of resources. Therefore, as a matter of law, the risk to life should remain real and immediate, and not probable.¹⁸ Similarly, the impact of avoiding an "impossible and disproportionate burden" implies that both the UK and ECHR-compliant States have a margin of appreciation,¹⁹ because the real risk must be to an individual's life, rather than a risk of causing harm.²⁰ This will prevent practical difficulties involved in implementing their positive obligations.²¹ Hence, it appears that the ECtHR's decision in *Tkheldidze v Georgia* is compatible with both UK law and the ECHR.²² This is because the decision simply reapplies a previously decided test against the United Kingdom,²³ which must be satisfied before Article 2 ECHR can be violated.

Furthermore, the very high threshold of the *Osman* test should be maintained in both UK law and the ECHR.²⁴ Nevertheless, in *Van Colle v United Kingdom*,²⁵ it was argued that the test's threshold should be lowered for UK responsibility when the UK created a relevant risk for the deceased. The deceased was invited as a witness in a criminal proceeding by the UK authorities in this case, but the defendant suspect had murdered him. It could be argued that the threshold cannot be lowered for UK responsibility, because it is the claimant's duty to provide evidence that objectively proves the failure of the State's positive obligation to protect life when there

¹⁶ *Osman* (n 9) 115-116.

¹⁷ *Ibid.*

¹⁸ *Rabone v Pennine Care NHS Trust* [2010] EWCA Civ 698, [73] (Jackson LJ).

¹⁹ Elizabeth Bates, 'Impossible or disproportionate burden': the UK's approach to the investigatory obligation under articles 2 and 3 ECHR' (2020) 5 European Human Rights Law Review 499, 503.

²⁰ *R (on the application of AP) v HM Coroner for Worcestershire* [2011] EWHC 1453 (Admin), [2011] 6 WLUK. 167, [20] (Mr Justice Hickinbottom).

²¹ Elizabeth Bates, (n. 19), 511.

²² Application No. 33056/17 (ECtHR, 8 July 2021).

²³ *Osman* (n. 9).

²⁴ *Van Colle v Chief Constable of the Hertfordshire Police* [2008] UKHL 50, [2009] 1 AC 225, [69] (Lord Hope)

²⁵ (2013) 56 EHRR 23, [2012] 11 WLUK 340.

existed a real and immediate risk.²⁶ Therefore, the test's success will be determined on a case-by-case basis because each claim raises unique issues.

Conclusion

This case illustrates that a State's negligent conduct may contribute to a failure of their positive obligation to protect life. Therefore, there is the likelihood that UK law in conjunction with the test of Article 2 ECHR might expand to include circumstances whereby the UK authorities' negligent conduct resulting in a failure to protect life constitutes a violation of their positive obligation. This is because, in the UK, authorities' negligence is increasingly being claimed to constitute a violation of Article 2 positive obligation to protect life.²⁷

²⁶ *Officer L, Re* [2007] UKHL 36, [2007] 1 WLR 2135, [20] (Lord Carswell).

²⁷ Jane Wright, 'The Operational Obligation under Article 2 of the European Convention on Human Rights and Challenges for Coherence - Views from the English Supreme Court and Strasbourg' (2016) 7 JETL 58, 59.

Kurt v Austria (Application No. 62903/15)

Introduction

*Kurt v. Austria*¹ is a crucial case in determining how the European Court of Human Rights (ECtHR) views the ‘positive duty to protect life’ under Article 2 of the European Convention on Human Rights (ECHR). The case concerned a woman in Austria who experienced domestic violence from her husband. She complained that the Austrian authorities had failed to fulfil their positive obligations by not taking her husband into pre-trial detention in order to protect herself and her children from him, and failing to do so constituted a breach of Article 2.

Facts, claims and decision

In July 2010, the applicant contacted the police alleging that her husband (E) had beaten her and requested a barring order, which police then granted. On 22nd May 2021, the applicant filed for divorce and reported to the police that E had raped her and beaten both her children, and that E had made threats to kill her and their children. Another restraining order was issued, barring E from the marital home, and criminal proceedings against E were initiated. The children confirmed the beating by E in subsequent interviews. On 25 May, E visited his two children in their school, and shot his son (A), while A’s younger sister, who had witnessed the scene, was not injured.² E committed suicide and was discovered dead in his car, later that day.

