



EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

SECOND SECTION

CASE OF NURCAN BAYRAKTAR v. TÜRKİYE

(Application no. 27094/20)

JUDGMENT

Art 8 • Private life • Refusal on the part of domestic courts to exempt applicant from statutory 300-day waiting period for divorced woman wishing to remarry without having to undergo medical examination to prove she was not pregnant • Aim of enabling determination of biological paternity obsolete in modern society • Question as to whether woman is pregnant closely tied to intimacy of private life • Reasons based on biological particularities of women reflect traditional idea of female sexuality, ignoring its physical and psychological relevance for self-fulfilment of women as people • Lack of relevant and sufficient reasons • Disproportionate measure

Art 14 (+ Art 12) • Marriage • Narrow margin of appreciation • Direct discrimination on grounds of sex not justified by aim of preventing uncertainty as to parentage of possible unborn child • Difference in treatment neither objectively justified nor necessary

Art 34 • Victim status • Applicant directly affected by statute providing for waiting period based solely on membership of category of divorced women who might remarry

STRASBOURG

27 June 2023

FINAL

06/11/2023

This judgment has become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Nurcan Bayraktar v. Türkiye,

The European Court of Human Rights (Second Section), sitting as a Chamber composed of:

Arnfinn Bårdsen, *President*,

Jovan Ilievski,

Pauliine Koskelo,

Saadet Yüksel,

Lorraine Schembri Orland,

Frédéric Krenç,

Davor Derenčinović, *judges*,

and Hasan Bakırcı, *Section Registrar*,

Having regard to:

the application (no. 27094/20) against the Republic of Türkiye lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by a Turkish national, Ms Nurcan Bayraktar (“the applicant”), on 27 June 2020;

the decision to give notice to the Turkish Government (“the Government”) of the complaints concerning Articles 6 § 1, 8, 12 and 14 of the Convention and to declare inadmissible the remainder of the application;

the parties’ observations;

Having deliberated in private on 30 May 2023,

Delivers the following judgment, which was adopted on that date:

INTRODUCTION

1. The present application concerned the domestic authorities’ refusal to grant the applicant’s request that she be exempted from the 300-day waiting period before remarrying imposed on divorced women under Article 132 du of the Civil Code, without undergoing a medical examination to determine whether she was pregnant. Relying on Articles 8, 12 and 14 of the Convention, the applicant alleged that the obligation for divorced women to observe a 300-day waiting period unless they proved that they were not pregnant constituted discrimination and an infringement of their right to respect for their private life and their right to marry.

THE FACTS

2. The applicant was born in 1973 and lives in İzmir. She was represented by Ms H. Yılmaz Kayar, a lawyer practising in Istanbul.

3. The Government were represented by their Agent, Mr Hacı Ali Açıkgül, Head of the Human Rights Department of the Ministry of Justice of the Republic of Türkiye.

4. In its judgment of 19 December 2012 the Kadıköy Family Court declared the applicant and her husband divorced. Following a judgment of

the Court of Cassation delivered on 27 November 2013 the part of the first-instance judgment pertaining to the divorce became final on 21 January 2014.

5. On 9 July 2014 the applicant asked the Istanbul Anadolu Family Court (“the Family Court”) to exempt her from the 300-day waiting period under Article 132 of the Civil Code, without requiring her to undergo a medical examination to prove she was not pregnant. Submitting that Article 132 of the Civil Code, wherein the waiting period was prescribed, instituted discrimination on grounds of sex and was accordingly in breach of the Constitution and of several treaties signed by Türkiye for the protection of human rights and to combat discrimination against women, including the Convention, she requested that the case be referred to the Constitutional Court for a preliminary ruling on the constitutionality of that provision.

6. On 11 July 2014 the Family Court directed the applicant to procure a medical certificate from a hospital indicating whether or not she was pregnant, which would be added to the file, and warned her that her application would be dismissed on procedural grounds should she fail to comply. In addition, it dismissed as unfounded the applicant’s allegation as to the unconstitutionality of Article 132 of the Civil Code.

7. On 22 July 2014 the applicant sent a letter to the Family Court in which she declared that she would not procure the medical certificate in question. She alleged that both the court’s request to that effect and Article 132 of the Civil Code ran counter to Articles 8, 12 and 14 of the Convention. She also requested that the court re-examine her allegation as to the unconstitutionality of Article 132 of the Civil Code.

