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Meeting: 1507th meeting (September 2024) (DH)

Item reference: Updated Action Plan (27/06/2024)

Communication from Lithuania concerning the case of Macate v. Lithuania (Application No. 61435/19)

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Réunion : 1507^e réunion (septembre 2024) (DH)

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Communication de la Lituanie concernant l'affaire Macate c. Lituanie (requête n° 61435/19) (**anglais uniquement**)



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Mr Pavlo Pushkar

27 June 2024

Department for the execution
of judgments of the European Court of Human Rights
Directorate General Human Rights and Rule of Law
Council of Europe

Cc:

Permanent Representation
of the Republic of Lithuania to the Council of Europe

BY E-MAIL TRANSMISSION

EXECUTION OF THE ECHR JUDGMENT IN THE CASE

MACATÉ V. LITHUANIA (NO. 61435/19)

UPDATED ACTION PLAN

The Agent of the Government of the Republic of Lithuania (hereinafter – the Agent of the Government) submits the updated action plan concerning the execution of the judgment of the Grand Chamber of the European Court of Human Rights (hereinafter – the Court or the ECtHR) in the case of *Macaté against Lithuania* (no. 61435/19). The judgment became final on 23 January 2023 in accordance with Article 44 § 1 of the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter – the Convention or the ECHR).

Description of the case

This case concerns a collection of six fairy tales written by the applicant, two of which depicted marriage between persons of the same sex. After its publication in 2013, the distribution of the book was temporarily suspended in 2014, and was resumed one year later after the book was marked with a warning label stating that its contents could be harmful to children under the age of 14. The Court found that the measures imposed in respect of the book had intended to limit children's access to information depicting same-sex relationships which had not pursued any aims that could be accepted as legitimate (violation of Article 10 of the Convention).



Regarding individual measures

In the Government's view, the applicant's individual situation was fully remedied through the award of just satisfaction under Article 41 of the Convention and removing the warning labels. Therefore, no further individual measures are required in this case.

Regarding general measures

Origin of the violation

In the *Macatė* case, the ECtHR found that the abovementioned measures taken by the publisher, such as marking the applicant's book with warning labels, had directly resulted from the domestic legislation (Article 4 § 2 (16) of the Law on the Protection of Minors against Negative Effects of Public Information, hereinafter – Minors Protection Law) and had been examined and endorsed by the domestic courts (see §§ 195-198, 202 of the judgment).

Article 4 § 2 of the Minors Protection Law provides for the cases when the public information is considered to be harmful to minors (see §§ 81-82 of the judgment). Pursuant to Article 4 § 2 (16) of the Minors Protection Law (the legal provision in issue), the public information which expresses contempt for family values, encourages a different concept of marriage and creation of family from the one enshrined in the Constitution and the Civil Code is considered to be harmful to minors.

Herein the Agent of the Government provides updated information regarding the general measures.

A. Constitutional Court proceedings regarding the constitutionality of Article 4 § 2 (16) of the Minors Protection Law

As soon as the Seimas (the Parliament) of the Republic of Lithuania rejected the Draft Law recognizing Article 4 § 2 (16) of the Minors Protection Law as repealed on 7 November 2023¹ (for more details regarding preparation of the draft Law, see Updated Action Plan of the Government Agent of 9 November 2023), and as there were grounds to examine the constitutionality of Article 4 § 2 (16) of the Minors Protection Law, on 27 December 2023 the Ministry of Justice prepared the Draft Resolution of the Government of the Republic of Lithuania (hereinafter – the draft Resolution), whereby the Government would decide to apply to the Constitutional Court asking to consider and adopt a decision on whether Article 4 § 2 (16) of the Minors Protection Law is in compliance with the Constitution.² The State authorities and non-governmental organizations (including the National LGBTI rights organisation (LGL) and Lithuanian Centre for Human Rights (LCHR)) expressed approval for such a legal evaluation of the concerned law provision.

On 14 February 2024 the Government of the Republic of Lithuania decided to file a petition with the Constitutional Court for an investigation into the compliance of Article 4 § 2 (16) of the Minors Protection Law with the Constitution.³ The Resolution of the Government refers to both the arguments of the ECtHR in the judgment in *Macatė* case and the extensive jurisprudence of

¹ The draft Law was prepared by the Ministry of Justice and approved and submitted to the Seimas by the Government.

