

IN THE EUROPEAN COURT OF HUMAN RIGHTS

App No:3564/11

B E T W E E N : -

LILIA EREMIA & OTHERS

Applicants

- and -

THE REPUBLIC OF MOLDOVA

Respondent

**WRITTEN SUBMISSIONS OF THE
EQUAL RIGHTS TRUST**

1. By letter dated 18 July 2011, the European Court of Human Rights (the ECtHR/the Court) granted The Equal Rights Trust (ERT) leave to make written submissions in the above proceedings. ERT is an independent international organisation with particular expertise in discrimination and equality.
2. These proceedings concern a state's response to complaints of persistent and severe domestic violence. The Court's jurisprudence relating to domestic violence reflects increasing awareness of and attention to the discriminatory nature of domestic violence against women. However, its jurisprudence in this respect has focused on discrimination by state agents in their application and implementation of the law. The Court has not, therefore, had the opportunity to develop its jurisprudence in relation to states' positive obligations under Article 14 of the European Convention on Human Rights (the Convention) in relation to domestic violence. While states' due diligence obligations in this regard could be, and have been, examined under Article 3, ERT respectfully submits that it is important that they also be examined under Article 14. The focus of this submission is on the reasons that it is important for issues of the type raised by the Applicants to be examined under Article 14 and the nature of states' positive obligations in this respect. Our comments relate to domestic violence against women.

Consideration under Article 14

3. The Court has explained that “[w]here a substantive Article of the Convention has been invoked both on its own and together with Article 14 and a separate breach has been found of the substantive Article, it is not generally necessary for the Court to consider the case under Article 14”.¹ ERT respectfully submits that it will be important for the Court to examine an alleged violation under Article 14, even where the Court has found a violation under another substantive Article, when acknowledgement of the discriminatory nature of an alleged breach is key to a proper understanding of its causes, consequences, solutions or impact.
4. On this basis, ERT submits that there are very important reasons that domestic violence should be examined under Article 14 of the Convention in conjunction with Article 3, in addition to any consideration under Article 3 and/or Article 8. Domestic violence is *caused by* other broader forms of discrimination against women.² Domestic violence *results in* other forms of discrimination against women.³ Domestic violence *impacts disproportionately and differently* upon women.⁴ Domestic violence, if it is to be effectively tackled, demands a *particular response*, which recognises the discriminatory causes and consequences of this phenomenon.⁵ Finally, domestic violence is one of the most serious and pervasive forms of discrimination against women. To fail to view it as a human rights violation

¹ *Chassagnou and others v France*, European Court of Human Rights (ECtHR) App. Nos. 25088/94, 28331/95 and 28443/95, 29 April 1999, Para 89.

² Committee on the Elimination of Discrimination against Women (CEDAW Committee), *General Recommendation 19: Violence against women*, 1992, UN Doc. A/47/38, Para 11: “Traditional attitudes by which women are regarded as subordinate to men or as having stereotyped roles perpetuate widespread practices involving violence or coercion, such as family violence and abuse”.

³ *Ibid.* The CEDAW Committee emphasised that “the underlying consequences of these forms of gender-based violence help to maintain women in subordinate roles and contribute to their low level of political participation and to their lower level of education, skills and work opportunities.”

⁴ Article 2(1) of the Council of Europe Convention on preventing and combating violence against women and domestic violence (the Council of Europe Convention) provides “This Convention shall apply to all forms of violence against women, including domestic violence, which affects women disproportionately”. See *Gonzales et al v Mexico*, IACtHR Case No. 281/02, 16 November 2009, Para 451 (vi): “bearing in mind the different impact that violence has on men and on women”.

⁵ Special Rapporteur on violence against women, its causes and consequences, *Report of the Special Rapporteur on violence against women, its causes and consequences*, 2011, UN Doc. A/66/215 (Special Rapporteur Report), Para 71: “Given the disparate and differentiated impact that violence has on women and on different groups of women, there is a need for specific measures of redress in order to meet their specific needs and priorities”.

which affects women as a group, by treating it as discrimination, is to fail to acknowledge the magnitude of the problem, and its impact upon the dignity of women. In relation to race discrimination, the Court has said that to fail to treat race discrimination as such is to “turn a blind eye to the specific nature of acts that are particularly destructive of fundamental rights.”⁶ ERT respectfully submits that this reasoning should guide the Court’s assessment as to whether it is necessary to examine a complaint under Article 14.