8. On 19 September 2014 the Family Court delivered a judgment on the merits of the case. It rejected the applicant’s application for exemption from the 300-day waiting period on procedural grounds. It noted that it had advised the applicant that she was to procure a medical certificate to the effect that she was not pregnant – which was necessary, according to the court, if she wished to remarry to someone other than her ex-husband –; that it had granted her a period within which to do so; and that the applicant, having declared that she refused to produce such a certificate, had requested unconditional exemption from the waiting period. In addition, the court again held that the allegation as to the unconstitutionality of Article 132 of the Civil Code was without pertinence. The judgment’s reasoning read as follows:

“This court finds that the obligation imposed on any divorced woman wishing to remarry to someone other than her ex-husband that she produce a certificate to the effect that she is not pregnant is not solely a question of that woman’s freedom, but also of the freedom, ... status and future within society of a possible unborn child and of all married couples; that, in this sense, the certificate proving she is not pregnant that a woman is required to produce in order to be authorised to remarry [constitutes] a guarantee for herself and ... for her possible unborn child; that subsequent proceedings, if any, taken to contest or establish the child’s parentage, would involve even greater [inconvenience] for the individuals concerned; that such proceedings are in effect more harmful and damaging [than the certificate in question], given the DNA tests and

medical examinations [which must be carried out in such cases] and the accusations [which the parties thereto make] against each other; and [that it is natural to see] gender equality as an equality of virtues and rights ... , but that a concept of equality that disregards the natural particularities of individuals, such as their birth, maternity and paternity, or an argument that boils down to saying “why am I being examined to see whether or not I am pregnant when men are not subjected to any examination?” cannot be countenanced.

Moreover, this court does not agree with the argument that this situation deprives women of their legal capacity or restricts that capacity. Indeed, ... men and women are equal in every respect as to their humanity and their rights and entitlements, but ... this conception of equality and freedom cannot be regarded as undermining the main dynamics, interests and serenity of the parties or of any as-yet unborn child. While equality between men and women, as set forth above, is accepted as a rule, one must nevertheless not lose sight of the fact that they each have qualities that make them superior to the other. For example, men’s [physical] strength cannot be [compared] to that of women, but, through the sensitivity and emotions that characterise them in their role as mothers, women are far stronger than men ... the ability to give birth is specific to women ...

Nor does this court agree with the argument that women are not obliged to disclose a potential pregnancy. In fact, in view of the nature of certain institutions, the obligation to determine certain situations ... is important with regard to persons who are parties to an act, namely, [in the present case,] to the persons who are marrying and to the unborn child, who are liable to be affected by the act [of remarrying]. Just as it cannot be regarded as normal for a person wishing to remarry to refuse to state whether or not he or she is already married or to consent to having his or her marital status verified, so too must the scheme provided for by the legislature in this context be deemed pertinent, given that remarriage can affect not only the woman herself but a number of other individuals as well, in a direct and more forceful manner.”

9. On 6 May 2015 the Court of Cassation, with which the applicant had lodged an appeal on points of law, upheld the Family Court’s judgment, which it considered to have complied with the requisite procedure and law.

10. The applicant lodged an application for rectification of that decision. On 2 December 2015 the Court of Cassation dismissed the application, finding that it did not correspond to any of the statutory grounds for such a remedy.

11. On 22 January 2016 the applicant lodged an individual application with the Constitutional Court. She submitted that the 300-day waiting period imposed on divorced women under Article 132 of the Civil Code constituted discrimination on grounds of sex and that the judgments that had been delivered by the courts in this regard had infringed her rights to a fair hearing, to respect for her private life, to marry and to an effective remedy.

12. On 3 April 2020 the Constitutional Court declared the applicant’s individual application inadmissible. It considered that her complaints relating to respect for her private life and the principle of equality were manifestly ill-founded, taking the view that there had been no interference with the rights and freedoms in issue or, if there had been such interference, that it had not involved any infringement of those rights and freedoms. As to the allegation

of an infringement of the right to a fair hearing, the Constitutional Court considered that this complaint was inadmissible *ratione materiae* as it concerned the alleged unconstitutionality of a legislative provision.

RELEVANT DOMESTIC AND INTERNATIONAL LEGAL FRAMEWORK

I. DOMESTIC LEGISLATION

13. Article 132 of the Civil Code (Law no. 4721 of 22 November 2001, having come into force on 1 January 2002), entitled “Waiting period for women [before remarrying]”, reads as follows:

“If the marriage has ended, the woman may not [re]marry until three hundred days have elapsed from the end of the marriage.

If the woman gives birth in that time, the waiting period shall thereby be terminated.

If it is [shown] that the woman is not pregnant from her previous marriage or if the spouses whose marriage has ended wish to remarry [to one another], the court shall waive that [waiting] period.”

14. Article 154 of the Civil Code, entitled “Failure to comply with the waiting period [before remarrying]”, reads as follows:

“A marriage [entered into] before the expiry of the female spouse’s waiting period shall not, however, be null and void.”

15. Article 285 of the Civil Code, entitled “Presumption of paternity”, provides as follows:

“The father of a child born during the marriage or within three hundred days following its [dissolution] shall be the husband.

The paternity of a child born after the expiry of that period may be attributed to the husband if it is proved that the mother’s pregnancy began during the marriage.

If the husband has been declared absent, the three-hundred-day period shall commence from the date of his presumed death or [from the date on which he was last heard from].”

16. As to paternity challenges, the relevant articles of the Civil Code read as follows:

“Article 286. The husband may [rebut] the presumption of paternity by bringing an action to deny paternity. Such an action shall be brought against the mother and the child.

