
DOMESTIC VIOLENCE IN CASE-LAW OF EUROPEAN COURT OF HUMAN RIGHTS

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Annotation. For various reasons domestic violence became one of the main issues on human rights in Lithuania recently. Lithuania has some experience complying with international human rights standards already. Of course, it faces some difficulties. Case-law of European Court of Human Rights is a helpful source for states seeking to carry out effectively their international duty to protect individuals from domestic violence. So, it's worthwhile to know the general context of the case-law of European Court of Human Rights on this issue. Thus this paper analyses the case-law of European Court of Human Rights on domestic violence issues, precisely – violence against women. Specific human rights (set in the European Convention on Human Rights and Fundamental Freedoms) violation of which may arise from the acts of domestic violence are highlighted. The main rules and principles applied in cases involving domestic violence are discussed.

Keywords: domestic violence, human rights.

INTRODUCTION

Recently one of the main issues on human rights in Lithuania is domestic violence. This happened for various reasons. One of them – recent tragedies of domestic violence which shocked Lithuania's society. Adoption of a new specific Law on protection Against Domestic Violence¹ (came into force in 15/12/2011) also provoked big discussions. Another reason for active considerations on this topic is a significant progress in the actions of Lithuania's authorities preparing to ratify Council's of Europe Convention on Preventing and Combating Violence Against Women and Domestic Violence, which is focused specifically on preventing domestic violence, protecting victims and prosecuting offenders². Yet another significant factor – recent decisions of European Court of Human Rights (hereinafter – ECHR or Court) against Lithuania on domestic violence issues. In these cases Lithuania was found

¹ Valstybės žinios, 14/16/2011, No. 72-3475.

² <http://www.coe.int/t/dghl/standardsetting/convention-violence/convention/Convention%202010%20English.pdf> [interactive] [accessed 28/04/2014]

or has admitted itself to be violated human rights established in European Convention on Human Rights and Fundamental Freedoms³ (hereinafter – Convention).

So it's worthwhile to know the general context of the Court's case-law on domestic violence issues.

The object of this research is case-law of European Court of Human Rights on domestic violence issues. Chosen cases deals with the issues of violence against women specifically, at some aspects – the other related persons (their members of family, relatives, *etc.*) also.

The objective of this research is to disclose the main aspects of case-law of European Court of Human Rights on domestic violence issues. In order to achieve the determined aim the following tasks are settled: 1. to review and generalize cases of the Court on the object of a research; 2. to identify specific human rights under the Convention violation of which may arouse from the acts of domestic violence. 3. to discuss the main rules and principles applied by the Court in cases of domestic violence.

Methods of the research. To accomplish mentioned tasks method of analysis of case-law, methods of logical, systemic and comparatyvistic analysis were used.

RESPECT FOR PRIVATE AND FAMILY LIFE

One of the most significant Court's conclusions concerning the obligations of states in cases of domestic violence is that considering domestic violence to be a “private matter” requiring a private prosecution is incompatible with the authorities' obligation to protect person's family life established in Article 8 of the Convention⁴. This was reiterated in *Bevacqua and S. v. Bulgaria*⁵ (§83). The Court also used a rule of customary international law that obliges states to prevent and respond to acts of violence against women with due diligence (§53). The applicant and her husband, who had separated and were divorcing, wished to obtain the custody of their three-year old son and seized the boy repeatedly from each other, including by using physical force. The husband assaulted the applicant repeatedly,

³ European Convention for the Protection of Human Rights and Fundamental Freedoms (adopted 4 November 1950, entered into force 3 September 1953). ETS 5; 213 UNTS 221 (ECHR).

⁴ **Article 8**

Right to respect for private and family life

1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

⁵ *Bevacqua and S. v. Bulgaria*. Application no. [71127/01](#). 12 June 2008.

so she requested interim custody measures and sought assistance in relation to her husband's aggressive behaviour. While the essential object of Article 8 is to protect the individual against arbitrary action by the public authorities, these obligations may involve the adoption of measures in the sphere of the relations of individuals between themselves. Children and other vulnerable individuals, in particular, are entitled to effective protection (§64). The authorities' positive obligations may include a duty to maintain and apply in practice an adequate legal framework affording protection against acts of violence by private individuals. The particular vulnerability of the victims of domestic violence and the need for active state involvement in their protection has been emphasised in a number of international instruments. The concept of private life includes a person's physical and psychological integrity (§65). Stating that the behaviour of the applicant's husband concerned her physical integrity and well-being, the Court came to the conclusion that at the relevant time Bulgarian law did not provide for specific administrative and policing measures and the measures taken by the police and prosecuting authorities on the basis of their general powers did not prove effective. The possibility for the applicant to bring private prosecution proceedings and seek damages was not sufficient as such proceedings obviously required time and could not serve to prevent recurrence of the incidents complained of. In the Court's view, the authorities' failure to impose sanctions or otherwise enforce husband's obligation to refrain from unlawful acts was critical in the circumstances of this case, as it amounted to a refusal to provide the immediate assistance the applicant needed (§83).