Positive Obligations under Article 14

5. ERT submits that, if established on the facts, a failure to respond adequately to domestic violence can represent not only a failure to provide equal protection of the law in breach of Article 14’s negative obligation, but also a failure to comply with the positive obligations under Article 14, which require states to tackle domestic violence proactively and holistically. A state will only effectively “secure” the other rights in the Convention without discrimination if they institute effective, comprehensive and coordinated measures of prevention, protection, investigation and reparation in respect of domestic violence. While any failings in this respect could be examined under Article 3 of the Convention, ERT submits that in order to recognise the true nature and extent of domestic violence, and the particular obligations states must meet in order to tackle it, it is also necessary for an examination of a state’s compliance with its positive obligations to proceed under Article 14. This is also essential in order to alert states to the need to implement effective gender-specific measures in reaction to any finding that it has failed to comply with its obligations.
6. The Explanatory Report to Protocol 12 to the Convention gives some guidance as to the extent to which Article 14 imposes positive obligation upon states to eliminate discrimination.⁷ While the *scope* of the obligation imposed by Article 1(1) of Protocol 12 differs from Article 14 in that it applies to “any right set forth by law”, the *nature* of the obligation is the same. Like Article 14, it provides that rights “shall be secured without discrimination”. In relation to whether Article 1(1) of Protocol 12 imposes

⁶ *Nachova and Others v Bulgaria* [GC], ECtHR App. Nos. 43577/98 and 43579/98, 6 July 2005, Para 160.

⁷ Explanatory Report to Protocol 12 to the European Convention on Human Rights.

positive obligations, the Explanatory Report states that “[t]he Article is not intended to impose a general positive obligation on the Parties to take measures to prevent or remedy all instances of discrimination in relations between private persons” (emphasis added).⁸ However, it goes on to explain that:

On the other hand, it cannot be totally excluded that the duty to "secure" under the first paragraph of Article 1 might entail positive obligations. [...] Regarding more specifically relations between private persons, a failure to provide protection from discrimination in such relations might be so clear-cut and grave that it might engage clearly the responsibility of the State and then Article 1 of the Protocol could come into play[...]⁹

The Court has recognised that domestic violence is a form of discrimination against women.¹⁰ The Explanatory Report to the Council of Europe Convention on preventing and combating violence against women and domestic violence (Council of Europe Convention) states that “[v]iolence against women, including domestic violence, is one of the most serious forms of gender-based violations of human rights in Europe”.¹¹ The Committee on the Elimination of Discrimination against Women (CEDAW Committee) has made clear that “[f]amily violence is one of the most insidious forms of violence against women.”¹² ERT submits that a failure to provide protection in respect of domestic violence is so grave that it entails state responsibility under Article 14 and that Article 14 imposes a positive obligation of due diligence upon states in respect of domestic violence.

7. Such an interpretation of Article 14 is also necessary in order to render the right enshrined in Article 14 practical and effective. States which fail to act diligently in tackling domestic violence tacitly condone such violence and create an environment in which domestic violence is likely to occur. The Inter-American Court of Human Rights (IACtHR) has recognised that:

⁸ Explanatory Report to Protocol 12 to the European Convention on Human Rights, Para 25.

⁹ Explanatory Report to Protocol 12 to the European Convention on Human Rights, Para 26.

¹⁰ *Opuz v Turkey*, ECtHR App. No. 33401/02, 9 June 2009, Para 200.

¹¹ Explanatory Report to the Council of Europe Convention, CM(2011)49, Para 1.

¹² CEDAW Committee, *General Recommendation 19: Violence against women*, 1992, UN Doc. A/47/38, Para 23.

