

DEVELOPMENTS REGARDING DOMESTIC VIOLENCE IN THE CASE-LAW OF THE EUROPEAN COURT OF HUMAN RIGHTS: KURT V. AUSTRIA

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Abstract

The focus of the paper is placed on the recent developments in the case-law of the European Court of Human Rights regarding cases that involve domestic violence. The European Court of Human Rights has already delivered a number of important judgments in cases concerning domestic violence. One of the most recent judgments in this regard is delivered in the case *Kurt v. Austria* on 4 July 2019. No violation of the European Convention of Human Rights was found in *Kurt*. However, it seems that the reasoning of the European Court of Human Rights by which it reached its judgment, in this case, does not take into account certain standards regarding domestic violence cases, established in its previous case-law. In this sense, the paper analyses this case in terms of the previously established case-law as regards domestic violence. Namely, as it seems that the case-law of the European Court of Human Rights on domestic violence is somewhat inconsistent, it is crucial for the European Court of Human Rights to fully clarify its approach on domestic violence, especially having in mind that its rulings are vital guidelines for the national authorities in fulfilling their obligations to secure to everyone the rights and freedoms guaranteed in the European Convention on Human Rights.

Keywords: domestic violence, European Court of Human Rights, European Convention on Human Rights, Kurt v. Austria

I. INTRODUCTION

The European Court of Human Rights (“ECtHR” or “Court”) has delivered a significant number of judgments and decisions in regard to cases concerning various forms of gender-based violence, including domestic violence. In fact, most cases concerning gender-based violence that are brought before the ECtHR are related to domestic violence. The European Convention on Human Rights (“ECHR” or “Convention”) itself does not contain any specific provisions in that regard. However, a number of provisions in the Convention, such as Article 2 (right to life), Article 3 (prohibition of torture), Article 8 (right to respect for private and family law), Article 13 (right to an effective remedy), Article 14 (prohibition of discrimination), have been identified as relevant to domestic violence. Namely, based on the interpretation and application of these provisions, the Court has developed extensive case-law concerning domestic violence and provided for certain standards that need to be followed in domestic violence cases.

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One of the most recent judgments regarding domestic violence is delivered by the ECtHR in the case *Kurt v. Austria*¹ on 4 July 2019. The case concerned a domestic violence situation, which persisted and escalated over time. It culminated with the killing of the applicant's son by her violent husband. The Court found no violation under Article 2 of the Convention, which protects the right to life. However, the reasoning of the Court, in this case, raises a question on whether the Court departed from the relevant principles and standards determined in its previous case-law. Moreover, in a judgment delivered in the case *Volodina v. Russia*² only five days after the judgment in *Kurt*, it seems that the Court had changed its approach again and took into account the principles and standards determined in its previous case-law that were not followed in *Kurt*.

In order to elaborate and examine the above-mentioned question, this paper first provides for an overview of the Court's case-law regarding domestic violence and the principles and standards developed by the Court in this sense. The next part of the paper encompasses an analysis on whether the Court's approach in the case *Kurt v. Austria* is in accordance with the principles and standards developed in domestic violence cases by the Court. Finally, the results of the analysis in regard to the approach of the Court in *Kurt* and its compliance with the principles and standards previously determined will be summarized.

II. PRINCIPLES AND STANDARDS OF THE EUROPEAN COURT OF HUMAN RIGHTS IN DOMESTIC VIOLENCE CASES

In a number of key judgments concerning cases that involve domestic violence, the ECtHR has formulated and developed various principles and standards that lay the foundation for securing protection from domestic violence.³ Also, there are several cases that do not deal directly with domestic violence, or any other form of violence against women, but are still important in this regard, as they lay a foundation for the concepts subsequently used by the Court. Such cases are: *Airey v. Ireland*⁴ and *Osman v. the United Kingdom*⁵.

The case *Airey v. Ireland* involves violence against women since Mrs. Airey sought to separate from her husband, who threatened her with physical violence and occasionally subjected her to physical violence. Due to lack of financial resources and in the absence of legal aid provided by the State, she had been unable to engage a lawyer to represent her before the Court. Among the others, she alleged a violation of Article 6 and Article 8.

The ECtHR found that the high costs of seeking a separation order before the Irish courts have violated the applicant's right to access to court under Article 6 of the ECHR. The Court also found that the inability to obtain a judicial separation from her husband constituted a violation of the applicant right to respect for her private and family life under Article 8 of the ECHR.