The child shall also be entitled [to bring a paternity suit]. Such an action shall be brought against the mother and the husband.

Article 287. Where the child [was conceived] in wedlock, it shall fall to the claimant to prove that the husband is not the father.

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A child born no fewer than one hundred and eighty days after the marriage and at most three hundred days after the [dissolution] of the marriage shall be deemed to have been [conceived] in wedlock.

Article 288. If the child was [conceived] before the marriage or during the [process of separation], the claimant shall not be required to provide further proof.

However, where there is convincing evidence that the husband had sexual intercourse with his wife during the period [of conception], the presumption of paternity in respect of the husband shall remain valid.

Article 289. The husband must bring the action within one year from the date on which he learned of the birth and [that] he was not the father or that the mother had had sexual intercourse with another man during the [period] of conception.

The child must bring the action at the latest within one year from reaching the age of majority.

In the event of justified delay, the one-year period shall commence on the date on which the reason for such delay ceases to apply.

Article 290. If a child is born within three hundred days from the [dissolution] of the marriage and the mother has since remarried, her new husband shall be presumed to be the father.

If that presumption is [rebutted], her former husband shall be deemed to be the father.”

17. Section 26 of Civil Registry Services Act (Law no. 5490 of 25 April 2006), entitled “Commencement of the waiting period for women [before remarrying]” provides as follows:

“The waiting period for women [before remarrying] shall commence on the date when the court decision becomes final.”

18. Article 2 – headed “Definitions” – of the regulation on marriage adopted by the Council of Ministers on 10 July 1985 defines the waiting period prior to remarrying as follows:

“...

(i) Statutory waiting period [before remarrying]: ... period of three hundred days during which a woman whose marriage has ended may not remarry in order to avoid confusion as to bloodlines.

...”

II. THE CONVENTION ON THE ELIMINATION OF ALL FORMS OF DISCRIMINATION AGAINST WOMEN

19. The relevant articles of the Convention on the Elimination of All Forms of Discrimination against Women, adopted by the United Nations General Assembly in resolution 34/180 of 18 December 1979, which entered into force on 3 September 1981 and was ratified by Türkiye on 20 December 1985, provide as follows:

Article 1

“For the purposes of the present Convention, the term ‘discrimination against women’ shall mean any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.”

Article 2

“States Parties condemn discrimination against women in all its forms, agree to pursue by all appropriate means and without delay a policy of eliminating discrimination against women and, to this end, undertake:

(a) To embody the principle of the equality of men and women in their national constitutions or other appropriate legislation if not yet incorporated therein and to ensure, through law and other appropriate means, the practical realization of this principle;

(b) To adopt appropriate legislative and other measures, including sanctions where appropriate, prohibiting all discrimination against women;

(c) To establish legal protection of the rights of women on an equal basis with men and to ensure through competent national tribunals and other public institutions the effective protection of women against any act of discrimination;

(d) To refrain from engaging in any act or practice of discrimination against women and to ensure that public authorities and institutions shall act in conformity with this obligation;

(e) To take all appropriate measures to eliminate discrimination against women by any person, organization or enterprise;

(f) To take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women;

(g) To repeal all national penal provisions which constitute discrimination against women.

...”

Article 5

“States Parties shall take all appropriate measures:

(a) To modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women;

(b) To ensure that family education includes a proper understanding of maternity as a social function and the recognition of the common responsibility of men and women in the upbringing and development of their children, it being understood that the interest of the children is the primordial consideration in all cases.

...”

Article 16

“1. States Parties shall take all appropriate measures to eliminate discrimination against women in all matters relating to marriage and family relations and in particular shall ensure, on a basis of equality of men and women:

- (a) The same right to enter into marriage;
- (b) The same right freely to choose a spouse and to enter into marriage only with their free and full consent;
- (c) The same rights and responsibilities during marriage and at its dissolution;
- (d) The same rights and responsibilities as parents, irrespective of their marital status, in matters relating to their children; in all cases the interests of the children shall be paramount;
- (e) The same rights to decide freely and responsibly on the number and spacing of their children and to have access to the information, education and means to enable them to exercise these rights;
- (f) The same rights and responsibilities with regard to guardianship, wardship, trusteeship and adoption of children, or similar institutions where these concepts exist in national legislation; in all cases the interests of the children shall be paramount;
- (g) The same personal rights as husband and wife, including the right to choose a family name, a profession and an occupation;
- (h) The same rights for both spouses in respect of the ownership, acquisition, management, administration, enjoyment and disposition of property, whether free of charge or for a valuable consideration;

2. The betrothal and the marriage of a child shall have no legal effect, and all necessary action, including legislation, shall be taken to specify a minimum age for marriage and to make the registration of marriages in an official registry compulsory.

...”