The right to respect for one's family life under Article 8 includes a parent's right to being reunited with his or her child and an obligation – albeit not absolute – on the national authorities to take such action (§65). The Court observed that because of its very nature and purpose, an application for interim custody measures must normally be treated with a certain degree of priority, unless there are specific reasons not to do so. No such reasons appear to have existed in this case, because the application was based, *inter alia*, on allegations of aggressive behaviour and thus, contrary to domestic courts' practice, clearly called for priority examination (§68). Prompt measures were needed, in particular, in the child's interest (§72). The national court did not treat the matter with any degree of priority: during the first six months, ignored the issue of interim measures, later handled it for a period of approximately eight months, until the applicant withdrew her request (§70, 71, 76). So the Court considered that the authorities' duty under Article 8 to secure respect for the right to private and family

life of the applicant and second applicant – her son – required the examination of the interim measures application with due diligence and without delay. They were also under a duty to secure the enjoyment of both applicants’ right to normal contacts between them (§73). And they failed to fulfil them.

In *A v. Croatia*⁶ the main ground to conclude state’s violation of a right to private life was its failure to implement decisions of the courts. A female applicant in the period of several years had experienced verbal (including serious death threats) and physical (including hitting and kicking the applicant in the head, face and body, causing injuries) violence by her ex-husband who suffered from severe mental disorders. He was recommended compulsory psychiatric treatment. He often abused the applicant in front of their minor daughter and, on several occasions, turned violent towards her too. The applicant brought a number of separate criminal and minor offences proceedings against him. Some protective measures, ordered by the court, were implemented, others – including compulsory psycho-social treatment – were not. Ex-husband, in violation of a restraining order against him, had hired a private detective who had come to an applicant’s secret address. Her request for an additional protective measure prohibiting him from harassing and stalking her was dismissed on the ground that she had not shown an immediate risk to her life. The ECHR admitted that violence experienced by the applicant pertains to the right to private life because it had interfered with her physical and moral, psychological integrity which is covered by the concept of private life. Under Article 8 states have a positive duty to adopt, maintain and apply in practice an adequate legal framework affording protection against acts of violence by private individuals (§58–60).

It’s worth to note that the Court announced the complaint incompatible *ratione materiae* under Article 6 of the Convention⁷ (fair and public hearing within a reasonable time), because it relates to criminal proceedings against third persons, not the applicant herself (§82–83).

⁶*A v. Croatia*. Application no. 55164/08. 14 October 2010.

⁷Article 6

Right to a fair trial

1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.
2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.
3. Everyone charged with a criminal offence has the following minimum rights:

As to the Article 13 (effective remedy for violation of human rights) the opinion of the Court was that the very same issues (failure of the national authorities to enforce their own decisions had no effective remedy to obtain protection against ex-husband's violence) have already been examined under Article 8 of the Convention and have led to a finding of a violation of Convention. Therefore, it is not necessary to examine the complaint under Article 13 (§87).

Not only actual physical violence may give rise to violation of Article 8. In *Hajduova v. Slovakia* the applicant both verbally and physically was attacked by her husband suffering from a serious personality disorder. She suffered a minor injury and feared for her life and safety, so she moved out of the family home with her children. The husband continued to threaten to kill her repeatedly. National court convicted him, but decided not to impose a prison sentence on him and held that he should undergo psychiatric treatment. The hospital did not carry out the treatment, nor did the national court ordered to carry it out. After his release from hospital the husband verbally threatened the applicant and her lawyer. And only after repeated criminal complaints he was transported to the hospital. In the Court's view, repeated threats after husband's release from hospital, which constitute the basis of the applicant's complaint under Article 8 of the Convention, did not actually materialise into physical violence. Notwithstanding, because of history of physical abuse any threats made by him would arouse in the applicant a well-founded fear that they might be carried out. This, in the Court's estimation, would be enough to affect her psychological integrity and well-being protected by Article 8 (§49) and imposing domestic authorities a duty to take reasonable preventive measures where they knew or ought to have known at the time of the existence of a real and immediate risk (Osman test). Furthermore the particular vulnerability of victims of domestic violence which the Court has highlighted in its case-law the domestic authorities should have exercised an even greater degree of vigilance in the present case (§50). The ECHR found that the national court's failure to comply with its statutory obligation to order perpetrator's detention for psychiatric treatment following his conviction amounted to a

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- (a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;
 - (b) to have adequate time and facilities for the preparation of his defence;
 - (c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;
 - (d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
 - (e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court.

breach of the state's positive obligations under Article 8 of the Convention to secure respect for the applicant's private life (§52).

Applicant's complaint under Article 5 of the Convention⁸ alleging that national court's failure to order psychiatric treatment for perpetrator violated her right to security was found incompatible *ratione materiae*. The Court referred to its pertinent jurisprudence that the concept of security must be understood in the context of physical liberty rather than physical safety (§54–55).