The importance of this judgment is in recognizing that Article 8, besides its primarily negative undertaking, also imposes a positive obligation inherent in effective respect for private or family life. Namely, this case is one of the founders of the concept of positive obligations arising under the Convention for the State Parties.

In the case *Osman v. the United Kingdom*, the Court further articulated the responsibility of the national authorities for private acts. In this case, the applicant's husband was killed by her son's former teacher, while her son was seriously wounded. Before the accident took place, the teacher had already threatened the applicant and her family. She complained that the national

¹ *Kurt v. Austria*, no. 62903/15, 4 July 2019

² *Volodina v. Russia*, no. 41261/17, 9 July 2019

³ Jelena Ristik, 'Protection from Gender-Based Violence before the European Court of Human Rights' (2020) 6(2) *Journal of Liberty and International Affairs*, p.75

⁴ *Airey v. Ireland*, 9 October 1979, Series A no.39

⁵ *Osman v. the United Kingdom*, 28 October 1998, Reports of Judgments and Decisions 1998-VIII

authorities have failed to protect the right to life of her husband from the threat posed by the teacher. However, the ECtHR did not find a violation of Article 2 of the Convention. According to the Court's reasoning, Article 2 implied a positive obligation on the authorities to take preventive measures to protect an individual whose life is at real and immediate risk from the criminal acts of another individual. Yet, the Court concluded that the facts in the case did not show that the police knew or ought to have known that the lives of the Osman family were at real and immediate risk from the teacher. Accordingly, the national authorities did not breach Article 2.

This case is important because the Court determined criteria to be followed in order to establish that the national authorities have violated their positive obligation to protect the right to life. According to the Court, "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 or individuals 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."⁶ These criteria are known as the "*Osman* test".

In its further cases, the Court continued to use the *Osman* test and applied it in domestic violence cases. Namely, in the case *Kontrová v. Slovakia*,⁷ the Court extended the positive obligations inherent in Article 2 of the Convention to the domestic context and confirmed that they apply to domestic violence. It should be noted that the Court did not directly address the abuse suffered by the applicant, but the violation was found as regards the rights of the children. Nevertheless, the significant aspect of this case is that the findings explicitly apply to domestic violence and have unequivocally contributed to the development of the case-law of the Court.⁸

The findings of the Court in the case *Kontrová v. Slovakia* were subsequently confirmed two years later in its judgment delivered in the case *Branko Tomašić and Others v. Croatia*.⁹

The concept of positive obligations was further applied and articulated in the case *Bevacqua and S. v. Bulgaria*.¹⁰ The applicant in this case was a victim of domestic violence. The case represents a landmark case since the Court held for the first time that there was a violation of the Convention concerning the actual abuse suffered by the applicant herself, as a victim of domestic violence. However, the case *Bevacqua and S. v. Bulgaria* was criticized because of the absence of focus on the discrimination aspect.¹¹

The discrimination aspect of violence against women was addressed by the Court in the case *Opuz v. Turkey*.¹² Namely, this case is considered a landmark case because for the first time in a domestic violence case the Court held that there had been a violation of Article 14 of the Convention, which guarantees prohibition of discrimination, in conjunction with Article 2 and Article 3. Namely, the Court recognized that domestic violence affected mainly women, while the general and discriminatory judicial passivity in Turkey created a climate that was conducive to it. According to the Court's findings, the violence suffered by the applicant and her mother could therefore be regarded as having been gender-based and discriminatory against women. Despite the reforms carried out by the Turkish Government in recent years, the overall unresponsiveness of the judicial system and the impunity enjoyed by aggressors, as found in

⁶ *Osman v. the United Kingdom*, 28 October 1998, § 115, Reports of Judgments and Decisions 1998-VIII

⁷ *Kontrová v. Slovakia*, no. 7510/04, 31 May 2007

⁸ Ronagh J.A. McQuigg, *International Human Rights Law and Domestic Violence, The effectiveness of international human rights law* (Routledge, Oxford, 2011), p.50

⁹ *Branko Tomašić and Others v. Croatia*, no. 46598/06, 15 January 2009

¹⁰ *Bevacqua and S. v. Bulgaria*, no. 71127/01, 12 June 2008

¹¹ Lee Hasselbacher, 'State Obligations Regarding Domestic Violence: The European Court of Human Rights, Due Diligence, and International Legal Minimums of Protection' (2010) 8(2) *Northwestern Journal of International Human Rights*, p.208-209

¹² *Opuz v. Turkey*, no. 33401/02, ECHR 2009

the applicant's case, indicated an insufficient commitment on the part of the authorities to take appropriate action to address domestic violence.¹³

It is important to emphasize that the Court's judgments in the cases *Bevacqua and S. v. Bulgaria* and *Opuz v. Turkey* "recognize and advance the due diligence standard in the context of domestic violence".¹⁴ Namely, there are several minimums foreseen that provide practical substance in order to assess the adherence of the state to the principles of protection, investigation, and prosecution. These minimums incorporate the availability of a judicial mechanism in order to obtain protection measures, as well as prosecution for all crimes of domestic violence in the public interest.¹⁵ As it was pointed out before, the Court went a step further in the case *Opuz v. Turkey* and recognized that the failure of the national authorities to exercise due diligence represents gender-based discrimination.