III. CONCLUDING OBSERVATIONS OF 16 AUGUST 2010 OF THE COMMITTEE ON THE ELIMINATION OF DISCRIMINATION AGAINST WOMEN IN RESPECT OF TÜRKİYE

20. At its forty-sixth session (12-30 July 2010), the Committee on the Elimination of Discrimination against Women, instituted by the Convention on the Elimination of All Forms of Discrimination against Women in order to assess the progress made in applying that convention, adopted its concluding observations on the elimination of discrimination against women in respect of Türkiye (CEDAW/C/TUR/CO/6), which it published on 16 August 2010. Paragraphs 40 and 41 of that document read as follows:

“...

Family relations

40. Recalling its previous concluding observations of 2005, the Committee is concerned that the 2002 amendment to the Civil Code regarding joint ownership of property acquired during marriage has not been applied retroactively, thus continuing

to disadvantage women who were married prior to its entry into force. Despite a 2004 decision of the European Court of Human Rights, which granted a woman the right to solely retain her maiden name, the Committee notes that, in accordance with article 187 of the Civil Code, married women can only retain their maiden name if it is accompanied by their spouses' surname. The Committee also notes that a waiting period of 300 days is still required for women to remarry after divorce.

41. In line with its previous concluding observations of 2005, the Committee recommends that the State party consider the impact of the lack of retroactive applicability of the 2002 amendment to the Civil Code regarding joint ownership of acquired property on women married prior to its entry into force. It invites the State party to consider a further amendment of the Civil Code to include marriages concluded before 2002. The Committee further urges the State party to review and amend without delay existing discriminatory legislation and provisions, including with respect to the retention of women's surnames after marriage and the waiting period for remarriage, to bring them fully into line with articles 2 and 16 of the Convention [on the Elimination of All Forms of Discrimination against Women].

..."

THE LAW

I. GOVERNMENT'S PRELIMINARY OBJECTIONS

21. The Government raised two objections on grounds of inadmissibility concerning the applicant's complaints under Articles 8, 12 and 14 of the Convention: they argued first that she lacked victim status and second that she had not suffered a significant disadvantage. As to the first objection, they explained that the applicant had failed to produce any tangible evidence that she had had prospective plans to remarry when she had lodged her claim with the domestic courts, and that she had not remarried since. They therefore considered that the applicant had not shown that the impugned waiting period had had an unfavourable impact on her life. They submitted that, as a consequence, the applicant, who in their view had not been directly affected by the 300-day waiting period, could not claim victim status. The Government argued, in consequence, that the main objective of the application was to criticise, in the abstract, an alleged incompatibility between Article 132 of the Civil Code, which prescribed that measure, and the Constitution and certain international conventions, and that the application amounted to an *actio popularis*.

22. As to their second objection, the Government noted that the applicant had requested exemption from the waiting period on 9 July 2014, whereas the court decision as to her divorce had become final on 21 January 2014. They submitted that the applicant had not described her plans to remarry in a manner that was sufficiently detailed and convincing to demonstrate that the remaining four months of the 300-day waiting period had been the source of a significant disadvantage for her. Consequently, they asked that the Court declare the application inadmissible for lack of a significant disadvantage.

23. The applicant disputed the objections raised by the Government. She submitted that, under the legislation in force, she could not, following her divorce, have taken any steps with a view to remarrying so long as the waiting period that had been imposed on her had not expired or been waived and that the arguments concerning her private life by which the Government had sought to substantiate their objections were designed to deflect attention away from that fact. She added that her victim status was undeniable since she had been unable to exercise her right to remarry before the expiry of the waiting period and that the fact that she had pointed out that Article 132 of the Civil Code was incompatible with the Constitution and with international conventions had by no means stripped her of that status. She further argued that she had undeniably sustained damage since exemption from the waiting period that had been imposed on her had been subject to the condition that she undergo a medical examination, a fact she alleged had prevented her throughout that period from exercising her right to take steps with a view to remarrying.

24. The Court reiterates that, in order to claim to be the victim of a violation, a person must be directly affected by the impugned measure. The Convention does not, therefore, envisage the bringing of an *actio popularis* for the interpretation of the rights set out therein or permit individuals to complain about a provision of national law simply because they consider, without having been directly affected by it, that it may contravene the Convention (see *Burden v. the United Kingdom* [GC], no. 13378/05, § 33, ECHR 2008, and *Tănase v. Moldova* [GC], no. 7/08, § 104, ECHR 2010). Consequently, the existence of a victim who has been personally affected by an alleged violation of a Convention right is indispensable for putting the protection mechanism of the Convention into motion, although this criterion is not to be applied in a rigid and inflexible way (see *Aksu v. Turkey* [GC], nos. 4149/04 and 41029/04, § 51, ECHR 2012, and *Bitenc v. Slovenia* (dec.), no. 32963/02, 18 March 2008).

25. In addition, the Court would point out that it interprets the concept of “victim” autonomously and irrespective of domestic concepts such as those concerning an interest or capacity to act (see *Sanles Sanles v. Spain* (dec.), no. 48335/99, ECHR 2000-XI), even though it should have regard to the fact that an applicant had been a party to the domestic proceedings (see *Micallef v. Malta* [GC], no. 17056/06, § 48, ECHR 2009).