The positive duty of a state to protect the right to private life isn't excluded by the fact that the applicant herself had also been violent towards her perpetrator. This is the conclusion the Court made in *Kalucza v. Hungary*⁹ where the applicant was posed to the threat to her physical integrity by her former common-law husband (§61). The applicant involuntarily shared her home with this person as co-owners. Mutual verbal and physical assaults occurred on a regular basis. Criminal complaints, repeated requests for a restraining order and civil proceedings to order his eviction from their flat were to no avail. The applicant was excluded from the protection of specific legal act which afforded protection only to married couples, divorced people and former registered partners (§67). The Court found that the domestic

⁸Article 5

Right to liberty and security

1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

- (a) the lawful detention of a person after conviction by a competent court;
- (b) the lawful arrest or detention of a person for noncompliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;
- (c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;
- (d) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;
- (e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;
- (f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.

2. Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.

3. Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.

4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.

5. Everyone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation.

⁹*Kalucza v. Hungary*. Application no. 57693/10. 24 April 2012.

courts failed to comply with their positive obligation to decide the cases within a reasonable time and criticised their approach that restraining order could not be issued as both parties were involved in the assaults: the aim of providing effective protection to victims would be seriously undermined (§68, 66). For the Court, protection equally applies in situations where an individual's right to the enjoyment of his home free of violent disturbance is at stake.

Generalizing, domestic violence depending on factual and legal background of the case raises violation of different aspects of the right to private and family life: person's physical and psychological integrity, parent's right to being reunited with his or her child, right to the enjoyment of a person's home free of violent disturbance. Not only actual physical violence, but other forms of violence (threats, for example) may give rise to violation of this right. Victim's violence towards the aggressor doesn't remove the positive duty of a state to protect the right to private and family life.

PROHIBITION OF DEGRADING, INHUMAN TREATMENT AND TORTURE

In *Valiuliene v. Lithuania*¹⁰ the Government of Lithuania taking into account previous case-law of the Court in similar cases presented the Court with a unilateral declaration, acknowledging a violation of Article 8¹¹ (see also concurring and dissenting opinions in *Valiulienė v. Lithuania*). But the Court decided not to accept it (§5) and concluded that the ill-treatment of the applicant in this case, which continually caused her physical injuries, combined with her feelings of fear and helplessness, was sufficiently serious to reach the level of severity under Article 3 of the Convention¹² and thus raised the Government's positive obligation under this provision taken together with Article 1¹³ (§70). The female applicant complained she had been beaten by her male partner on several occasions. The Court grounded its decision on its own case-law interpreting Article 3: ill-treatment must attain a minimum level of severity to fall within the scope of Article 3. The assessment of this

¹⁰*Valiulienė v. Lithuania*. Application no. 33234/07. 26 March 2013.

¹¹ Lietuvos Respublikos Vyriausybės atstovo Europos žmogaus teisių teisme 2013 metų veiklos ataskaita [The Report of the Activity in 2013 of the Agent of the Government of the Republic of Lithuania to the European Court of Human Rights]. 1 March 2014. http://www.tm.lt/dok/LRV_%20atstovo_ataskaita_2013.pdf. P.11.

¹²Article 3

Prohibition of torture

No one shall be subjected to torture or to inhuman or degrading treatment or punishment.

¹³Article 1

Obligation to respect human rights

The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention.

minimum is relative: it depends on all the circumstances of the case, such as the nature and context of the treatment, its duration, its physical and mental effects and, in some instances, the sex, age and state of health of the victim. Treatment has been held by the Court to be “inhuman” because, inter alia, it was premeditated, was applied for hours at a stretch and caused either actual bodily injury or intense physical and mental suffering. Treatment has been considered “degrading” when it was such as to arouse in its victims feelings of fear, anguish and inferiority, capable of humiliating and debasing them and possibly breaking their physical or moral resistance (§65, 66). Article 3 requires states to put in place effective criminal-law provisions to deter of offences against personal integrity, backed up by law-enforcement machinery for the prevention, suppression and punishment of breaches of such provisions which the authorities knew or ought to have known of (§75, 77). The Court concluded, that in the instant case Lithuanian law provided a sufficient regulatory framework to pursue the crimes against applicant (§78). But the practices and the manner in which those criminal-law mechanisms were implemented in the instant case, were defective to the point of constituting a violation of Lithuania's positive obligations under Article 3 of the Convention (§79-86). Because of the flaws in the actions of the relevant state authorities investigation was ineffective and did not provide adequate protection to the applicant against acts of violence: the criminal proceedings by Lithuanian authorities were discontinued because the prosecution has become time-barred, the case was never established by a competent court.