In the case *Valiulienė v. Lithuania*¹⁶, concerning the complaint by a woman who was a victim of domestic violence about the state's failure to investigate her allegations of ill-treatment and to bring her partner to account, the adequateness of the *Osman* test in situations of domestic violence was criticized by Judge de Albuquerque. Namely, in his Concurring opinion, he emphasized that the stage of an "immediate risk" was often too late for the national authorities to intervene. According to him, "the recurrence and escalation inherent in most cases of domestic violence make it somehow artificial, even deleterious, to require an immediacy of the risk".¹⁷ In that sense, "a more rigorous standard of diligence is especially necessary in the context of certain societies".¹⁸ He concludes that "the emerging due diligence standard in domestic violence cases is stricter than the classical *Osman* test".¹⁹

In the case *Talpis v. Italy*,²⁰ concerning the conjugal violence suffered by the applicant, which resulted in the murder of her son and her own attempted murder, "the Court seems to follow the way paved by Judge de Albuquerque".²¹ According to the Court, "the risk of a real and immediate threat (...) must be assessed taking due account of the particular context of domestic violence".²² Furthermore, "In such a situation it is not only a question of an obligation to afford general protection to society (...) but above all to take account of the recurrence of successive episodes of violence within the family unit".²³

In the judgment delivered in the case *Kurt v. Austria*²⁴ two years later, concerning the murder of the applicant's son by his father after previous allegations of domestic violence by the applicant against the father, the Court seems to follow again the classical "*Osman* test" and concludes that there is no violation of Article 2. Namely, in this case, the Court stated that "not every claimed risk to life can entail for the authorities a Convention requirement to take operational measures to prevent that risk from materialising".²⁵ It further held that "for such 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

¹³ *ibid* § 200

¹⁴ Lee Hasselbacher, 'State Obligations Regarding Domestic Violence: The European Court of Human Rights, Due Diligence, and International Legal Minimums of Protection' (2010) 8(2) *Northwestern Journal of International Human Rights*, p.203

¹⁵ *ibid*

¹⁶ *Valiulienė v. Lithuania*, no. 33234/07, 26 March 2013

¹⁷ *ibid* Concurring opinion of Judge Pinto de Albuquerque

¹⁸ *ibid*

¹⁹ *ibid*

²⁰ *Talpis v. Italy*, no. 41237/14, 2 March 2017

²¹ Sara de Vido, 'States' Positive Obligations to Eradicate Domestic Violence: The Politics of Relevance in the Interpretation of the European Convention on Human Rights' (2017) 6(6), p.5

²² *Talpis v. Italy*, no. 41237/14, § 122, 2 March 2017

²³ *ibid*

²⁴ *Kurt v. Austria*, no. 62903/15, 4 July 2019

²⁵ *ibid* § 64

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”.²⁶

Five days after the judgment in the case *Kurt v. Austria*, the Court issued a judgment in the case *Volodina v. Russia*²⁷, concerning the applicant's complaint that the national authorities had failed to protect her from repeated domestic violence, including assaults, kidnapping, stalking and threats. The applicant also alleged that the current Russian legal system is not adequate in order to deal with such violence and discrimination against women. In this case, the Court applied the approach established in the case *Talpis v. Italy* regarding the obligation of the national authorities under Article 3 of the Convention. Namely, the Court reiterated that “the risk of a real and immediate threat must be assessed, taking due account of the particular context of domestic violence”.²⁸

III. APPROACH OF THE EUROPEAN COURT OF HUMAN RIGHTS IN KURT V. AUSTRIA

In the case *Kurt v. Austria*, the applicant alleged that the Austrian authorities had failed to protect her and her children from her violent husband, which had resulted in him murdering their son.²⁹ Namely, she complained that the authorities had failed to fulfil their positive obligation to take preventive operational measures for the protection of her son's life.³⁰

In July 2010, the applicant called the police and reported that her husband had beaten her, as well as that he had been beating her for years. A barring order was issued against the applicant's husband regarding their common apartment, as well as the applicant's parents' apartment. In January 2011, six months after the applicant had reported her husband to the police, he was convicted of bodily harm and dangerous threatening behaviour against the applicant. He was sentenced to three months imprisonment, suspended for three years with probation. The applicant did not report any further incidents to the police in the next two years.