Relying on Article 2 of the ECHR, the applicant claimed that E should have been held in pre-trial detention following her report on 22 May 2012 since there had been an immediate and real risk that E would re-offend against his family, and, therefore, the Austrian authorities failed to protect her and her family.

On appeal, the Grand Chamber of the ECtHR held that there had been no violation of Art.2 (ten votes to seven). The Court highlighted that Article 2 includes a ‘two-part positive obligation.’ First, to ‘take preventive measures to protect an individual whose life the authorities knew or ought to have known was at risk from another individual’s criminal act (*Osman* test),’³ and secondly, to ‘put in place an administrative and legislative framework designed to provide effective deterrence against threats to the right of life.’⁴

¹ *Kurt v Austria* App no 62903/15 (ECHR, 15 June 2021).

² *Ibid* 35-39.

³ *Osman v UK* ECHR 1998-VIII 3124 at para 115.

⁴ *Talpis v Italy* App no 41237/14 (ECHR, 2 February 2014) at para 100.

Regarding the first obligation, the Court assessed the applicant's claim in light of the *Osman* test. The Court considered whether the Austrian authorities knew or ought to have known of the existence of a real and immediate threat to the applicant's children from E. The Court held that the authorities were right to conclude that a more restrictive method (i.e. taking E into pre-trial detention) was not warranted. This was because E's keys were seized and it prevented E from accessing the applicant's and her parent's houses following the 2012 barring order. Also, that there were no indications that E had a weapon or evidence of an escalation of the situation.

Regarding the second obligation, the Court assessed whether the Austrian authorities' measures were adequate and proportionate to the level of the risk assessed. The Court held that even though a legal framework for the applicant's and her children's protection existed, (i.e. banning order, temporary restraining order), full use of it was not made, as an immediate risk to the life of the children (at school) was not perceived at the time.

Therefore, the Court held that there was no violation of Article 2, and the Austrian authorities fulfilled their positive duties by taking necessary actions.

The comparable law in the UK

The *Osman* case is one of the significant cases that was decided by ECtHR against the UK in relation to the positive duty to protect life from acts of others under Article 2. There, the ECtHR decided that there was no breach of Article 2 when an obsessed teacher murdered his student's father, since there was no real and immediate risk to the victim's life and the police had already taken reasonable measures to prevent harm.⁵ The *Osman* case was followed by the decision in *Van Colle v United Kingdom*.⁶ There the Court held that there was no breach of Article 2 when a witness in a fraud trial was murdered by the defendant following the defendant's threats to the witness. This was because there was no special rules for protecting witnesses under Article 2. Moreover, in *Michael v Chief Constable of South Wales*,⁷ the issue was whether the police owed a duty of care to Ms. Michael in negligence and under Article 2. The Supreme Court in *Michael* held that the Article 2 claim turned on whether the call handler ought to have heard Michael say that there had been a threat to kill and since it involved questions of fact, it should be properly determined at trial.⁸

In terms of *Kurt*, the ECtHR relied on the *Osman* test to clarify the general principles related to domestic violence cases. Under this, the Court considered the dynamics and the specific context of domestic violence in its assessment and reconfirmed that the authorities must exercise extra caution when dealing with cases that involve domestic abuse. Moreover, in its judgment the Court highlighted that the

⁵ Ibid

⁶ *Van Colle v UK* App No 7678/09 (ECHR, 13 November 2012).

⁷ *Michael v Chief Constable of South Wales* [2015] UKSC 2.

⁸ Ibid, para 139.

children had not been the main target of E's violence or threats, although the applicant's children had been subjected to physical abuse by their father. Even though this may have been the case as identified by the majority in *Kurt*, according to Soukhanda, violence against children within a common household can appear as a form of punishment against their partner. Therefore, the recurrence of successive episodes within a family unit must be considered by the Court,⁹ and the authorities should have conducted a separate risk assessment for the applicant's children.¹⁰

Moreover, Judge Huseynov, in his concurring opinion in *Kurt*, opined that the case of *Osman* is very different from the context of domestic abuse cases like *Kurt*, because domestic violence cases usually comprise an ongoing cycle of abuse rather than one single incident. This does not mean that the *Osman* test should be completely abandoned in cases that involve domestic violence; instead, it should be used in such a way that it takes into account the unique nature of domestic violence, as opposed to other forms of criminality.¹¹