The most recent case against Lithuania *D.P. v. Lithuania*¹⁴ dealt with domestic violence issues also, but this time violence not only against the woman, but her children too. It was declared a violation of Article 3 of the Convention in this case also, this time by a unilateral declaration of Lithuania. The state taking into account the mentioned Court’s conclusion in *Valiuliene v. Lithuania* acknowledged that the manner in which the criminal-law mechanisms had been implemented in the instant case was defective as far as the proceedings were concerned, to the point of constituting a violation of the State’s positive obligations under Article 3 of the Convention (§32). An applicant and her children had experienced systematic beatings by her husband and father of children. Physical and psychological violence continued after divorce: he kept frightening, threatening, terrorizing the children. She alleged that father’s behaviour had had a negative psychological impact on children and had contributed to her son’s suicide. The state acknowledged that the criminal case was not

¹⁴*D.P. v. Lithuania*. Application no. [27920/08](#). 22 October 2013.

examined within the reasonable time and became time barred, so the applicant has not been ensured effective protection of the rights guaranteed by Article 3 of the Convention (§37).

The same conclusion was made in *E.M. v. Romania*¹⁵. Criminal proceedings accusing the female applicant's husband of threats, insults, assault and other acts of violence in the presence of their minor daughter have resulted in acquittal grounding it on the lack of evidences. The Court stated a failure in criminal proceedings to take measures necessary to assess credibility of an alleged act of domestic violence that was supported by forensic evidence. There was a lack of cooperation between the authorities responsible for intervening in domestic violence cases, which had impeded clarification of the facts. Although the applicant had complained only of one incident, the authorities were nonetheless under a duty to act with diligence and to take the matter seriously where the alleged existence of an act of domestic violence, supported by forensic evidence, was brought to their attention.

These cases illustrates the Court's interpretation in other cases that Convention is a living instrument and that the increasingly high standard being required in the area of the protection of human rights and fundamental liberties correspondingly and inevitably requires greater firmness in assessing breaches of the fundamental values of democratic societies¹⁶.

Accordingly, the ill-treatment (even a single act) causing physical injuries, combined with feelings of fear and helplessness, can be sufficiently serious not only to endanger person's physical and psychological integrity, but to reach the level of severity under Article 3 of the Convention also.

RIGHT TO BE NOT DISCRIMINATED

Non-discrimination is an essential component to the realization of women's right. Recognizing gendered violence as a violation of women's rights has been a masive achievement of international human rights' law¹⁷. Of course, not every case of domestic violence against women is gendered based¹⁸. However, in *Mudric v. Moldova*¹⁹ the Court found not only violation of Article 3 of the Convention, but – because of gender based

¹⁵ *E.M. v. Romania*. Application no. [43994/05](#). 30 October 2012.

¹⁶ *A v. Croatia*. *Ibid*, §67.

¹⁷ Otto D. Women's Rights. *International Human Rights Law*. Oxford University Press, 2010. P. 343, 362–363).

¹⁸ Vaigė L. The Concept of Domestic violence in Lithuania and the Concept of Gender from the Perspective of International law. *Socialinių mokslų studijos* [Societal Studies]. 2013, 5 (1). P. 270.

¹⁹ *Mudric v. Moldova*. Application no. [74839/10](#). 16 July 2013.

violence – Article 14²⁰ in conjunction (prohibition of discrimination). The applicant complained that the authorities had tolerated physical and verbal attacks at her home by her ex-husband, and had failed to enforce protection court orders. The Court concluded that fear of further beatings and following beatings, breaking into applicant's house and living there were sufficiently serious to cause the applicant suffering and anxiety amounting to inhuman treatment within the meaning of Article 3 of the Convention (§45). So the Court concluded that the manner in which the authorities had handled the case (long and unexplained delays in enforcing the court protection orders, not subjecting ex-husband to mandatory medical treatment, not starting the criminal proceedings in respect of violence) amounted to a failure to comply with their positive obligations under Article 3 of the Convention (§48, 50, 55).

The Court has already accepted in its case-law that a general policy or measure which is apparently neutral but has disproportionately prejudicial effects on persons or groups of persons who, as for instance, are identifiable only on the basis of gender, may be considered discriminatory notwithstanding that it is not specifically aimed at that group, unless that measure is objectively justified by a legitimate aim and the means of achieving that aim are appropriate, necessary and proportionate. Where an applicant produces *prima facie* evidence that the effect of a measure or practice is discriminatory, the burden of proof will shift on to the respondent state, to whom it falls to show that the difference in treatment is not discriminatory (*A. v. Croatia*, §94²¹). In the Court's opinion, the facts of this case and the findings of the United Nations Special rapporteur on violence against women about domestic violence in Moldova clearly demonstrates that the authorities amounted to repeatedly condoning such violence and reflected a discriminatory attitude towards her as a woman (§63).