² The draft Resolution can be found here: <https://e-seimas.lrs.lt/portal/legalAct/lt/TAP/876275f0a4ca11ee8172b53a675305ab?positionInSearchResults=10&searchModelUUID=7ad70653-d74e-45c0-983f-5fc8c6ac9a9e>

³ https://lrkt.lt/~prasymai/2_2024.htm

the Constitutional Court, wherein the Constitutional Court declared that constitutional concept of the family may not be derived solely from the institution of marriage and is neutral in terms of gender (the rulings of the Constitutional Court of 28 September 2011 and 11 January 2019) as well as extensive jurisprudence of the Constitutional Court regarding the case-law of the ECtHR as a source of the interpretation of Lithuanian law and 'the doctrinal provision that the international treaties ratified by the Seimas acquire the power of the law cannot be construed as meaning that, purportedly, the Republic of Lithuania may disregard its international treaties, if a different legal regulation is established in its laws or constitutional laws from the one established by international treaties'; 'in cases when a national legal act (it goes without saying, except the Constitution itself) establishes the legal regulation which competes with that established in an international treaty, then the international treaty is to be applied.'

On 22 February 2024 the Constitutional Court decided to accept the petition of the Government to consider and adopt a decision on whether Article 4 § 2 (16) of the Minors Protection Law is in compliance with Article 25 §§ 1 and 2 of the Constitution⁴, Article 29 of the Constitution⁵, Article 38 §§ 1 and 2 of the Constitution⁶, Article 138 § 3 of the Constitution⁷ and the constitutional principle of a State under the rule of law.⁸ The Constitutional Court proceedings are pending.

In this connection the Agent of the Government notes that pursuant to Article 107 §§ 1 and 2 of the Constitution, "a law (or part thereof) of the Republic of Lithuania or another act (or part thereof) of the Seimas, an act of the President of the Republic, or an act (or part thereof) of the Government may not be applied from the day of the official publication of the decision of the Constitutional Court that the act in question (or part thereof) is in conflict with the Constitution of the Republic of Lithuania. The decisions of the Constitutional Court on the issues assigned to its competence by the Constitution shall be final and not subject to appeal." In this respect the legal power of such a legal act is abolished (see *inter alia* the ruling of the Constitutional Court of 6 June 2006, the decision of 3 May 2010, the ruling of 25 October 2011). The Constitutional Court has noted that Article 107 § 1 of the Constitution is to be construed as meaning that every legal act (or part thereof) passed by the Seimas, the President of the Republic, or the Government, or

⁴ **Article 25**

"Everyone shall have the right to have his own convictions and freely express them. No one must be hindered from seeking, receiving, or imparting information and ideas. <...>".

⁵ **Article 29**

„All persons shall be equal before the law, courts, and other state institutions and officials. Human rights may not be restricted; no one may be granted any privileges on the grounds of gender, race, nationality, language, origin, social status, belief, convictions, or views.“

⁶ **Article 38**

"The family shall be the basis of society and the State. Family, motherhood, fatherhood, and childhood shall be under the protection and care of the State <...>".

⁷ **Article 138**

"<...>
International treaties ratified by the Seimas of the Republic of Lithuania shall be a constituent part of the legal system of the Republic of Lithuania."

⁸ <https://lrkt.lt/lt/teismo-aktai/paieska/135/ta2965/content>

adopted by referendum, which is recognised as being in conflict with any legal act of higher power, *inter alia* (and, first of all) with the Constitution, is removed from the Lithuanian legal system, as it may never be applied anymore (*inter alia* the rulings of the Constitutional Court of 28 March 2006, 25 October 2011, 6 February 2012). Under the Constitution, after the Constitutional Court recognises a law (or part thereof) or other act (or part thereof) of the Seimas, act (or part thereof) of the President of the Republic, or act (or part thereof) of the Government to be in conflict with the Constitution, the institutions which have issued the corresponding act—the Seimas, the President of the Republic, and the Government—under the Constitution, are prohibited from repeatedly establishing, by adopting corresponding laws and other legal acts afterwards, the legal regulation that has been recognised to be in conflict with the Constitution. The legal regulation established in Article 107 §§ 1 and 2 of the Constitution also means that the power of a decision (ruling) of the Constitutional Court may not be overcome by a repeated adoption of laws or other acts of the Seimas, acts of the President of the Republic, and acts of the Government (see *inter alia* the ruling of 30 May 2003, 25 October 2011). Rulings passed by the Constitutional Court of Lithuania are binding on all State institutions, courts, all enterprises, establishments, and organisations as well as officials and citizens (see *inter alia* the rulings of the Constitutional Court of 28 March 2006, 25 October 2011).