26. The Court also reiterates that it is open to a person to contend that a law violates his or her rights, in the absence of an individual measure of implementation, and therefore to claim to be a “victim” within the meaning of Article 34 of the Convention, if he or she is required to either modify his or her conduct or risk being prosecuted, or if he or she is a member of a class of people who risk being directly affected by the legislation (see *Burden*, cited above, § 34; *Norris v. Ireland*, 26 October 1988, §§ 33-34, Series A no. 142; *Dudgeon v. the United Kingdom*, 22 October 1981, § 41, Series A no. 45;

Marckx v. Belgium, 13 June 1979, § 27, Series A no. 31; and *Michaud v. France*, no. 12323/11, § 51, ECHR 2012).

27. In the present case, the applicant asked the national authorities to authorise her to remarry following her divorce without being required to observe the 300-day waiting period provided for by law or to prove that she was not pregnant by means of a medical examination. Admittedly, the applicant failed to provide any evidence that she had had a plan to marry at the relevant time or that she had actually entered into a marriage thereafter. However, it is not for the Court to speculate as to whether she had serious prospects of remarrying when she made her request. The right to marry has a close affinity with the right to respect for private life (see *Frasik v. Poland*, no. 22933/02, § 90, ECHR 2010 (extracts), and, *mutatis mutandis*, *Dadouch v. Malta*, no. 38816/07, §§ 47-48, 20 July 2010) and marriage primarily comes down to a purely personal decision taken by an individual in the subjective and changing circumstances of his or her private life. Nor is it relevant that the applicant did not remarry after the waiting period had expired.

28. In the Court's view, the very fact that, under Article 132 of the Civil Code, the applicant was subjected to a waiting period before being able to remarry and that it was necessary, in order to have that period waived, for her to bring proceedings specifically to that end before the domestic authorities, in the course of which it was required of her that she produce a medical certificate proving she was not pregnant, all solely for the reason that she belonged to the category of divorced women who might remarry, suffices for her to have victim status (see, *mutatis mutandis*, *Ternovszky v. Hungary*, no. 67545/09, § 21, 14 December 2010).

29. Accordingly, the applicant was directly affected by the legislation providing for the impugned waiting period and can thus claim to be a victim of the discrimination she alleged in the exercise of her right to respect for her private life and her right to marry (see, *mutatis mutandis*, *Vallianatos and Others v. Greece* [GC], nos. 29381/09 and 32684/09, § 49, ECHR 2013 (extracts); *Open Door and Dublin Well Woman v. Ireland*, 29 October 1992, § 44, Series A no. 246-A; and *S.L. v. Austria* (dec.), no. 45330/99, 22 November 2001).

30. Consequently, the Court dismisses the Government's objection as to a lack of victim status.

31. As to the second objection concerning an alleged lack of a significant disadvantage, the Court notes that the Government complained that the applicant had lodged her request with the national authorities at a late stage, namely four months prior to the expiry of the 300-day waiting period that had been imposed on her. The Court notes that it is not for it to speculate as to the appropriate time for the applicant to have decided to remarry following her divorce. It takes the view that, even though the applicant waited until there were only four months left before the waiting period expired in order to lodge

her request for its curtailment, the effect of its imposition on her was to restrict her freedom to choose the date on which she might remarry – which was undeniably a matter of considerable importance for her private life – and that this effect cannot be underestimated (see, *mutatis mutandis*, *Schmidt v. Latvia*, no. 22493/05, §§ 73-75, 27 April 2017). Accordingly, this objection must also be dismissed.

II. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

32. The applicant complained that, in order to authorise her to remarry before the expiry of the statutory 300-day waiting period that had commenced on the date of her divorce, the national authorities had required that she disclose whether or not she was pregnant and that she undergo a medical examination to verify that she was not. She alleged that this practice amounted to interference with her right to respect for her private life and relied in this regard on Article 8 of the Convention, which reads as follows:

“1. Everyone has the right to respect for his private and family life ...

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.”

A. Admissibility

33. Noting that this complaint is neither manifestly ill-founded, nor inadmissible on any other grounds listed in Article 35 of the Convention, the Court declares it admissible.

B. Merits

1. *The parties’ submissions*

(a) *The applicant*

34. The applicant alleged that the imposition on divorced women of a 300-day waiting period before remarrying, the fact that its curtailment was subject to a court decision – which was in turn conditional on a medical examination to verify that the woman in question was not pregnant –, and the prohibition of remarriage which was thus imposed on pregnant, divorced women constituted interference with women’s right to respect for their private and family life.

35. She submitted that Article 132 of the Civil Code, which formed the legal basis for the impugned measure, was incompatible with the Convention. She complained that the authorities, which had submitted that this provision sought to protect the interests of others, had failed to take into account a

woman's right to respect for her private and family life. In that connection, she argued that this right belonging to women could not be disregarded in favour of the idea – which she considered abstract – of protecting the parentage of an unborn child. She submitted, consequently, that the prevention of disorder could not be regarded as a legitimate aim in the present case.