Sufficient *prima facie* evidence was also found in cases, where the discriminatory gender based nature of state's failure to protect from inhuman treatment is proved by findings of the United Nations Special rapporteur on violence against women and the National Bureau of Statistics supported by the specific facts of the case: a prosecutor's refusal to start a criminal investigation for physical and psychological abuse by ex-husband towards female

²⁰Article 14

Prohibition of discrimination

The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

²¹*A. v. Croatia*. Application no. 55164/08. 14 October 2010.

applicant and her minor daughter on the ground that the injuries weren't severe enough; prolonged consideration for a protection order and failure to send it for enforcement; suspension of enforcement of the order to evict the perpetrator, thus forcing the applicants to move into a refuge; applicants' fear of further assaults – in *T.M., C.M. v. Moldova*²² (§62); pressing by police officials to withdraw complaint against aggressor; shielding him from all responsibility by prosecutor's decision to conditionally suspend the proceedings; suggesting reconciliation by social workers since the applicant was “not the first nor the last woman to be beaten up by her husband” – in *Eremia v. The Republic of Moldova*²³(§89)).

And on the contrary, if an applicant doesn't produce sufficient *prima facie* evidence the complaint under Article 14 is rejected: failure to show different treatment compared to others in analogous situations (*Kalucza v. Hungary*, §75²⁴); the fact that certain acts of domestic violence may be the subject of minor offences, but not criminal proceedings does not in itself appear discriminatory on the basis of gender, especially where efforts to seek protection against violence weren't hampered by state authorities (*A. v. Croatia*, §97, 100–101²⁵).

Summarizing, the Court's findings of gender based discrimination are relied on sufficient *prima facie* evidence produced by applicant and supported by statistical data and specific national and international law: customary law (due diligence), provisions of legislation (CEDAW, Belém do Pará Convention), case-law and findings of various bodies (United Nations Special rapporteur on violence against women, CEDAW Committee, United Nations Commission on Human Rights, Inter-American Commission).

MULTIPLE VIOLATIONS

It was already mentioned that ECHR found a violation of Article 8 in *A. v. Croatia*. But it declared that there is no need to examine the complaint under Article 3. In *Valiulienė v. Lithuania* the decision of the Court was opposite. The conclusion in both instances was grounded on the argument that after finding a violation of Convention under one article no separate issue remained under another article because the essence has already been dealt in context of the former. But the Court's case-law shows that there are instances when state's failure to fulfil obligation amounted to violation of both Article 3 and 8. For example, in *B. v.*

²²*T.M., C.M. v. Moldova*. Application no. 26608/11. 28 January 2014.

²³*Eremia v. The Republic of Moldova*. Application no. 3564/11. 28 May 2013.

²⁴*Kalucza v. Hungary*. Application no. 57693/10. 24 April 2012.

²⁵*A. v. Croatia*. Application no. 55164/08. 14 October 2010.

*Republic of Moldova*²⁶ the Court concluded that allowing the aggressor – ex-husband of an applicant – to live in the same apartment as his victim thus rendering ineffective protection order and not prosecuting in public interests exposed her to the risk of further ill-treatment; subjected the applicant to constant fear of further ill-treatment. This fear was sufficiently serious to cause the applicant suffering and anxiety amounting to inhuman treatment within the meaning of Article 3 of the Convention (§58). Besides, the applicant's physical and moral integrity has been affected by periodic abuse in her own apartment, therefore state authorities have failed to balance the rights involved (the applicant's right not to be subjected to ill-treatment and ex-husband's right to use the apartment) and forced the first applicant to continue risking being subjected to violence or to leave home thus violating Article 8 of the Convention.

In *E.S. and others v. Slovakia*²⁷ state has admitted that it failed to discharge the positive obligation to protect the rights of the children applicants under Articles 3 and 8 of the Convention, but not the rights of their mother. She filed a criminal complaint against her husband on the ground that he had ill-treated both her and the children and had sexually abused one of their daughters. He was convicted subsequently, but meanwhile she requested an interim measure ordering her husband to move out of their apartment. The request was dismissed on the ground that the husband had a joint tenancy right and this would restrict his right to use the apartment. The applicants had to move away from their home, their family, their friends and school. The ECHR concluded that until aggressor's conviction and exclusion him from joint tenancy (a period of some years) no effective remedy was open to the applicant by which she could secure protection for herself and her children against the treatment by her husband which reached the threshold of Articles 3 and 8 in respect of all applicants (§43).

In *Eremia v. The Republic of Moldova* the Court found a violation of Article 14 in conjunction to Article 3 in respect of female applicant and Article 8 in respect of other applicants – her daughters. Physical injuries and the fear of further assaults was sufficiently serious to cause the first applicant to experience suffering and anxiety amounting to inhuman treatment within the meaning of Article 3 of the Convention (§54). The aggressor (husband of applicant) was a trained police officer, so the risk to the applicant's physical and

²⁶ *B. v. Republic of Moldova*. Application no. 61382/09. 16 July 2013.

²⁷ *E.S. and others v. Slovakia*. Application no. 8227/04. 15 September 2009.

psychological well-being was imminent and serious enough as to require the authorities to act swiftly (§61). The investigation on his violence was suspended with the possibility to be completely released from criminal liability if he committed no further offences for one year, despite his disregard of the protection order not to enter family house, thus shielding him from criminal liability. These facts led the Court to the conclusion that state failed to take effective measures against aggressor and to ensure his punishment (§66). Psychological well-being of other applicants has been adversely affected by verbal abuse and repeatedly witnessing their father's violence against their mother in the family home. So, according to the Court, the domestic authorities did not properly comply with their positive obligations under Article 8 of the Convention in respect of other applicants (§79).