On 22 May 2012, the applicant filed for divorce and reported her husband to the police for rape, beating her and her children regularly and making daily threats to kill her and their children. The rape happened three days before she reported it to the police. The applicant stated that she was in great fear of her husband and that she was reporting all this to the police at a later stage because she wanted to protect herself and her children. Another barring order was issued against the applicant's husband regarding the marital home, as well as the applicant's parents' apartment. On the same day, the public prosecutor instituted criminal proceedings against the applicant's husband for rape, bodily harm and dangerous threats, and also interviewed the children. The children confirmed that their father had beaten their mother, as well as them.

On 24 May 2012, the applicant's husband was questioned and confronted with his children's statements. The next day, on 25 May 2012, he visited his children's school, took his son to a basement and shot him. On the same day, he had committed suicide. Two days later, the applicant's son succumbed to his injuries and died.

In February 2014, the applicant instituted official liability proceedings, claiming that the public prosecutor should have requested for her husband to be held in pre-trial detention following her report on 22 May 2012. She argued that there had been a real and immediate risk that he would re-offend against his family and that it was clear that the barring order had not offered

²⁶ *ibid* § 65

²⁷ *Volodina v. Russia*, no. 41261/17, 9 July 2019

²⁸ *ibid* § 86

²⁹ *Kurt v. Austria*, no. 62903/15, § 3, 4 July 2019

³⁰ *ibid* § 67

sufficient protection. In November 2014, the St. Polten Regional Court dismissed her claim, holding that there had not been an immediate risk to her son's life. In January 2015, the Vienna Court of Appeal dismissed her appeal. In April 2015, the Supreme Court rejected the applicant's extraordinary appeal on points of law.

In December 2015, the applicant lodged an application to the European Court of Human Rights. On 4 July 2019, a Chamber of the Court delivered a judgment. It found that there has been no violation of Article 2 of the Convention, as the Austrian authorities did not fail to comply with their positive obligations to the life of the applicant's son.³¹

Unlike some previous cases, such as *Bevacqua and S. v. Bulgaria*, *Opuz v. Turkey*, *Talpis v. Italy*, the case *Kurt v. Austria* did not concern a delay or inactivity of the national authorities in regard to responding to the applicant's complaints on domestic violence. Namely, in this case, the authorities reacted immediately to the applicant's reports of domestic violence. However, the measures that were taken did not prevent the applicant's husband from murdering his son. In this sense, the Court's main task was to establish whether the national authorities have complied with their positive obligations to take preventive operational measures under the substantive limb of Article 2 of the Convention.

As regards the positive obligations to take preventive operational measures, the Court had to examine whether the national authorities could or should have known at the time that the applicant's husband posed a real and immediate risk to the boy's life, which required more serious measures to be taken, such as taking him to detention.³² In answering this question, the Court followed the classical *Osman* test, according to which "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".³³

When examining what was known to the public prosecutor at the relevant time, in order to decide which measures to be taken in respect of the applicant's husband, the Court concluded that the offences committed by the applicant's husband in 2012 are the same as the offences he committed in 2010 and that there were no indications that suggested an escalation of the situation.³⁴ However, it appears that the level of violence committed by the applicant's husband in 2010 and 2012 was not the same. Namely, in 2010, he was convicted of bodily harm caused by pushing her against a wall and slapping her, as well as of dangerous threatening behaviour.³⁵ On the other hand, in 2012, the public prosecutor instituted criminal proceedings against him based on the suspicion of rape, bodily harm and dangerous threat.³⁶

Namely, it appears that there were several indications that the level of violence committed by the applicant's husband in 2012 has significantly increased compared to the level of violence committed in 2010. One of the most important indications in this regard is the suspicion of rape. Moreover, the applicant's husband started to make serious death threats on daily basis against the applicant and their children.³⁷ Also, unlike before, there was evidence that the applicant's husband had beaten their two minor children, as well as that he always took the applicant's mobile phone away from her and locked her in their apartment occasionally.³⁸ Furthermore, in 2012 the applicant filed for divorce,³⁹ while the children gave statements that