Impact of the case

Unfortunately, *Kurt*'s reasoning missed a chance to emphasise the importance of diligence when dealing with the vulnerability of the victim and the complex situation of domestic violence cases. Therefore, it is unclear as to whether the national authorities should consider the recent shift in the application of the *Osman* test. In this respect, it remains to be seen whether future cases will clarify this and place a greater emphasis on the standard to be applied in the cases of domestic violence like *Kurt*.

⁹ Soukhanda Kent-Morris, 'Risk assessment for child victims of domestic abuse' [2021] 5 EHRLR 572.

¹⁰ Ibid

¹¹ Stuart Casey, *The Protection of At-Risk Groups and individuals* (OUP, 2021).

R.B. v Estonia [2021] Application No. 22597/16

Introduction

RB v Estonia raises the question whether the applicant's rights were violated under Articles 3 (prohibition of torture) and 8 (right to private and family life) of the European Convention of Human Rights (ECHR). This case concerned a failure to advise a four-year-old child of her duty to tell the truth and their right not to testify against her father, leading to her testimony's exclusion and the father's acquittal of sexual abuse. The European Court of Human Rights (ECtHR) held that the Estonian Supreme Court overlooked RB's vulnerability, failing to adopt measures to protect her rights, integrity and human dignity.

Background Facts

RB is an Estonian citizen, born in 2007. She was four-years-old when in 2012 she reported that she was a victim of sexual abuse by her father. An investigator conducted video-recorded interviews with RB before trial, but RB was not advised of her duty to tell the truth and of her right not to testify against a family member; thus the investigator failed to meet the requirement under the Estonian criminal procedural rules. Due to her young age, RB was not called to testify in court. The video-recorded statements were disclosed, and viewed by the first-instance and appeal courts. In 2014, her father was convicted and appealed to the Estonian Supreme Court. It recognised the failure to advise RB of her procedural rights and obligations under Estonian law, which rendered her testimony inadmissible. R.B.'s father was acquitted in 2015. RB applied to the ECtHR, claiming that Estonian authorities had failed to apply criminal procedural law and to effectively investigate the sexual abuse, amounting to a violation of their positive obligations under Articles 3 and 8 of the ECHR towards RB.

The Decision of the European Court

The ECtHR unanimously held that Estonia violated Articles 3 and 8 of the ECHR. The articles impose positive obligations on the State to protect human dignity and integrity.¹ Article 3 is absolute i.e., torture cannot be legitimate or justified in any circumstances, and undermines the legal system that accepts it.² Torture occurs when the behaviour's severity reaches its highest level, inflicting extremely serious

¹ *M. and C. v Romania* [2011] ECHR 1452 App No. 29032/04, *M.P. and Others v Bulgaria* [2011] ECHR 1920 App No. 22457/08.

² *A v Secretary of State for the Home Department* [2005] UKHL 71.

suffering.³ For example, rape/sexual abuse falls within torture's scope. Article 8 refers to the right to private and family life, including the respect for one's physical/psychological integrity.⁴ It is a conditional right that can only be interfered with when the violation is prescribed by law and necessary in a democratic society for the pursuit of a legitimate aim. Estonian authorities are obliged to investigate allegations effectively,⁵ ensure protection to vulnerable children,⁶ apply adequate laws preventing ill-treatment inflicted by others⁷ and establish efficient laws to punish perpetrators.⁸ The ECtHR underlined that authorities must adopt child-friendly procedural rules to safeguard the child's testimony.⁹ The Estonian authorities failed to take reasonable steps to protect RB's testimony.¹⁰ The ECtHR emphasised that Estonia was obliged under the ECHR to uphold the respect for the child's best interests, the protection of human dignity and integrity of R.B.¹¹ The Estonian authorities equally failed to consider RB's vulnerability, rights, and needs as a victim of sexual abuse.¹²

The ECtHR noted that when advising child witnesses of their rights/duties, their age and level of understanding must be considered. Estonian law does not provide exceptions/adaptations for child witnesses, and the Estonian authorities rendered RB's testimony inadmissible due to the strict application of procedural rules that do not draw a distinction between adult and child witnesses. The ECtHR reiterated that Estonian authorities are responsible for interpreting/applying domestic law, and that the ECtHR's role is to determine whether that interpretation is in line with the ECHR.¹³ The ECtHR decided that there were significant flaws in Estonian authorities' response to RB's alleged rape claim by her father. The ECtHR held that the way that the criminal legal mechanisms were implemented was defective and, thus, the Estonian State is accountable for a violation of its positive obligations under Articles 3 and 8 of the ECHR.