However, the Court rejected the complaint under Article 17 of the Convention²⁸ (prohibition of abuse of rights) as unsubstantiated and manifestly ill-founded in this case. Review of analysed cases shows that the Court rejected complaints under Articles 5, 6, 17. The most common reason for this was that such complaints raised no separate issue or were unsubstantiated.

RIGHT TO LIFE

It was not until 1995 that ECHR took its first decision on the merits under Article 2 (*McCann v. UK*). Since then, it has decided many more Article 2 cases with the result that the meaning of this article has become much clearer and very extensive²⁹. Article 2 of the Convention³⁰ enjoins the state to take appropriate steps to safeguard the lives of those within its jurisdiction. This involves a primary duty on the state to secure the right to life by putting in place effective criminal-law provisions to deter the commission of offences against the

²⁸ Article 17

Prohibition of abuse of rights

Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention.

²⁹ Harris D.J., O'Boyle M., Bates E.P., Buckley C.M. *Law of the European Convention of Human Rights*. Oxford University Press, 2009. P. 66.

³⁰ Article 2

Right to life

1. Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.
2. Deprivation of life shall not be regarded as inflicted in contravention of this Article when it results from the use of force which is no more than absolutely necessary:
 - (a) in defence of any person from unlawful violence;
 - (b) in order to effect a lawful arrest or to prevent the escape of a person lawfully detained;
 - (c) in action lawfully taken for the purpose of quelling a riot or insurrection.

person backed up by law-enforcement machinery for the prevention, suppression and punishment of breaches of such provisions. It also extends in appropriate circumstances to a positive obligation on the authorities to take preventive operational measures to protect an individual whose life is at risk from the criminal acts of another individual, but not imposing an impossible or disproportionate burden on authorities. A positive obligation will arise where it has been established that the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual from the criminal acts of a third party and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk. These are the general principles of right to life described in Court's case-law and reiterated in *Branko Tomasic v. Croatia*³¹ (§49–51). After repeated death threatening, the aggressor, suffering from mixed personality disorder, was sentenced and ordered compulsory psychiatric treatment. When he was released, he shot her wife, daughter and himself. Under ECHR assessment, no adequate measures were taken to diminish the known likelihood to carry out the threats: Government had failed to show that he received psychiatric treatment in prison; no investigation was initiated in respect of his threats to use guns. This means violation of the substantive aspect of Article 2 of the Convention – failure to take all necessary and reasonable steps to afford protection for the lives. Because of the link to this aspect, the Court considered that there is no separate issue to examined complaint of the applicants (relatives of shot woman and her children) under the procedural aspect of Article 2 (effective official investigation) (§65) and Article 13 of the Convention (§70–74).

But in *Kontrova v. Slovakia*³² the Court found separate issues both under Article 2 and 13. After a long history of physical and psychological abuse, including death threatening with a shotgun, an applicant's husband shot two their minor children and himself. The national courts established that the police failed to ensure its obligations: assisting in changing criminal complaint into minor offence one; failing to duly register the applicant's criminal complaint, launching a criminal investigation and commencing criminal proceedings immediately, keeping a proper record of the emergency calls and advising the next shift of the situation, and taking action in respect of the allegation that the applicant's husband had a shotgun and had made violent threats with it. The direct consequence of these failures was the

³¹ *Branko Tomasic v. Croatia*. Application no. 46598/06. 15 January 2009.

³² *Kontrova v. Slovakia*. Application no. 7510/04. 31 May 2007.

death of the applicant's children. Consequently, there has been a violation of Article 2 of the Convention (§55).

The applicant claimed that she had no possibility of obtaining compensation for non-pecuniary damage. The Court itself in appropriate cases award just satisfaction, recognising pain, stress, anxiety and frustration as rendering appropriate compensation for non-pecuniary damage. In the event of a breach of Articles 2 and 3 of the Convention, which rank as the most fundamental provisions of the Convention, compensation for the non-pecuniary damage flowing from the breach should in principle be available as part of the range of possible remedies (§64). However, the action for protection of personal integrity provided her with no such remedy. Accordingly, there has been a breach of Article 13 of the Convention, taken together with Article 2 of the Convention (§65).

Applicants in all analyzed cases were awarded non-pecuniary damage, although smaller than was claimed by applicants. The biggest amounts, ruling on an equitable basis and Court's case-law, were awarded in cases of violation of most fundamental provisions of the Convention: right to life (EUR 25000 in this case (§72); EUR 30000 in *Opuz v. Turkey*³³ (§210); EUR 40000 in *Branko Tomasic v. Croatia* (§78)), right to be protected from inhuman treatment (EUR 15000 in *Eremia v. The Republic of Moldova*, EUR 15000 in EUR 8000 in *E.S. and others v. Slovakia* (§53)); in other cases – smaller amounts.