[G]eneral and discriminatory judicial ineffectiveness [in respect of domestic violence] also creates a climate that is conducive to domestic violence, since society sees no evidence of willingness by the State, as the representative of the society, to take effective action to sanction such acts.¹³

The CEDAW Committee has held that states must “[v]igilantly and in a speedy manner prosecute perpetrators of domestic violence in order to convey to offenders and the public that society condemns domestic violence”.¹⁴ The UN Special Rapporteur on violence against women, its causes and consequences (Special Rapporteur) has said:

The pervasiveness of patriarchal attitudes in the law enforcement and justice system [...] leads to inadequate responses to cases of violence against women and the persisting social acceptance of such acts [...]¹⁵

ERT respectfully submits that it is appropriate for an alleged failure to exercise due diligence in respect of domestic violence to be examined against a state’s positive obligations under Article 14 because any failing in this respect would tacitly condone, and thus perpetuate, this most severe form of discrimination.

8. ERT further submits that this due diligence obligation should be interpreted in the light of more specialised instruments which elaborate the nature of states’ obligations in respect of domestic violence. The Court has held that “in defining the meaning of terms and notions in the text of the Convention, [it] can and must take into account elements of international law other than the Convention, the interpretation of such elements by competent organs, and the practice of European States reflecting their common values” (emphasis added).¹⁶ Likewise, in *Opuz v Turkey*, the Court held that “the Court has to have regard to the provisions of more specialised legal

¹³ *Maria da Penha Maia Fernandes v Brazil*, IACtHR Case 12.051, 16 April 2001, Para 56.

¹⁴ *Fatma Yildirim (deceased) v Austria*, CEDAW Committee Communication No. 6/2005, 6 August 2007, UN Doc. CEDAW/C/39/D/6/2005, Para 12.3 (b).

¹⁵ Special Rapporteur Report, Para 50.

¹⁶ *Demir & Baykara v Turkey*, ECtHR App. No. 34503/97, 12 November 2008, Para 85.

instruments and the decisions of international legal bodies on the question of violence against women” (emphasis added).¹⁷

9. The CEDAW Committee has been clear that domestic violence is a form of gender-based violence and that “[s]tates parties have a due diligence obligation to prevent, investigate, prosecute and punish such acts of gender based violence.”¹⁸ In 2011, the Special Rapporteur said that “the due diligence responsibility comprises the obligation of States to: (a) prevent acts of violence against women; (b) investigate and punish all acts of violence against women; (c) protect women against acts of violence, and (d) provide remedy and reparation to victims of violence against women.”¹⁹ The Council of Europe Convention provides that “[p]arties shall [...] exercise due diligence to prevent, investigate, punish and provide reparation for acts of violence covered by the scope of this Convention that are perpetrated by non-State actors”.²⁰ These sources provide authoritative support for the view that states’ positive obligations in respect of domestic violence comprise obligations to a) prevent; b) protect; c) investigate, prosecute and punish; and d) provide remedy and reparation in respect of domestic violence. A failure to implement measures adequate to meet these obligations would constitute a breach of a state’s positive obligation to “secure” the rights contained in Articles 3 and/or 8 without discrimination, in violation of Article 14. While states dispose of a wide margin of appreciation in determining the means of doing so, international standards are clear that certain acts and omissions would, if established, constitute a failure to meet the required standard. The remainder of these submissions focuses on those aspects of each of the positive obligations under Article 14 (a-d) which are most relevant to this Application.

a) *Prevent*

10. The state’s most basic obligation in order to prevent domestic violence is to enact an effective and comprehensive system of criminal and civil law to

¹⁷ *Opuz v Turkey*, ECtHR App. No. 33401/02, 9 June 2009, Para 185.

¹⁸ CEDAW Committee, *General Recommendation No. 28 on the Core Obligations of States Parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women*, 2010, UN Doc. CEDAW/C/2010/47/GC.2, Para 19.

¹⁹ Special Rapporteur Report, Para 50.

