Strasbourg, 4 May 2009

CAHVIO (2009) 10

AD HOC COMMITTEE ON PREVENTING AND COMBATING VIOLENCE AGAINST WOMEN AND DOMESTIC VIOLENCE (CAHVIO)

CASE LAW OF THE EUROPEAN COURT OF HUMAN RIGHTS ON VIOLENCE AGAINST WOMEN

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1. VIOLENCE AGAINST WOMEN COMMITTED BY STATE AGENTS

Aydin v. Turkey (Rape in custody constituting torture; positive obligation to investigate under article 3).

Facts

- Members of the Turkish security forces raped and tortured a Kurdish girl while in detention.

Decision

- The ECtHR the state was responsible for violation of the ECHR, article 3. Rape in detention by a state official was described as an especially grave and abhorrent form of ill-treatment, causing deep psychological scars. The accumulation of physical and mental violence suffered and `the especially cruel act of rape to which she was subjected' constituted torture. (Paras 83-87).
- The ECtHR considered the responsibility of the state with respect to its positive obligation to investigate allegations of violation of article 3. Investigation is not a matter of private interest but an essential pre-requisite to the right of access to criminal, civil or administrative courts and to an effective remedy. In this case inadequacies in investigation included the prosecutors' failure to treat the allegations seriously and to pursue complaints about the collusion of public officials in unlawful acts, through their failure to interview implicated members of the security forces, or to question the accuracy of the reports of incidents submitted by security forces. There had been no attempt to locate witnesses, nor to seek corroboration.
- The ECtHR considered deficiencies in the medical examination of the victim made it inconsistent with the `requirements of a fair and effective' investigation of rape in custody. The examination had been directed more at ascertaining whether the victim was a virgin than in determining whether she had been raped.
- The ECtHR required that a person alleging rape be examined `with all appropriate sensitivity by medical professionals with particular experience in the area and whose independence is not circumscribed by instructions given to the prosecuting authority as to the scope of the examination.' (Paras 103-9).

2. VIOLENCE AGAINST WOMEN COMMITTED BY NON-STATE ACTORS

Airey v. Ireland *(1979)*

Facts

- The applicant was seeking judicial separation from her husband. She alleged that he was violent towards her and he had a conviction for assaulting her.

Judicial separation was only available through High Court proceedings and legal aid was not available for such proceedings.

Decision

- The ECtHR held that the protection of human rights must not be theoretical or illusory, but practical and effective. Therefore the obligation to secure the Convention rights does not merely compel the state to abstain from interference in private or family life (article 8) but may also require the state to take positive action, in this case to provide legal aid to enable a woman to seek a judicial separation.

X and Y v. The Netherlands (1985)

Facts

- Ms Y, a mentally handicapped child of 16, lived in a privately-run home for such children. One night she was woken by Mr B and forced to have sexual intercourse with him. This had traumatic consequences for Ms Y and caused her major mental disturbance. Her father X reported the incident to the police. However due to a gap in the law the complaint could not be proceeded with.

Decision

- The ECtHR found the Netherlands to be in breach of the ECHR, article 8 because its criminal law provided no remedy for a mentally disabled girl who had been sexually abused. The Court held that the protection afforded by the civil law was insufficient because 'fundamental values and essential aspects of private life' were at stake. Effective deterrence could only be achieved by the criminal-law but gaps in the law meant that this had not been achieved.

Bevacqua v. Bulgaria (2001)

Facts

- The applicants were a mother and her son. The mother suffered domestic abuse from her husband, left the family home and sought divorce and custody of her child. There were a series of incidents around access to the child, involving aggressive behaviour on the part of the husband. Under the Bulgarian Penal Code, criminal proceedings in respect of wilfully inflicted "light bodily injury" may generally only be instituted by the victim. Bulgarian courts have held facial bruises, a broken nose and head contusions without loss of consciousness to be examples of light bodily injuries.
- The mother claimed that Bulgaria was in violation of the ECHR because it had failed to assist her in prosecuting her husband for domestic violence. Placing the burden of prosecution for light bodily injury on the victim was incompatible with the state's duty to provide protection against domestic violence and was discriminatory in that the law's shortcomings impacted disproportionately on women. It treated domestic violence as a trivial family matter that did not warrant public prosecution. The authorities failed to assist

her in prosecuting her husband and charged her with abduction of her son when she sought refuge with him in a shelter for abused women.
- There were also claims relating to interim custody of the child.