Coming back to *Kontrova v. Slovakia*, as the complaint under Articles 6 and 8 had the same factual and legal background, the Court considered that it is not necessary to examine the facts of the case separately.

Separate issues and violation of two separate articles were found by the Court in one of most significant cases of its case-law on domestic violence: Article 2 – in respect of the death of applicant's mother and Article 3 – in respect of personal integrity of an applicant (*Opuz v. Turkey*³⁴). There was an escalating violence against the applicant and her mother by applicant's husband. The crimes committed by him were sufficiently serious to warrant preventive measures (stabbing with a knife, running the car on them) and there was a continuing threat to the health and safety of the victims (death threatening with guns). The obstacles resulting from the legislation and failure to use available means deprived the applicant's mother of the protection of her life and safety (§145). Court concluded that the

³³ *Opuz v. Turkey*. Application no. 33401/02. 9 June 2009.

³⁴ *Ibid.*

national authorities cannot be considered to have displayed due diligence as they failed to pursue criminal proceedings on acts of violence in public interest, regardless of the victims' withdrawal of complaints, especially when it happened only because of death threats (§149). In some instances, the national authorities' interference with the private or family life of the individuals might be necessary in order to protect the health and rights of others or to prevent criminal acts. The seriousness of the risk to the applicant's mother rendered such intervention by the authorities necessary in the present case (§144). The Court made a conclusion that state didn't offer any protective measures until the message that complaint is brought before ECHR. In domestic violence cases perpetrators' rights cannot supersede victims' human rights to life and to physical and mental integrity (§147). The criminal proceedings against aggressor on killing applicant's mother with a gun, which have already lasted more than several years, releasing him from detention pending the appellate procedure cannot be described as meeting requirements of prompt and effective investigation (§150–151).

The Court observed that the violence suffered by vulnerable applicant, in the form of physical injuries and psychological pressure, were sufficiently serious to amount to ill-treatment within the meaning of Article 3 of the Convention (§161). And finally it concluded that there has been a violation of this article as a result of the State authorities' failure to take protective measures in the form of effective deterrence against serious breaches of the applicant's personal integrity by her husband (§1). The violence suffered by the applicant had not ended and the authorities had continued its inaction, so they didn't display the required diligence to prevent the recurrence of violent attacks (§169, 173). The public prosecutor ought to have applied legislation on protection from domestic violence and pursue criminal proceedings on its own motion (§168, 171).

What is important that the Court, reasoning on general and unintentional discriminatory judicial passivity in Turkey, mainly affecting women, found a gender based discrimination (violation of Article 14) in conjunction to both violated articles here. Discrimination was found for the first time in a case on domestic violence³⁵. Court based this conclusion on a large analysis of its case-law, provisions of specialised legal instruments (CEDAW, Belém do Pará Convention) and the decisions of international legal bodies on violence against women (CEDAW Committee, United Nations Commission on Human Rights, Inter-American Commission), the approach to domestic violence in Turkey: violence suffered by the

³⁵ http://www.echr.coe.int/Documents/FS_Violence_Woman_ENG.pdf [interactive] [27/04/2014].

applicant and her mother and failure to protect personal integrity of the applicant and her mother's life may be regarded as gender-based violence which is a form of discrimination against women (§199–200).

The Court didn't find it necessary to examine the same facts also in the context of Articles 6 and 13 (§205).

Reviewing the case-law of ECHR on breaches of Article 2 in domestic violence cases shows that conclusions are based on general principles of interpretation of this right stressing that perpetrators' rights cannot supersede victims' human rights to life and to physical and mental integrity.

CONCLUSIONS

The case-law of ECHR on domestic violence is disparate. This aspect is sometimes highlighted by the very Court. All the analysed cases involved physical and verbal attacks by the aggressor – private individual, but in the Court's view, they have resulted in human rights violations of different nature: Article 8 of the Convention (right to respect for private and family life), or Article 3 (prohibition of torture, inhuman or degrading treatment), seldom – even Article 2 (right to life). Failure of a state to protect from domestic violence may become a violation of several human rights. This is the case when factual and legal background gives rises to separate issues for multiple violations in respect of the same applicant or violations of different rights in respect of different applicants of the case. The most common combination of multiple violations is Article 3 and 8, in other cases – Article 3 in conjunction with Article 14 (prohibition of discrimination), Article 2 and Article 3 in conjunction with Article 14, Article 2 and 13 (right to an effective remedy). The Court rejected complaints on multiple violations under Articles 5, 6, and 17. The most common reason for this was that such complaints raised no separate issue or were unsubstantiated.

Interpretations of ECHR in cases involving domestic violence issues in respect of definition of relevant human right content, extent of states' duties, main principles of application are in principle consistent to its general case-law, but with some specificity. Vulnerability of domestic violence victims requires active and prompt involvement of a state with due diligence in order to effectively perform positive obligations safeguarding human rights. In domestic violence cases perpetrators' rights cannot supersede victims' human rights to life and to physical and mental integrity. The standards used by the Court to measure

whether state has breached its duty to protect specific human rights were so called Osman test (whether the authorities knew or ought to have known at the time of the existence of a real and immediate risk) and due diligence.