²⁰ Council of Europe Convention, Article 5(2).

deter and protect against domestic violence. However, it is also essential that such laws are implemented and seen to be implemented by the public. The CEDAW Committee has said:

the political will that is expressed in the aforementioned comprehensive system [... in respect of domestic violence] must be supported by State actors, who adhere to the State party's due diligence obligations.²¹

11. The obligation to prevent includes an obligation to sensitize state agents responsible for implementing preventive and protective measures, to ensure that they are effective in practice. The Council of Europe Convention provides that “[p]arties shall provide or strengthen appropriate training for the relevant professionals dealing with victims or perpetrators of all acts of violence covered by the scope of this Convention, on the prevention and detection of such violence, equality between women and men, the needs and rights of victims, as well as on how to prevent secondary victimisation.”²² The Special Rapporteur has noted that: “[o]ther preventative measures include the development of training and awareness-raising programmes directed at relevant professional groups, including police, prosecutors, members of the judiciary, doctors, nurses and social workers.”²³ A state which has failed to adequately train state agents responsible for tackling domestic violence, will breach its positive obligation to prevent domestic violence under Article 14 by undermining the effectiveness of those measures.

b) Protect

12. It is clear that in order to meet its due diligence obligations, a state is obliged not only to put in place effective criminal legislation and civil law provisions to protect people against domestic violence and offer them appropriate support services, but also to intervene effectively to protect individuals when they are at risk. The CEDAW Committee has stated that states must “ensure that criminal and civil remedies are utilized in cases where the perpetrator in a domestic violence situation poses a dangerous

²¹ *Fatma Yildirim (deceased) v Austria*, CEDAW Committee Communication No. 6/2005, 6 August 2007, UN Doc. CEDAW/C/39/D/6/2005, Para 12.1.2.

²² Council of Europe Convention, Article 15(1).

²³ Special Rapporteur Report, Para 56.

threat to the victim”.²⁴ The Council of Europe Convention requires states to ensure that “responsible law enforcement agencies respond to all forms of violence covered by the scope of this Convention promptly and appropriately by offering adequate and immediate protection to victims”.²⁵

13. The specific nature of domestic violence has implications for when the positive obligation to intervene under Article 14 is triggered. States fail to respond adequately to protect the victims of domestic violence because they fail to accurately assess the risk of further violence.²⁶ For this reason, the Council of Europe Convention highlights the need for risk assessment and risk management.²⁷ Its Explanatory Report notes that “risk assessment and risk management [must] consider the probability of repeated violence, notably deadly violence, and adequately assess the seriousness of the situation”.²⁸ The Court has long recognised that a failure to make a distinction in the way in which situations that are essentially different are handled may constitute unjustified treatment irreconcilable with Article 14 of the Convention.²⁹ Domestic violence is often fluid and characterised by repetitive violence, which can escalate suddenly.³⁰ Where state agents are made aware that a person has been subject to domestic violence, they ought to take into account the particular nature of domestic violence in assessing whether she is at risk. An inadequate risk assessment would in itself constitute a failure to protect.
14. The specific nature of domestic violence also has implications for the nature and extent of the obligation to protect. The Court has often held that vulnerable people deserve particular measures of protection.³¹ The Court has also found that particularly harmful forms of discrimination require

²⁴ *Fatma Yildirim (deceased) v Austria*, Communication No. 6/2005, 6 August 2007, UN Doc. CEDAW/C/39/D/6/2005, Para 12.3 (b).

²⁵ Council of Europe Convention, Article 50(1).

²⁶ Special Rapporteur Report, Para 60.

²⁷ Council of Europe Convention, Article 51.

²⁸ Explanatory Report to the Council of Europe Convention, CM(2011)49, Para 260.

²⁹ *Thlimmenos v Greece* [GC], ECtHR App. No. 34369/97, 6 April 2000, Para 44.

³⁰ Meyersfeld, B. “Developments in International Law and Domestic Violence”, *Interights Bulletin*, Summer 2011, p. 108.