Analysis of comparable law and its impact

In *RB v Estonia*, the ECtHR's approach regarding the State's obligation to protect children from sexual abuse is based on its settled case law. The decision reiterates the principles established in the previous cases: *M. and C. v Romania*, *M.P. and Others v Bulgaria*, *X. and Y. v The Netherlands*, *M.C. v Bulgaria*, *Soderman v Sweden*, *X and Others v Bulgaria*, *G.U. v Turkey*, *Z. v Bulgaria*, *M.M.B. v Slovakia*, *C.A.S.*

³ *Aksoy v Turkey* [1997] 23 EHRR 553 App No. 21987/93.

⁴ Steve Foster, *Human Rights and Civil Liberties* (Longman, 3rd ed, 2011), 71.

⁵ *X. and Y. v The Netherlands* [1985] ECHR 4 App No. 8978/80.

⁶ *M.C. v Bulgaria* [2003] ECHR 651 App No. 39272/98.

⁷ *Soderman v Sweden* [2013] ECHR 1357 App No. 5786/08.

⁸ *X and Others v Bulgaria* [2021] ECHR 93 App No. 22457/16.

⁹ *G.U. v Turkey* [2016] ECHR 907 App No. 16143/10.

¹⁰ *Z. v Bulgaria* [2020] ECHR 358 App No. 39257/17.

¹¹ *M.M.B. v Slovakia* [2019] ECHR 839 App No. 6318/17; *C.A.S. and C.S. v Romania* [2012] ECHR 512 App No 26692/05.

¹² *A and B v Croatia* [2019] ECHR 478 App No. 7144/15.

¹³ *Selahattin Demirtas v Turkey (no. 2) v Turkey* [2020] ECHR 922 App No. 14305/17.

and *C.S. v Romania*, *A and B v Croatia*. Additionally, in *A v the United Kingdom*,¹⁴ the ECtHR held that the UK has a positive duty to protect its vulnerable citizens from physical harm when it reaches the relevant high severity level. It clarified that severity was based on the victim's young age, and that the UK violated the ECHR by failing to protect a nine-year-old child who was violently beaten by his step-father. In *Z and Others v. the United Kingdom*,¹⁵ the ECtHR decided that UK law and remedies were insufficient and stressed that the State has a duty to protect the child at risk. In *E and Others v. the United Kingdom*,¹⁶ the ECtHR held that prolonged sexual abuse met the threshold of an Article 3 violation. The ECtHR stated that "a failure to take reasonably available measures which could have had a real prospect of altering the outcome or mitigating the harm is sufficient to engage the responsibility of the State."¹⁷

The ECtHR's ruling is compatible with the settled UK case law and statute. In *M (A Child)*,¹⁸ the court held that a man sexually abused the nine-year-old granddaughter of his partner. In *Wolverhampton City Council v JA*,¹⁹ the court held that two sisters aged 12 and 13 were sexually abused by their father and their mother's former partners. In *K (Children), Re*,²⁰ the Court of Appeal upheld the first-instance judge ruling that a father sexually abused his six-year-old daughter, attacking her physical integrity. Further, ss.5, 6 and 7 of the Sexual Offences Act 2003 cover rape, assault by penetration and sexual assault in cases where the victim is a child aged under 13. The child cannot give consent and the sexual offence is complete if sexual intercourse, penetration or touching occurs.

The ECtHR's decision demonstrates a children's rights-based approach, following principles of child-friendly justice.²¹ Sexually abused children are seen as "particularly vulnerable" individuals.²² In *R.B. v Estonia*, the ECtHR stressed the importance of adapting the States' judicial systems to child-friendly frameworks and of adopting measures that guarantee special legal protection to children particularly in cases involving sexual violence. This case plays a vital role in promoting child-friendly procedures in Estonia and in other States.