36. In particular, the applicant pointed out that the waiting period was imposed on pregnant women without exception and that, for those who were not pregnant, it could only be waived on condition that the woman concerned initiated the relevant proceedings and agreed, as part of those proceedings, to undergo a mandatory medical examination to prove she was not pregnant. She submitted that it was neither necessary nor proportionate to place such a burden on divorced women in a democratic society.

(b) The Government

37. The Government argued that there had been no interference with the applicant's right to respect for her private life in the present case. They submitted that the waiting period for divorced women was not imposed in an absolute fashion; that, in accordance with the relevant legislation, it had been possible for the applicant to have the waiting period waived in the context of the *ex parte* proceedings she had brought to that end in the Family Court; that producing a medical certificate indicating that she was not pregnant, as requested by the court as part of those proceedings, could not be regarded as having imposed an impossible burden on the applicant; that, in this connection, there had been no coercion on the part of the authorities that might have caused her physical harm; and that the applicant's request for exemption from the waiting period had been rejected because she had refused, of her own free will, to undergo the requisite medical examination in order to obtain the medical certificate in question.

38. Should the Court find that there had been interference, the Government argued that such interference had been in accordance with Article 132 of the Civil Code, which they claimed satisfied the requirements of clarity, accessibility and foreseeability, and that it had pursued the legitimate aims of protecting the rights and freedoms of others and preventing disorder, given, they argued, that the purpose of the rule under Article 132 of the Civil Code was to ensure that parentage was determined accurately.

39. As to the necessity of the interference, the Government submitted that the purpose of the requirement that a woman seeking exemption from the waiting period produce a medical certificate proving that she was not pregnant was to determine accurately the parentage of any child born after the end of a marriage and to avoid any confusion in that regard. They emphasised that this requirement was thus designed to protect the interests at stake, namely those of the parties, those of society and above all those of the unborn child. They added that the medical examination which the woman

concerned was required to undergo to obtain the certificate consisted in a blood or urine test and did not require a gynaecological examination, arguing that this examination was therefore not a significant or unbearable medical procedure for the woman to have to undergo.

40. Consequently, the Government considered that, having regard to the wide margin of appreciation they claimed the member States enjoyed in determining legal parent-child relationships, which was a matter of public policy, and given that the proceedings for waiving the waiting period and the medical certificate required as part of those proceedings had not imposed an excessive burden on the applicant, the impugned interference had met a pressing social need and had been proportionate to the legitimate aims pursued.

2. The Court's assessment

(a) Whether there has been an interference

41. The Court reiterates that the notion of “private life” within the meaning of Article 8 of the Convention is a broad concept which does not lend itself to exhaustive definition and encompasses the right to personal development (see *K.A. and A.D. v. Belgium*, nos. 42758/98 and 45558/99, § 83, 17 February 2005), whether in terms of personality (see *Bensaid v. the United Kingdom*, no. 44599/98, § 47, ECHR 2001-I, and *Christine Goodwin v. the United Kingdom* [GC], no. 28957/95, § 90, ECHR 2002-VI) or of personal autonomy, which is an important principle underlying the interpretation of the Article 8 guarantees (see *Pretty v. the United Kingdom*, no. 2346/02, § 61, ECHR 2002-III, and *Fedotova and Others v. Russia* [GC], nos. 40792/10 and 2 others, § 141, 17 January 2023).

42. The Court has found that it would be too restrictive to limit the notion of private life to the most intimate aspects of an individual's life (see, in particular, *Niemietz v. Germany*, 16 December 1992, § 29, Series A no. 251-B). Article 8 thus guarantees a right to “private life” in the broad sense, including the right to lead a “private social life”, that is, the possibility for the individual to develop his or her social identity. In that respect, the right in question enshrines the possibility of approaching others in order to establish and develop relationships with them (see *Bărbulescu v. Romania* [GC], no. 61496/08, § 70, 5 September 2017, and the authorities cited therein). Accordingly, a person's “private life” embraces multiple aspects of the person's social identity (see *López Ribalda and Others v. Spain* [GC], nos. 1874/13 and 8567/13, § 87, 17 October 2019, and *Denisov v. Ukraine* [GC], no. 76639/11, § 95, 25 September 2018). The Court has found, for example, that a person's civil status, be it married, single, divorced or widowed, forms part of his or her personal and social identity protected under Article 8 (see *Dadouch*, cited above, § 48) and that the right

to marry has a close affinity with the right to respect for private life (see *Frasik*, cited above, § 90).

43. In the present case, the Court notes that, following her divorce, the applicant had to bring proceedings to seek exemption from the 300-day waiting period imposed on divorced women before remarrying and that, as part of those proceedings, it was requested of her that she provide a medical certificate to the effect that she was not pregnant. It finds that the present case falls within the scope of Article 8, since it concerns a most intimate aspect of the applicant's private life as a woman (see, *mutatis mutandis*, *Dudgeon*, cited above, § 52; *Smith and Grady v. the United Kingdom*, nos. 33985/96 and 33986/96, § 90, ECHR 1999-VI; and *S.L. v. Austria*, no. 45330/99, § 29, ECHR 2003-I; and see also, *mutatis mutandis*, *Dadouch*, cited above, § 48).