Decision

- The ECtHR reiterated the state's positive obligations under article 8 that may involve the adoption of measures in the sphere of the relations of individuals between themselves, especially for the effective protection of vulnerable people. State 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 ECtHR noted 'that 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 applicant had sought assistance in relation to her husband's aggressive behaviour and the ECtHR noted that the police and prosecutors had taken some measures – they issued a police warning against the husband and attempted to assist the parties reach agreement. The ECtHR did not accept that the Convention requires state-assisted prosecution (as opposed to private prosecution by the victim) in all cases of domestic violence.
- However on the facts 'certain administrative and policing measures' including those mentioned in Recommendation Rec(2002)5 of the Committee of Ministers of the Council of Europe (Para 33) were called for. Bulgarian law was inadequate as it 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 were not effective. The availability of private prosecution and an action for damages were insufficient because of the time involved and the inadequacy of such measures to prevent repeated incidents. The authorities' failure to impose sanctions or otherwise enforce the husband's obligation to refrain from unlawful acts 'amounted to a refusal to provide the immediate assistance the applicants needed' and their view that the situation was a 'private matter' was in violation of the state's positive obligations under article 8.

MC v. Bulgaria (2003) (Legal definition of rape; positive obligations on states; state's duty to investigate)

Facts

- The complainant (aged 14) alleged rape by two men with whom she was acquainted and had gone out with willingly, but on condition she was home by a certain time. After her allegations of rape the case was referred to an investigator, but no charges were brought. Subsequently the district prosecutor ordered further investigations and proposed to terminate the proceedings for lack of evidence that the complainant had physically resisted sexual intercourse, or that the men had used force or coercion against her. Bulgarian judicial practice was to interpret lack of physical resistance as evidence tending towards consent.

Decision

- The Bulgarian Criminal Code definition of rape as occurring *inter alia* when a woman is compelled to have sexual intercourse 'by means of force or threats' was challenged as being contrary to the ECHR, articles 3 and 8. The ECtHR concluded that states' positive obligations under the Convention 'must be seen as requiring the penalisation and effective prosecution of any non-consensual sexual act, including in the absence of physical resistance by the victim.' A criminal code that limits rape to where the rapist has used force or threats of force puts women at risk of further violence. The Court noted that there had been a trend in Europe against requiring evidence of force in cases of rape (as had historically been required) towards concentrating on whether the victim had given consent. The contemporary standard is to punish nonconsensual sexual acts without requiring proof of physical resistance. A 'rigid approach to the prosecution of sexual offences, such as requiring proof of physical resistance in all circumstances, risked leaving certain types of rape unpunished and thus jeopardising the effective protection of the individual's sexual autonomy.' (Para. 166).
- The Court held that there was a positive duty on states to ensure the effectiveness of the criminal law through effective investigation and prosecution. 'Such positive obligations cannot be considered in principle to be limited solely to cases of ill-treatment by state agents'. (Para. 151), There must be 'a context-sensitive assessment of the credibility of the statements made and for verification of all the surrounding circumstances.' (Para. 177). The authorities must 'explore all the facts and decide on the basis of an assessment of all the surrounding circumstances.' (Para. 181). This had not been done. Witness evidence had not been tested, the applicant was not able to put questions to the witnesses and the prosecutors had not considered the credibility of the evidence of the two accused. The approach of the prosecutors and investigators 'fell short of the requirement inherent in the states' positive obligations –viewed in the light of the relevant modern standards in comparative and international law – to establish and apply effectively a criminal law system punishing all forms of rape and sexual abuse.' (Para. 185). The investigative flaws amounted to breach by Bulgaria of its obligation to establish and apply an effective criminal-law system punishing all forms of rape and sexual abuse.
- The ECtHR noted the special vulnerability of children to forms of sexual abuse. The authorities could be criticised for attaching 'too little weight to the particular vulnerability of young persons and the special psychological factors involved in cases concerning the rape of minors.' (Para. 183).

Kontrova v. Slovakia (2007) (Sets out the test for the positive obligation on states)

Facts

- The applicant filed a criminal complaint against her husband accusing him of assaulting and beating her with an electric cable. She also stated that there was a long history of physical and psychological abuse by her husband. Some days later she went with her husband to the District Police Station seeking to withdraw the complaint. The authorities decided to take no further action. There was a further incident some weeks later and then the husband shot and killed her two children and himself.