³¹ For example, the Court has found that the Roma require “special protection” because of their history of disadvantage. See *Orsus and others v Croatia*, ECtHR App. No. 15766/03, 16 March 2010, Para 147.

special vigilance and a vigorous reaction.³² Given the particularly harmful effects of domestic violence, and since women who have experienced domestic violence are particularly vulnerable to further abuses, and have particular protection needs, under Article 14 states should exercise particular vigilance in taking tailored steps to protect a woman who has been subject to domestic violence. States must also take particular measures to protect children against domestic violence and its effects. The Council of Europe Convention provides that states' protection measures must "address the specific needs of vulnerable persons, including child victims."³³ The Convention on the Rights of the Child contains particular obligations in this respect³⁴ and requires the best interests of the child to be a primary consideration in all actions concerning children.³⁵

c) *Investigate, prosecute and punish*

15. The positive obligations under Article 14 demand that states effectively investigate, prosecute and punish perpetrators of domestic violence. Furthermore, states' systems and proceedings in this respect must be based on a "gendered understanding of violence".³⁶ The Special Rapporteur has found "numerous instances in which States fail in their duty to investigate and punish acts of violence against women appropriately, particularly with regard to violence committed in the private sphere."³⁷ She concludes that this is often linked to, *inter alia*, "patriarchal attitudes in the law enforcement and justice system".³⁸ The court has held, in relation to Article 3, that states' investigative obligation cannot be met by an investigation which is insufficiently thorough, and which relies upon hasty or ill-founded conclusions.³⁹ ERT submits that in order to ensure an appropriate investigation in relation to domestic violence, it must be carried out by state agents trained in domestic violence and gender awareness, in a gender-sensitive manner. Further, at all stages of investigations and judicial

³² See *Nachova and Others v Bulgaria* [GC], ECtHR App. Nos. 43577/98 and 43579/98, Para 145: "Racial violence is a particular affront to human dignity and, in view of its perilous consequences, requires from the authorities special vigilance and a vigorous reaction."

³³ Council of Europe Convention, Article 18(3).

³⁴ Convention on the Rights of the Child, Article 19.

³⁵ Convention on the Rights of the Child, Article 3.

³⁶ Council of Europe Convention, Article 49(2).

³⁷ Special Rapporteur Report, Para 60.

³⁸ Special Rapporteur Report, Para 60.

³⁹ *Boicenco v Moldova*, ECtHR App. No. 41088/85, 11 July 2006, Para 123.

proceedings, effective measures must be taken to protect victims of domestic violence, members of their families and witnesses from “intimidation, retaliation and repeat victimisation”.⁴⁰ In the absence of such measures, a state will not only fail in its obligation to “protect”, but also violate its obligations to investigate and prosecute, by jeopardising the success of these processes.

d) *Remedy and Reparation*

16. Finally, states must ensure “gender-specific”⁴¹ remedy and reparation for victims of domestic violence. This should include adequate compensation and transformative remedies aimed at addressing structural discrimination against women. The Special Rapporteur has said:

Since violence perpetrated against individual women generally feeds into patterns of pre-existing and often crosscutting structural subordination and systemic marginalization, measures of redress need to link individual reparation and structural transformation.⁴²

Conclusion

17. Recognition of domestic violence as discrimination is essential to understanding its causes, consequences, impact and solutions. Further, ERT respectfully submits that if states are to be encouraged to respond appropriately to domestic violence, by implementing holistic and coordinated systems covering prevention, protection, investigation, prosecution, punishment and reparation, a failure to respond to domestic violence should be assessed against the positive obligations under Article 14.

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⁴⁰ Council of Europe Convention, Article 31(1)(f).

⁴¹ Special Rapporteur Report, Para 70.

⁴² Special Rapporteur Report, Para 71. The IACtHR has applied a gender-sensitive approach to transformative reparations. In *Gonzales et al v Mexico* (IACtHR Case No. 281/02, 16 November 2009) “bearing in mind the context of structural discrimination” which meant that “reparations must be designed to change the situation” (Para 451) the IACtHR ordered Mexico to implement “permanent education and training programs and courses for public officials on human rights and gender, and on a gender perspective to ensure due diligence in conducting preliminary inquiries and judicial proceedings concerning gender-based discrimination, abuse and murder of women, and to overcome stereotyping about the role of women in society” and to “conduct an educational program for the general population” (Paras 22 – 23 of the Operative Paragraphs of the Judgment).