¹⁴ [1998] App No. 95599/94.

¹⁵ [2001] App No. 29392/95.

¹⁶ [2002] App No. 33218/96.

¹⁷ *Ibid*, para 99.

¹⁸ [2017] EWCA Civ 2445.

¹⁹ [2017] EWFC 62.

²⁰ [2019] EWCA Civ 184.

²¹ Committee of Ministers of the Council of Europe, *Guidelines of the Committee of Ministers of the Council of Europe on child friendly justice* (17 November 2010).

²² *A and B v Croatia* [2019] ECHR 478 App No. 7144/15.

Leo Hope

Kurt v Austria [2021] Application No 62903/15 (15th June 2021)

Introduction

The Grand Chamber judgment in *Kurt v Austria* has been hailed by Ronald McQuigg as "highly important,¹ and a much-anticipated development in the court's jurisprudence on domestic violence."² The case was concerned with whether the Austrian authorities had failed to sufficiently protect Ms Kurt and her children from her violent husband in the events leading up to the fatal shooting of their son, as required under Article 2 of the European Convention Human Rights

Background and facts

Prior to the fatal shooting in 2012, below Ms Kurt had made Austrian authorities aware on two occasions, once in 2010 and once in 2012, that both her and her children were subjected to an array of domestic violence offences. On the two occasions Ms Kurt had reported this, the Austrian authorities responded by issuing two barring and protection orders under section 38a Security and Police Act³ against the husband. At the time, the second barring order was issued; however, Ms Kurt raised that her husband had raped her and made serious threats towards both her and her children's lives. The 2012 barring order did protect Ms Kurt and her children at their residency, but this did not extend to the children's school. This is of the utmost significance with regards to this litigation as this was where the fatal shooting of the son took place on 25th May 2012.

Ms Kurt, therefore, brought proceedings before the ECtHR against the Austrian authorities for failing under their positive obligation under Article 2 to protect her children from not only a real and immediate risk the husband posed to both her and her children but also against the adequacy of the barring order put in place as a protective measure. Ms Kurt believed her husband should have been placed in pre-trial detention. In 2019⁴, the Fifth Chamber found

¹ Ronald McQuigg, 'Kurt v Austria: domestic violence before the Grand Chamber of the European court of Human Rights' [2021] 5 EHRLR 550.

² Ibid 550.

³ [2021] Application No. 62903/15, [14].

⁴ *Kurt v Austria* [2019] Application No. 62903/15, decision 4 July 2019).

unanimously there to be no breach on behalf of Austrian authorities of Article 2, and thus under Article 43⁵ was referred to the Grand Chamber.

The Grand Chamber Judgment

In determining whether there was a breach by the Austrian authorities of their positive obligations under Article 2, the Grand Chamber laid down and expanded upon the test in *Osman*⁶ as assessing whether there was a "real and immediate risk"⁷ to life also required further consideration as to the "specific context and dynamics of domestic violence".⁸ The Grand Chamber had to determine in this case whether firstly the Austrian authorities had acted immediately and with special diligence to domestic violence allegations. Secondly, whether an "autonomous, proactive and comprehensive"⁹ risk assessment was undertaken by the authorities and thirdly, as a result of the risk assessment whether the Austrian authorities should have known there was a real and immediate risk to the life of Ms Kurt's son. By a ten to seven majority, the Grand Chamber held in favour that these principles had been adequately satisfied and thus that the Austrian authorities had not failed under their positive obligation under Article 2 when protecting Ms Kurt and her children.

Despite the majority acknowledging the children had been subjected to abuse by their father, it was held that because they were not the "main targets of the husbands' threats"¹⁰, it could not be satisfied that the father presented as a real and immediate risk to the children's lives, specifically with regards to the son based on the information provided. In this particular case, the dissenting judges highlighted significant flaws and failings on behalf of the Austrian authorities. Whilst they agreed with the principles laid down when expanding the *Osman* test to the present domestic violence case, they did not believe the risk assessment undertaken by the Austrian authorities was sufficient. They noted that the Austrian authorities had not sufficiently prioritised the children in this case despite the fact that "Children who are victims of domestic violence are particularly vulnerable individuals and thus entitled to protection against serious breaches of personal integrity"¹¹ as noted in *Talpis*¹² and *Voldina*¹³.