Domestic violence depending on factual and legal background of the case raises violation of different aspects of the right to respect for private and family life (Article 8 of the Convention): person's physical and psychological integrity, parent's right to being reunited with his or her child, right to the enjoyment of a person's home free of violent disturbance. Not only actual physical violence, but psychological attacks as well may give rise to violation of this right. Victim's violence towards the aggressor doesn't remove the positive duty of a state to protect the right to private and family life.

According to the Court's interpretation, ill-treatment (even a single act) causing physical injuries, combined with feelings of fear and helplessness, can be sufficiently serious not only to endanger person's physical and psychological integrity, but to reach the level of severity under Article 3 of the Convention also.

Case-law of ECHR on breaches of Article 2 (right to life) in domestic violence cases shows that conclusions are based on general principles of interpretation of this right stressing that perpetrators' rights cannot supersede victims' human rights to life and to physical and mental integrity.

The Court's findings on human rights violations, especially of gender based discrimination (Article 14), are supported by statistic data and specific international law: customary law, provisions of legislation, case-law and findings of various bodies.

Only two of analysed cases have ended with the state's admission with human rights violations. In all the others violation was found by Court's decisions. Under considerations by the Court, the main factors causing human rights violations were legislation (deficiency of it) or the manner of its implementation: deficient national case-law; failure to implement decisions of domestic courts; to investigate effectively; to cooperate between the authorities; to ensure its functions; inaction of competent state authorities. States' representatives, whose actions or inaction amounted to breach of the state's duty varies from officials of police, detention institutions, and national courts to social workers.

Applicants in all analyzed cases were awarded non-pecuniary damage, although smaller than was claimed by applicants. The biggest amounts were awarded in cases of violation of

most fundamental provisions of the Convention: right to life, right to be protected from inhuman or degrading treatment.

Relevant case-law of European Court of Human Rights is a helpful source for legislation, legal practices, interpretations, case-law of national courts of states seeking to carry out effectively their international duty to protect individuals from domestic violence.

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EUROPOS ŽMOGAUS TEISIŲ TEISMO PRAKTIKA BYLOSE DĖL SMURTO ARTIMOJE APLINKOJE

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Santrauka

Viena iš pagrindinių žmogaus teisių temų pastaruoju metu Lietuvoje – smurtas artimoje aplinkoje. Pernai Europos žmogaus teisių teismas dviejose bylose prieš Lietuvą nustatė žmogaus teisių, įtvirtintų Europos žmogaus teisių ir pagrindinių laisvių apsaugos konvencijoje, pažeidimus (vienoje byloje – nusprendus teismui, kitoje – pažeidimą pripažinus). Pagal šio teismo praktiką bylose, kilusiose dėl smurto artimoje aplinkoje, neefektyvi apsauga nuo tokio smurto gali tapti konvencijos 3 str. (kankinimo draudimas), 8 str. (teisė į privataus ir šeimos gyvenimo gerbimą), rečiau – 2 str. (teisė į gyvybę) pažeidimu. Atsižvelgiant į konkrečios bylos aplinkybes ir teisinę aplinką, netinkamas pozityvios pareigos vykdymas gali tapti pagrindu keleto teisių pažeidimui: 3 ir 8 str., 3 str. kartu su 14 str. (diskriminacijos draudimas), 2 str. ir 3 str. kartu su 14 str., 2 ir 13 str. (teisė į veiksmingą teisinę gynybą). Nustačius vieno ar kito straipsnio pažeidimą, pareiškimai dėl 5 str. (teisė į laisvę ir saugumą), 6 str. (teisė į teisingą bylos nagrinėjimą), 17 str. (piktnaudžiavimo teisėmis draudimas) pažeidimo buvo pripažinti kaip nepagrįsti ar nesuteikiantys atskiro pagrindo. Savo suformuotą praktiką kitokio pobūdžio bylose (principus, taisykles, standartus) teismas su tam tikrais ypatumais taiko ir bylose, susijusiose su smurtu artimoje aplinkoje. Pagrindiniais veiksniais, lemiančiais netinkamą pareigos saugoti vykdymą, teismas pripažįsta turinčią trūkumų teisinę sistemą, netinkamas jos įgyvendinimo priemonės ir būdus, ydingą nacionalinių teismų praktiką. Europos žmogaus teisių teismo praktika bylose dėl smurto artimoje aplinkoje yra naudingas teisėkūros, teisinių mechanizmų ir procedūrų, nacionalinių teismų praktikos šaltinis siekiant tinkamai įgyvendinti konvencijos standartus atitinkančią pareigą saugoti nuo smurto artimoje aplinkoje.

Pagrindinės sąvokos: smurtas artimoje aplinkoje, žmogaus teisės.

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