The Government Agent believes that the initiative of the Government to apply to the Constitutional Court is credible and proves the efforts of the Government to comply with the judgment of the ECtHR in *Macatė* case.

B Evolution of the domestic practice as an effective general measure

Besides the abovementioned initiative of the Government to apply to the Constitutional Court, the Agent of the Government notes that there is not a slightest theoretical or practical possibility of further application of the legal provision in issue (Article 4 § 2 (16) of the Minors Protection Law) in a discriminatory manner on the grounds of sexual orientation.

First, the Convention and the ECtHR's case-law has direct effect in Lithuania and prevails over the domestic laws (except for the Constitution).

Second, according to the jurisprudence of the Constitutional Court, the constitutional concept of the family may not be derived solely from the institution of marriage and is neutral in terms of gender (the rulings of the Constitutional Court of 28 September 2011 and of 11 January 2019).

Third, the Agent of the Government recalls that in the case of *Macatė*, while the Government acknowledged that Article 4 § 2 (16) of the Minors Protection Law, at the time of its enactment and for some time afterwards, might have been seen as discriminatory, the Government argued that that had been rectified by the Constitutional Court's ruling of 11 January 2019. It should be stressed that replying to that argument of the Government, *the ECtHR stated that 'though it does not doubt the importance of the Constitutional Court's ruling for the protection of LGBTI persons and their families in Lithuania, the Court sees no grounds on which to find that that ruling had any bearing on the applicant's case'* (emphasis added). In particular, the ECtHR noted that there was nothing in the decision of the Vilnius Regional Court in the case of *Macatė*, taken shortly after the ruling of the Constitutional Court of 11 January 2019, to indicate that it took the Constitutional Court's ruling into consideration when assessing the measures taken on the basis of Article 4 § 2

(16) of the Minors Protection Law in respect of the applicant's book. Therefore, in the case of *Macatė* the ECtHR found that 'there are no grounds to find that the Vilnius Regional Court considered that treating information about same-sex relationships as harmful to children was no longer permissible under Lithuanian constitutional law' (emphasis added) (see § 198 of the judgment). The Agent of the Government notes the developments that took place in the domestic practice ever since. The practice of the domestic authorities ensures the non-application of Article 4 § 2 (16) of the Minors Protection Law in a discriminatory manner. The authorities adhere to the relevant case-law of the ECtHR regarding the concept of family and the jurisprudence of the Constitutional Court of Lithuania regarding the constitutional concept of family, which is neutral in terms of gender. Herein the Agent of the Government provides certain examples of the relevant domestic practice.

- 1) The Inspectorate of Journalist Ethics (hereinafter – the Inspectorate) has not found any single violation of Article 4 § 2 (16) of the Minors Protection Law since 2014. Recommendations of the Inspectorate of 2017 explicitly state that while the marking of information with any warning labels or indexes, irrespective of the indicated age of the children, discrimination on different grounds, including sexual orientation, is prohibited.⁹ For example, recently, P.G. applied to the Inspectorate regarding public information about the same-sex couple waiting for their baby as allegedly violating Article 4 § 2 (16) of the Minors Protection Law. On 28 December 2023 the Inspectorate found no violation of Article 4 § 2 (16) of the Minors Protection Law in this regard. In its decision, the Inspectorate referred to the jurisprudence of the ECtHR and the Constitutional Court which had recognized that the wide concept of family is not limited to the family based on the institution of marriage and is neutral in terms of gender. The Inspectorate also referred to the case-law of the ECtHR, wherein it had been recognized that distinction based on considerations regarding sexual orientation is not acceptable under the Convention. Last, in its decision of 28 December 2023, the Inspectorate, citing the judgment of the ECtHR in the case of *Macatė v. Lithuania*, recalled that restrictions on children's access to information about same-sex relationships, based solely on considerations of sexual orientation, are incompatible with notions of equality, pluralism and tolerance inherent in a democratic society.
- 2) The relevant case-law of the ECtHR regarding the concept of family and the constitutional concept of family which is not limited to the family based on the institution of marriage is followed by the Supreme Court of Lithuania.¹⁰ The inferior courts of

⁹ Recommendation of the Inspector of Journalist Ethics to broadcasters regarding public information falling into the category of information whose publication and dissemination is restricted (*Žurnalistų etikos inspektoriatas rekomendacija transliuotojams dėl viešosios informacijos priskyrimo informacijos, kuri ribojama skelbti ir platinti, kategorijai*): <https://www.lrs.lt/apps3/1/2087_AVWXWVSW.PDF>