Decision

- The ECtHR reiterated the positive obligation on states 'take appropriate steps to safeguard the lives of those within its jurisdiction' and the primary duty to secure the right to life by putting in place effective criminal-law provisions to deter the commission of offences against the person, backed up by law-enforcement machinery for the prevention, suppression and punishment of breaches of such provisions.
- The positive obligation extends in appropriate circumstances to requiring the authorities to take preventive operational measures to protect an individual whose life is at risk from the criminal acts of another individual. The scope of the positive obligation must be interpreted in a way which does not impose an impossible or disproportionate burden on the authorities and does not apply to every claimed risk to life. 'For a positive obligation to arise, it must be 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.'
- On the facts of the present case, the ECtHR affirmed that it is one of the main tasks of the police to protect fundamental rights and freedoms, life and health. The local police department were aware of the situation through communications and emergency phone callsm which detailed serious allegations of long-lasting physical and psychological abuse, severe beating with an electric cable and threats with a shotgun.
- The police had specific obligations: accepting and registering the applicant's criminal complaint; launching a criminal investigation; commencing criminal proceedings against the applicant's husband; keeping a proper record of the emergency calls; 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 police failed to comply with these obligations and indeed one of the officers involved assisted the applicant and her husband in modifying the first criminal complaint so that it was treated as a minor offence, resulting in the deaths of the children. This failure constitutes a violation of ECHR Article 2.

Branko Tomasic v. Croatia (2009) (Reiterates the test in Kontrova as to the state's positive obligation to take measures to protect the right to life; procedural duty to investigate under article 2).

Facts

- The applicant alleged that her husband (unwedded) had made repeated threats against her and their one year old daughter, including that he had a bomb that he would throw at her. Following complaints made by her, he was detained and criminal proceedings instigated against him. A psychiatric opinion was obtained that stated that he was suffering from a profound personality disorder. He served his sentence but shortly after his release he murdered his wife and daughter and then took his own life.

Decision

- The ECtHR reiterated the state's primary duty to secure the right to life by putting in place effective criminal-law provisions to deter the commission of offences against the person, backed up by law-enforcement machinery for the prevention, suppression and punishment of breaches of such provisions
- State authorities also have a positive obligation to take preventive operational measures to protect an individual whose life is at risk from the criminal acts of another individual. This must not amount to an impossible or disproportionate burden on authorities and not every claimed risk to life entails a Convention requirement to take operational measures to prevent that risk from materialising. The positive obligation arises where 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' (Para. 51).
- The ECtHR indicated the ways in which the Croatian authorities had failed to take adequate measures in the circumstances of the case. Although the husband had stated that he had a bomb, no search of his premises and vehicle was ordered during the initial criminal proceedings against him. Although a psychiatric report was made for the purposes of the criminal proceedings which stressed the need for continued psychiatric treatment, the psychiatric treatment that was ordered was too short and the Government failed to show that it had been actually and properly administered. The failure to provide adequate psychiatric treatment while he was in prison meant that his condition was not assessed immediately prior to his release to determine the risk to his wife and daughter. The ECtHR found this last to be particularly striking since the local courts had taken his threats seriously and the psychiatric report had stated that there was a strong likelihood that he might repeat the same or similar offences.
- The ECtHR reiterated the procedural obligation under article 2 for an effective official investigation when individuals have been killed (whether by state officials or private individuals) in order 'to secure the effective implementation of the domestic laws which protect the right to life'. This requires taking reasonable steps to secure the evidence concerning the incident and the authorities must act of their own motion once the matter has come to their attention. (Para. 62).

Siliadin v France (2005) (Requirements of ECHR, article 4).

Facts

- A Togolese woman was sent to France at age 15 to work as a domestic servant in return for schooling and legal immigration status. After some months she was handed over to another couple, Mr and Mrs B to help with household chores and to look after their young children. Although she was supposed to leave after the birth of a new baby, she stayed and was made to work from 7.30 a.m. until 10.30 p.m. every day with no days off. She slept in the children's bedroom on a mattress on the floor, wore old clothes and was not paid for over 3 years. The accused were acquitted of offences under the Criminal Code because the

applicant was said not to be in a position of vulnerability or dependence on the basis that she was able to leave the house unsupervised and could contact her family.