³¹ *ibid* § 80

³² *ibid* § 68

³³ *ibid* § 65

³⁴ *ibid* § 70

³⁵ *ibid* § 10

³⁶ *ibid* § 19

³⁷ *ibid* § 14

³⁸ *ibid* § 15, 17 and 19

³⁹ *ibid* § 11

the applicant's husband had beaten them and he was later confronted with his children's statements.⁴⁰

It could be noted that the foregoing observations in respect to the worsening of the situation problematize the Court's finding that, because the applicant's husband complied with the barring order in 2010, it could reasonably be expected that such an order would be effective in 2012 as well.⁴¹

In his concurring opinion, judge Hüseyinov criticized the classical application of the *Osman* test and the context-insensitive approach of the Court. According to him, the Court applied the classical *Osman* test "robustly" and in doing so "overlooked the peculiarity of domestic violence as a distinctive social phenomenon".⁴² He reiterated that "domestic violence often constitutes not just an isolated incident, but rather a continuous practice of intimidation and abuse".⁴³ In addition, he supported the view of judge de Albuquerque in his concurring opinion in the case *Valiuliene v. Lithuania* and the approach of the Court in the case *Talpis v. Italy*. In his opinion, "seeking to prove the immediacy of the risk to life in domestic violence cases in order to establish a violation of Article 2 would not be consonant with the scope of the due diligence obligations of States in the field of preventing and combating domestic violence ...".⁴⁴

In addition, especially striking in terms of the assertion that the approach of the Court is context-insensitive, having in mind the peculiarity of domestic violence and the resulting vulnerability of the victim, is the approach to the fact that the applicant had spent three more days in the apartment she shared with her husband before reporting the alleged rape. Namely, the Court did not take into account the vulnerability of the applicant, i.e. the possibility that the domestic violence suffered by the applicant for years could have produced great fear of her husband and prevent her from taking immediate action to report him to the police. On the contrary, the Court used this fact in order to reduce and relativize the seriousness of the situation.⁴⁵

IV. CONCLUSION

The ECtHR has built up a substantial body of jurisprudence regarding domestic violence, as a form of gender-based violence. Namely, despite the lack of specific provisions in the ECHR in this regard, the Court has developed an extensive case-law in this field, by using a number of provisions in the Convention as relevant to domestic violence.

It could be noted that there have been very positive developments within the case-law of the Court concerning domestic violence, such as the extending of the positive obligations inherent in Article 2 of the Convention to the domestic context; recognizing that domestic violence could be regarded as having been gender-based and discriminatory against women, etc. Namely, the Court developed various principles and standards to be followed in dealing with the complex phenomenon of domestic violence.

However, it seems that the reasoning provided by the Court in the judgment delivered in the case *Kurt v. Austria* could undermine the progress made in the Court's case law concerning domestic violence cases and create uncertainty regarding the standards that should be followed in dealing with such cases. Namely, it could be concluded that the approach of the Court to some of the facts in *Kurt* is context-insensitive in terms of overlooking the particularity of

⁴⁰ *ibid* § 19-20

⁴¹ *ibid* § 70, 74-76

⁴² *ibid* Concurring opinion of judge Hüseyinov, § 1

⁴³ *ibid* § 4

⁴⁴ *ibid*

⁴⁵ *Kurt v. Austria*, no. 62903/15, § 70, 75, 79, 4 July 2019

domestic violence, especially its tendency towards recurrence and escalation as well as the resulting vulnerability of the victims. This means that, in *Kurt*, the Court departed from its previously established case-law and did not take into account the standard already developed by the Court in the case *Talpis v. Italy*, i.e. to take into account the shift in the application of the *Osman* test. Moreover, only five days later, the Court delivered a judgment in the case *Volodina v. Russia*, where it took into account the standard developed in *Talpis*.

It could be argued that, in *Kurt*, the reasoning given by the Court not only missed the opportunity to support and reinforce the necessary degree of diligence towards the complex situations of domestic violence but also created uncertainty as to which standard should be taken into account by national authorities when dealing with domestic violence cases. Namely, as it seems that the Court's case-law on domestic violence is somewhat inconsistent, it is very important for the Court to fully clarify its approach in those issues, particularly given that its rulings are vital guidelines for the national authorities in fulfilling properly their obligations arising from the Convention.

At the time of writing this paper, the judgment delivered in the case *Kurt v. Austria* is still not final in terms of Article 44(2) of the Convention. On 4 November 2019, a referral to the Grand Chamber of the ECtHR has been granted regarding this case, and on 17 June 2020, a hearing before the Grand Chamber was held. It remains to be seen whether the Court will clarify this issue and take a strong stance on the standards to be followed in domestic violence cases.

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