¹⁰ The decision of the Supreme Court of Lithuania of 5 November 2020 in criminal case No. 2K-231-489/2020, para. 24: <<https://liteko.teismai.lt/viesasprendimupaieska/tekstas.aspx?id=12103706-08c0-4360-b851-6a710c29fbc9>>; the decision of the Supreme Court of Lithuania of 8 December 2020 in criminal case No. 2K-270-628/2020, para 13: <<https://liteko.teismai.lt/viesasprendimupaieska/tekstas.aspx?id=a0d1d5c4-cb72-4a69-a79e-f452c0d4a14b>>; the decision of the Supreme Court of Lithuania of 6 April 2022 in criminal case No. 2K-31-489/2022, para. 9.4: <<https://liteko.teismai.lt/viesasprendimupaieska/tekstas.aspx?id=1902bd9a-c860-438a-8bfa-77e677460dfc>>.

general jurisdiction also rely on the relevant case-law of the ECtHR, the jurisprudence of the Constitutional Court stating that the constitutional concept of family is based on the content of relationships, whereas the form of expression of such relationships has no essential significance for the constitutional concept of family, and on the case-law of the Supreme Court of Lithuania regarding the concept of family¹¹.

- 3) In its decision of 1 February 2022 in criminal case No. 1A-40-468/2022, the Vilnius Regional Court rejected the appellate complaint of the convicted P. V., who had been convicted under Article 170 § 2 of the Criminal Code (hate speech against the persons on the ground of their convictions, views and sexual orientation). P. V. stated that during the Seimas elections he had expressed his opinion regarding the concept of family. The Vilnius Regional Court *inter alia*, extensively referred to the relevant case-law of the ECtHR, wherein it had been found that discrimination based on sexual orientation is as serious as discrimination based on race, origin or colour. The Vilnius Regional Court also referred to the case-law of the ECtHR, including *Beizaras and Levickas v. Lithuania*, wherein the ECtHR saw no reason to consider maintaining family values and acknowledging the social acceptance of homosexuality to be incompatible, especially in view of the growing general tendency to view relationships between same-sex couples as falling within the concept of “family life”. The domestic court referred to the jurisprudence of the Constitutional Court of Lithuania regarding the constitutional concept of family. Namely, the domestic court recalled that as early as in its ruling of 28 September 2011 the Constitutional Court of Lithuania had found that ‘the constitutional concept of family may not be derived solely from the institution of marriage, which is enshrined in Article 38 § 3 of the Constitution’; ‘the constitutional concept of family is based on mutual responsibility between family members, understanding, emotional affection, assistance and similar relations, as well as on the voluntary determination to take on certain rights and responsibilities, that is to say, the content of relationships, whereas the form of expression of such relationships has no essential significance for the constitutional concept of family’. Referring to the ruling of the Constitutional Court of 11 January 2019 the domestic court recalled that the constitutional concept of the family, among other things, is neutral in terms of gender’.¹²
- 4) Similarly, in its decision of 22 April 2022 in criminal case No. 1A-77-491/2022, the Panevėžys Regional Court rejected the appellate complaint of the convicted V. J., who had been convicted under Article 170 § 2 of the Criminal Code (hate speech against homosexual persons on the ground of their sexual orientation). In his appellate complaint, V. J. stated that by his comment he had expressed his opinion regarding the concept of family and criticized homosexuality. The Panevėžys Regional Court, *inter alia*, extensively referred to the relevant case-law of the ECtHR, wherein it had been found that discrimination based on sexual orientation is as serious as discrimination based on

¹¹ Eg., see the decision of the Vilnius Regional Court of 14 June 2023 in criminal case No. 1A-228-908/2023, para. 24: <<https://liteko.teismai.lt/viesasprendimupaieska/tekstas.aspx?id=38dcd834-f83d-4223-bd6d-2047a322c6ec>>; the decision of the Kaunas Regional Court of 24 July 2023 in criminal case No. 1A-409-919/2023, paras. 5-7: <<https://liteko.teismai.lt/viesasprendimupaieska/tekstas.aspx?id=91794f48-0013-4625-8088-4de764ee23f7>>.