Decision

- The ECtHR examined whether these facts breached article 4. The Court noted that 'domestic slavery' persisted in Europe for thousands of people, the majority of whom are women. In accordance with modern standards and trends, states have a positive obligation to penalise and punish any act aimed at maintaining a person in a situation incompatible with Article 4. The applicant's situation was not 'slavery' but was 'servitude'.
- Criminal sanctions were needed as a deterrent.
- The case does not address directly violence against women but the ECtHR noted that the applicant had no resources, was vulnerable, isolated, and had no means of subsistence other than in the home of Mr and Mrs B. She was entirely at Mr and Mrs B.'s mercy, since her papers had been confiscated. She had no freedom of movement or free time. Many of these are factors that increase women's vulnerability to violence or make women unable to leave violent, or potentially violent situations.

3. CASES WHICH DO NOT DIRECTLY INVOLVE VIOLENCE AGAINST WOMEN BUT SET OUT SOME RELEVANT PRINCIPLES

Tyrer v. UK (1978).

- This is a useful case for resisting arguments of local custom or tradition. The case involved corporal punishment (birching) on the Isle of Man. The Attorney-General for the Isle of Man argued that corporal punishment was not in breach of the ECHR since it did not outrage public opinion in the Island, in effect an assertion that local practices justified the violence. The ECtHR rejected this argument and emphasised that 'it is never permissible to have recourse to punishments which are contrary to Article 3 (torture, cruel, inhuman and degrading treatment) whatever their deterrent effect may be.'

Assenov v Bulgaria (1998)

- The ECtHR read the Article 3 prohibition against torture in conjunction with Article 1 (state party's obligation to secure Convention rights), as requiring 'by implication that there should be an effective official investigation …If this were not the case, the general legal prohibition of torture and inhuman and degrading treatment and punishment, despite its fundamental importance.., would be ineffective in practice and it would be possible in some cases for agents of the State to abuse the rights of those within their control with virtual impunity.'

A v. UK (1998)

This case does not involve violence against women but does indicate the trend towards an understanding of violence within the home as constituting a violation of human rights.

Facts

- A young boy was beaten repeatedly by his stepfather. The stepfather was acquitted by an English court, through the defence of 'reasonable chastisement'.

Decision

- The European Court found that the punishment constituted 'inhuman or degrading punishment', in breach of the ECHR, article 3 and that UK law failed to provide adequate protection. The ECHR, article 1 requires states parties to 'secure' Convention rights to everyone within their jurisdiction and in conjunction with article 3 requires 'States to take measures designed to ensure that individuals within their jurisdiction are not subjected to torture or inhuman or degrading treatment or punishment, including such ill-treatment administered by private individuals... Children and other vulnerable individuals, in particular, are entitled to State protection, in the form of effective deterrence, against such serious breaches of personal integrity.'

4. SUMMARY

The ECtHR has considered the issues of:

- State responsibility for the acts of its agents in committing torture in custody (Aydin).
- The positive obligation on states to make protection under the ECHR effective, including respect for private life under article 8 in situations of domestic violence (Airey; X and Y; Bevacqua).
- The state's positive obligation to protect life in appropriate circumstances where '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.' The ECtHR has applied the test in situations of domestic violence (Kontrova; Branko Tomasic).
- The state's positive obligation to put in place effective criminal-law provisions to deter the commission of offences against the person, backed up by law-enforcement machinery for the prevention, suppression and punishment of breaches of such provisions. (X and Y; MC; Kontrova; Branko Tomasic).
- The state's procedural obligations to carry out an effective investigation of allegations of violation of ECHR article 2 (right to life) and 3 (prohibition of torture) (Aydin; MC).
- Rape as constituting torture (Aydin).
- The criminal law definition of rape as not requiring physical resistance (MC).

- The ECtHR has referred to Recommendation Rec(2002)5 of the Committee of Ministers of the Council of Europe on the protection of women against violence and CEDAW, GR No.19, thereby bringing into its case law both these non-binding statements of legal standards with respect to violence against women. (MC; *Bevacqua*).

The judgment in Opuz v Turkey (Appl. No. 33401/02) is currently awaited. The oral proceedings were held in October 2008. The case involves a number of issues of domestic violence.

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