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# Recent ECtHR case law in non-discrimination matters

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# Main points

## 1. A brief recall:

- *Article 14*
  - content
  - ‘ordinary’ application
- *The Strict Scrutiny Test*
  - *rationale*
  - relevant grounds

## 2. Recent case law (2017-2018):

- *When Article 14 has been applied:*
  - does it confirm previous case law?
  - does it confirm the strict scrutiny test?
  - what are the relevant grounds?
- *When Article 14 has not been applied:*
  - exploring the *rationale*
  - does it confirm previous case law?



# Article 14 ECHR – Key aspects

## Art. 14 reads as follows:

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

## Key points:

- a complementary provision... *but an autonomous right*
- an open list... *followed by an evolutionary interpretation of grounds*
- the need to identify a “clear situation of inequality” *in order to be applied* (see *Opuz v. Turkey*)
- the “*within the ambit*” test: the “*magnifying effect*” on the ECHR, while waiting for the ratification of Protocol no. 12 by all CoE Members...



# Article 14 – The ‘Ordinary’ Application

*An issue arises under Article 14 if:*

- there is a difference in treatment of persons in relevantly similar situations... to be demonstrated, *despite no clear criteria exist*: the lack of comparable situations is a justification in itself!
- the difference in treatment has *no objective and reasonable justification*:
  - it does not pursue a legitimate aim (overall *protecting the life of a democratic society*)
  - there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realised (*only if manifestly disproportionate*)

Attention: States enjoy a margin of appreciation in assessing *whether and to what extent* differences in otherwise similar situations justify a difference in treatment...



# The Strict Scrutiny Test

- aimed to:
  - *combating particularly dangerous kinds of discrimination opposite to the idea of democratic society and involving «vulnerable groups»*
  - *differentiating among grounds*
- characterised by:
  - *a (partial) reversal of burden of proof*
  - *the need of “particularly serious reasons” by way of justification: not only attention on the relationship of proportionality but also on the necessity to achieve the proposed aim*
- consequences:
  - the ECHR is usually read as a *«living instrument»*
  - the margin of appreciation is progressively restricted, esp. in light of the specific grounds at stake



# Relevant Grounds for the Strict Scrutiny Test

*Not always clear but these may include:*

- *Gender* – see *Konstantin Markin v. Russia* (GC)
- *Ethnic origin* – see *Orsus and others v. Croatia* (GC)
- *Sexual orientation (?)* – see *P.B. and P.S. v. Austria*
- *Health status/disability (?)* – see *Kiyutin v. Russia*
- *Gender identity (?)*
- *Religion (??)*
- *Disability (??)*

*The focus is placed on:*

- innate personal characteristics, *or*
- core choices that are fundamental for a person's or a group's identity

*For other grounds, no strict scrutiny test applies: for instance, language, age, residence...*



# Recent ECtHR case law

Years 2017-2018

## – *Gender:*

- *Domestic violence:* Talpis v. Italy (2 March 2017) and Balsan v. Romania (23 May 2017)
- *Imprisonment:* Khamtokhu and Aksenchik v. Russia (GC, 24 January 2017) and Alexandru Enache v. Romania (3 October 2017)
- *Sexuality:* Carvalho Pinto de Sousa Morais v. Portugal (25 July 2017)
- *Parents' role and residence:* Leonov v. Russia (10 April 2018)

## – *Ethnic origin:*

- *Racial abuses by private agents:* Skorjanec v. Croatia (28 March 2017) and Alkovic v. Montenegro (5 December 2017)

*While addressing new issues, this cases also confirms and specifies relevant previous case law: see Opuz v. Turkey (domestic violence) and Secic v. Croatia (racial abuses).*



# Recent ECtHR case law

Years 2017-2018

– *Sexual orientation:*

- *Civil unions:* Ratzenbock and Seydi v. Austria (26 October 2017)
- *Procreation:* Charron and Merle-Montet v. France (16 January 2018)
- *Parental authority:* Bonnaud and Lecoq v. France (6 February 2018)
- *Parental leave:* Hallier and others v. France (12 December 2017)
- *Ban on homosexual expression:* Bayev and others v. Russia (20 June 2017)

– *Religion:*

- *Symbols:* Belcacemi and Oussar v. Belgium (11 July 2017) and Dakir v. Belgium (11 July 2017)

*This confirms relevant case law in each field:*

- the freedom of CoE Member States to differentiate between couples' status (*Schalk and Kopf v. Austria*) and the application of strict scrutiny test (*Alekseyev v. Russia*)
- a wide margin of appreciation in allowing or not the display of religious symbols (*S.A.S. v. France*)...



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# Recent ECtHR case law

Years 2017-2018

Other grounds and rights and reasonable justifications:

- Being employed in public/private sector and the right to property:
  - *Pension related issues*: Fabian v. Hungary (GC) (5 September 2017)
- Being a representative of a political party and political freedoms:
  - *Impossibility to run for legislative elections*: Cernea v. Romania (27 February 2018)
- Disability and right to education:
  - *Impossibility to attend University*: Enver Sahin v. Turkey (30 January 2018)

*In Enver Shain, the Court stressed the need to read Art. 14 ECHR in light of: the development of international law and the consensus on the States' obligations to adopt "reasonable accommodations" for correcting "factual inequalities" and "granting a dignified and autonomous life" to PWD...*



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# Recent ECtHR case law

Years 2017-2018

*Attention to cases where Article 14 has not been applied/considered (but potentially could):*

- *Gender identity*: A.P., Garçon and Nicot v. France (6 April 2017)
- *Ethnic origin*: Kiraly and Domotor v. Hungary (17 January 2017) and Balta v. France (16 January 2018)
- *Sexual orientation*: Orlandi and others v. Italy (14 December 2017)
- *Religion*: Hamidovic v. Bosnia and Herzegovina (5 December 2017)

*This case law brings us back to Article 14's own limits...*



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# Final remarks

*The recent case law:*

- does not reveal, overall, substantive changes
- confirms the application of the strict scrutiny test to the «usual» grounds
- discloses increasing attention to other grounds and factual inequalities, such as in relation to disability...

*Taken as a whole, recent trends confirm the key aspects for moving towards significant changes in non-discrimination:*

- the need for consensus
- the specific right involved
- the identification of situation of «clear inequality»
- the ECtHR as the best placed authority to decide...





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