⁵ Article 43 European Convention on Human Rights.

⁶ *Osman v United Kingdom* [1998] Application No. 23452/94 (decision 28 October 1998).

⁷ *Ibid* [116]

⁸ [2021] Application No. 62903/15, [164].

⁹ [2021] Application No. 62903/15, [168].

¹⁰ [2021] Application No. 62903/15, [206].

¹¹ [2021] Application No. 62903/15, [12].

¹² *Talpis v Italy* [2017] Application No. 41237/14 (decision 2 March 2017).

¹³ *Voldina v Russia* [2019] Application No. 41261/17 (decision 9 July 2019).

Comparable Law to the UK

Whilst the *Osman* test has not been expanded upon in UK domestic law the way in which *Kurt v Austria* was in the Grand Chamber, this does not exclude the *Osman* tests importance in determining whether Article 2 has been breached by public authorities under their positive duty in the UK. The *Osman* test specifically in determining whether authorities “should have known or ought to have known at the time of a real and immediate risk to life”¹⁴ is a test that has proved vitally important in the decisions laid down in *Michael v Chief Constable of South Police*¹⁵ and in *Van Colle*.¹⁶

When determining whether the police had failed under their positive obligation under Article 2 to protect *Van Colle* from Mr Brougham in the events leading up to him being murdered, Lord Bingham stated that “every ingredient” of the *Osman* test is significantly important. This is a rather similar attitude to that shown by the judges in the Grand Chamber of *Kurt v Austria*. It was held that despite the police being aware of Mr Brougham intimidating and threatening Van Colle, this did not pose a sufficiently real and immediate risk on his life, thus falling short of breaching Article 2, where the ECtHR¹⁷ later reaffirmed the House of Lords decision in 2012.

Lord Carswell in *Re Officer L*¹⁸ has emphasised the importance of the *Osman* test in relation to Article 2 but has highlighted the difficulty it presents when trying to satisfy it due to its “high threshold”¹⁹ to meet. *Osman* has made it clear that a positive obligation under article 2 cannot impose an “impossible or disproportionate burden”²⁰.

Kurt v Austria’s impact on the UK

The impact of *Kurt v Austria* has not gone unnoticed with academics such as Lisa Marie Weinberger stating that the case has provided much-needed clarity on “general principles regarding domestic violence”²¹ for the ECtHR. The impact this case will also have on the UK

¹⁴ *Osman v United Kingdom* [1998] Application No. 23452/94 (28 October 1998), [116].

¹⁵ [2015] UKSC 2, [2015] AC 1732.

¹⁶ *Van Colle* [2008] UKHL 50, [2009] 1 AC 225.

¹⁷ *Van Colle v United Kingdom* [2012] Application No. 7678/09 (13 November 2012).

¹⁸ [2007] UKHL 36, [2007] 1 WLR 2135.

¹⁹ *Ibid*, 2143 (Lord Carswell).

²⁰ *Osman v United Kingdom* [1998] Application No. 23452/94 (28 October 1998) [116].

²¹ Lisa Maria Weinberger, ‘Kurt v Austria: A missed chance to tackle intersectional discrimination and gender based stereotyping in domestic violence cases’ (*Strasbourg Gobscribers*, August 18th 2021)

is essential and significant to establish as s.2(1) of the Human Rights Act 1998 states that ECtHR decisions "must be taken into account"²² by domestic courts if an issue of domestic violence arises. How this Grand Chamber case will be used and applied by judges in domestic case law moving forward is an exciting wait, to say the least. This is especially so when considering the fact that ECtHR cases such as *Kontrava v Slovakia*²³ have been referred by the House of Lords in *Van Colle* to as a significant source of authority.

<https://strasbourgothers.com/2021/08/18/kurt-v-austria-a-missed-chance-to-tackle-intersectional-discrimination-and-gender-based-stereotyping-in-domestic-violence-cases/> accessed 5th December 2021.

²² Human Rights Act 1998, s 2 (1).

²³ [2007] Application No. 7510/04 (decision 31 May 2007).