44. The Court observes that the waiting period imposed on the applicant following her divorce and the authorities' requirement that she undergo a medical examination to verify that she was not pregnant, on pain of having her application for the waiver of that period dismissed, clearly had an impact on her private life. Accordingly, it finds that the waiting period imposed on the applicant and the requirement that, in order to have it waived, she undergo a medical examination to verify that she was not pregnant constituted interference with her right to respect for her private life, which is protected under Article 8 of the Convention (see, *mutatis mutandis*, *Vavříčka and Others v. the Czech Republic* [GC], nos. 47621/13 and 5 others, § 263, 8 April 2021, and *Dadouch*, cited above, § 50).

(b) Whether the interference was justified

45. To determine whether this interference entailed a violation of Article 8 of the Convention, the Court must examine whether it was justified under the second paragraph of that Article, that is, whether the interference was "in accordance with the law", pursued one or more of the legitimate aims specified therein, and to that end was "necessary in a democratic society".

46. The Court observes that it is common ground between the parties that this interference was in accordance with the law, namely with Article 132 of the Civil Code (see paragraph 13 above). It takes note of the applicant's argument that this provision is incompatible with the principles embodied in the Convention (see paragraph 35 above). That being so, it finds that this argument goes to the necessity of the interference rather than calling into question its legal basis.

47. The Government submitted that the interference had pursued the aims of protecting the rights and freedoms of others and preventing disorder (see paragraph 38 above). The applicant disputed the aims put forward by the Government. She argued that the national authorities had failed to take account of the interest of women in securing respect for their private life (see paragraph 35 above). While it has reservations as to the legitimacy of the aim pursued by the measure at issue, the Court will nevertheless proceed on the

assumption that the interference pursued the legitimate aims of protecting the rights and freedoms of others and of preventing disorder.

48. As to the necessity of the interference, the Court reiterates that an interference will be considered “necessary in a democratic society” for the achievement of a legitimate aim if it answers a “pressing social need” and, in particular, if it is proportionate to the legitimate aim pursued and if the reasons adduced by the national authorities to justify it are “relevant and sufficient” (see *L.B. v. Hungary* [GC], no. 36345/16, § 115, 9 March 2023).

49. It next reiterates the fundamentally subsidiary role of the Convention system and recognises that the national authorities have direct democratic legitimisation in so far as the protection of human rights is concerned. Moreover, by reason of their direct and continuous contact with the vital forces of their countries, they are in principle better placed than an international court to evaluate local needs and conditions (see *Dubská and Krejzová v. the Czech Republic* [GC], nos. 28859/11 and 28473/12, § 175, 15 November 2016).

50. It is therefore primarily the responsibility of the national authorities to make the initial assessment as to where the fair balance lies in assessing the need for an interference in the public interest with individuals’ rights under Article 8 of the Convention. Accordingly, in adopting legislation intended to strike a balance between competing interests, States must in principle be allowed to determine the means which they consider to be best suited to achieving the aim of reconciling those interests (see *Odièvre v. France* [GC], no. 42326/98, § 49, ECHR 2003-III, and *Van der Heijden v. the Netherlands* [GC], no. 42857/05, § 56, 3 April 2012).

51. While it is for the national legislature to make the initial assessment, the final evaluation as to whether an interference in a particular case is “necessary”, as that term is to be understood within the meaning of Article 8 of the Convention, remains subject to review by the Court (see *S. and Marper v. the United Kingdom* [GC], nos. 30562/04 and 30566/04, § 101, ECHR 2008, and *Van der Heijden*, cited above, § 57).

52. A certain margin of appreciation is, in principle, afforded to the national authorities as regards that assessment; its breadth depends on a number of factors dictated by the particular case. The margin will tend to be relatively narrow where the right at stake is crucial to the individual’s effective enjoyment of intimate or key rights. Where a particularly important facet of an individual’s existence or identity is at stake, the margin allowed to the State will be restricted. Where there is no consensus within the member States of the Council of Europe, either as to the relative importance of the interest at stake or as to the best means of protecting it, particularly where the case raises sensitive moral or ethical issues, the margin will be wider (see *Van der Heijden*, cited above, §§ 58-60, and the references cited therein; *Parrillo v. Italy* [GC], no. 46470/11, § 169, ECHR 2015, and the references cited therein; and *Vavříčka and Others*, cited above, § 273).

53. In the present case, being compelled pursuant to Article 132 of the Civil Code to observe the 300-day waiting period following her divorce, the applicant brought proceedings in the Family Court seeking exemption therefrom and, as part of those proceedings, was required by the authorities, as a precondition for its waiver, to produce a medical certificate to the effect that she was not pregnant. Having refused to undergo the medical examination required to obtain the certificate in question, her request was dismissed.