¹² The decision of the Vilnius Regional Court of 1 February 2022 in criminal case No. 1A-40-468/2022, paras. 5, 20: <<https://liteko.teismai.lt/viesasprendimupaieska/tekstas.aspx?id=ca8361fe-9573-41cc-b753-ef7adcd20df9>>.

race, origin or colour. The Panevėžys Regional Court also referred to the case-law of the ECtHR, including *Beizaras and Levickas v. Lithuania*, regarding compatibility between maintaining family values and acknowledging the social acceptance of homosexuality, especially in view of the growing general tendency to view relationships between same-sex couples as falling within the concept of “family life”. The domestic court referred to the jurisprudence of the Constitutional Court of Lithuania (the rulings of 28 September 2011 and 11 January 2019) regarding the ‘the constitutional concept of family which may not be derived solely from the institution of marriage and which is neutral in terms of gender’.¹³

- 5) The administrative courts also follow the case-law of the ECtHR regarding the concept of family and adhere to the constitutional concept of family. For example, one should recall the administrative case No. eA-3227-624/2019 which concerned the issuance of residence permit to the alien in Lithuania, who asked to be considered as a family with the same-sex person living in Lithuania. The Supreme Administrative Court relied on the constitutional concept of family.¹⁴ Similarly, the administrative case No. A-1713-1188/2023 concerned the request of Mr G. D. to issue residence permit in Lithuania. Mr G.D. stated that he and Ms Y. L. should be considered as family. In its decision of 30 March 2023 the Vilnius Regional Administrative Court (the first-instance court) granted the complaint and obliged the Migration Department to examine the request of Mr G.D. *de novo*. What is important is that the first-instance court administrative court referred to the ruling of the Constitutional Court which had found that the constitutional concept of family shall be interpreted regard being had to the international legal obligations of the Republic of Lithuania having ratified the ECHR. The domestic court recalled that the Constitutional Court had recalled that according to the case-law of the ECtHR, the concept of family is not limited to the traditional family constituted on the ground of marriage; other relations, which are characterized by the permanence of relationships between individuals, the nature of assumed obligations, having common children, etc., are also protected. In its decision of 14 June 2023, the Supreme Administrative Court of Lithuania upheld the decision of the first-instance administrative court. The Supreme Administrative Court agreed that the Migration Department had failed to assess the proportionality of the refusal to issue residence permit in the light of concept of family construed in the official jurisprudence of the Constitutional Court and the case-law of the ECtHR.¹⁵

C. Publication and dissemination measures

It should be observed that under the Constitution of the Republic of Lithuania the Convention upon its ratification became a constituent part of the Lithuanian legal system and, pursuant to the

¹³ The decision of the Panevėžys Regional Court of 22 April 2022 in criminal case No. 1A-77-491/2022, paras. 11, 15: <<https://liteko.teismai.lt/viasasprendimupaieska/tekstas.aspx?id=9d9d3471-9209-438e-9804-6e9880f10fbf>>.

¹⁴ The decision of the Supreme Administrative Court of Lithuania of 20 March 2019 in administrative case No. eA-3227-624/2019, paras. 30-34: <<https://liteko.teismai.lt/viasasprendimupaieska/tekstas.aspx?id=d94e19be-b36e-44f6-8ff5-c97b0c67bdf2>>

¹⁵ The decision of the Supreme Administrative Court of Lithuania of 14 June 2023 in administrative case No. A-1713-1188/2023, paras. 18-19, 45, 53-56: <<https://liteko.teismai.lt/viasasprendimupaieska/tekstas.aspx?id=7acaf1e8-3aee-443a-8ee1-59efa02bc9a4>>.

well-established case-law of the Constitutional Court, the Supreme Court of Lithuania and the Supreme Administrative Court of Lithuania, the Convention and the ECtHR's case-law have direct effect in Lithuania. Thus, the dissemination of the judgment of the ECtHR is to be considered as a general measure. The Agent of the Government separately informed in writing the competent domestic authorities (the domestic courts, the Ministry of Culture, the Ministry of Education, Science and Sport, the Inspectorate, the Office of the Equal Opportunities Ombudsperson and the Commission of Lithuanian radio and television) about the judgment, sending detailed explanatory notes. The translation of the judgment into Lithuanian is published and is placed both on the official internet website of the Ministry of Justice on the following address <<https://tm.lrv.lt/lt/>> and HUDOC database, thus, it is freely accessible to all the relevant institutions, domestic courts and other persons concerned.

CONCLUSION

The Committee of Ministers will be informed about any developments in execution of the judgment at issue.

Respectfully,



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