54. The Court notes, firstly, that in the reasoning of its judgment, the Family Court essentially held that the medical certificate proving that a woman was not pregnant, which was required for the waiting period to be waived, was of particular importance for the protection of the interest of a possible unborn child and of other relevant members of society in the accurate determination of that child's biological parentage (see paragraph 8 above). Similarly, the Government emphasised the role played by the waiting period imposed on divorced women and by the medical certificate proving they were not pregnant in accurately determining biological parentage (see paragraph 39 above). Furthermore, the definition of the waiting period as set out in the marriage regulation (see paragraph 16 above) appears to show that, in imposing such a rule, the authorities sought to avoid "confusion as to bloodlines".

55. If, as the domestic authorities asserted, the principal aim of the waiting period – and of making the waiver of this requirement conditional upon the woman's not being pregnant – was to determine accurately the biological parentage of a possible unborn child, then it is necessary to distinguish biological paternity from the legal presumption of paternity. While it is true that, in most legal systems, the legal father of a child born in wedlock is presumed to be the husband, a child's biological father can nevertheless, regardless of whether the child was born in or out of wedlock, recognise or claim paternity of that child at any time upon presentation of scientific proof in support of his claim, in particular a DNA test. Likewise, under Article 285 of the Civil Code, in the event that a recently divorced woman is pregnant and gives birth to a child during the waiting period before remarrying, such a situation cannot not give rise to anything more than a presumption of paternity with regard to the ex-husband and does not necessarily affect the determination of the biological father (see paragraph 15 above). In this sense, the aim of preventing "confusion as to bloodlines", in other words of enabling the determination of biological paternity, seems obsolete in a modern society. Moreover, even assuming that the aim of the waiting period was to preserve the ex-husband's presumption of paternity with regard to any child born in that period, it would still be superfluous given that other legal avenues are available under current systems of law for recognising and determining paternity (see the relevant provisions of the Civil Code cited in paragraph 16 above). Moreover, the waiting period only commences on the date on which

the divorce decision becomes final (see paragraph 15 above) whereas, in most cases, the spouses no longer live together in practice from the start of the divorce proceedings, which can sometimes last for years.

56. Furthermore, the Court would emphasise that the question whether a woman is pregnant must be regarded as closely tied to the intimacy of her private life, irrespective of whether or not she has recently divorced. It finds that making a divorced woman's ability to remarry, without observing the waiting period, conditional upon her producing a medical certificate to the effect that she is not pregnant amounts to violating that intimacy and placing her intimate private life, including her sex life, under the scrutiny of the authorities. In the reasoning of its judgment, the Family Court does not appear to have taken into account the aspects of the case bearing on the applicant's private life in weighing up the various interests at stake in relation to the applicant's request for exemption from the waiting period.

57. Lastly, the Court must express its concern as to the assumptions underlying the conclusion reached by the Family Court, which implies that divorced women, owing to the particularities of their female biology, especially the role they might play as mothers and their ability to give birth, have a duty to society to disclose any pregnancy before remarrying and should be burdened with the disadvantage of a waiting period for the sake of protecting the interests of a possible unborn child and those of other relevant parties (see paragraph 8 above). That assumption reflects a traditional idea of female sexuality as being essentially linked to child-bearing purposes and thus ignores its physical and psychological relevance for the self-fulfilment of women as people (see *Carvalho Pinto de Sousa Morais v. Portugal*, no. 17484/15, § 52, 25 July 2017).

58. Regard being had to the foregoing considerations, the Court concludes that it cannot be considered that subjecting the applicant to a 300-day waiting period before remarrying following her divorce and requiring her, as part of the proceedings she instituted to have that waiting period waived, to produce a medical certificate to the effect that she was not pregnant – one which could only be obtained by means of a medical examination – served any pressing social need, was proportionate to the legitimate aims pursued or was justified on sufficient and relevant grounds. Accordingly, the impugned interference with the applicant's right to respect for her private life in the present case was not necessary in a democratic society.

59. There has therefore been a violation of Article 8 of the Convention.

III. ALLEGED VIOLATION OF ARTICLE 14 OF THE CONVENTION IN CONJUNCTION WITH ARTICLE 12

60. The applicant alleged that the requirement imposed on divorced women that they observe a 300-day waiting period before remarrying unless they proved they were not pregnant constituted discrimination and an

infringement of their right to marry. She relied on Articles 14 and 12 of the Convention, which read as follows:

Article 14

“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.”

Article 12

“Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right.”

A. Admissibility

61. The Court notes that this complaint is neither manifestly ill-founded nor inadmissible on any other grounds listed in Article 35 of the Convention. It must therefore be declared admissible.

B. Merits

1. The parties' submissions

(a) The applicant

62. The applicant submitted that the 300-day waiting period for divorced women provided for by Article 132 of the Civil Code indisputably constituted discrimination on grounds of sex. She considered that such unequal treatment between women and men could by no means be justified – contrary to the authorities' submissions – by the possibility that a woman might be pregnant and that to accept such an argument would amount to depriving pregnant women of their right to marry until the day they gave birth. In her view, requiring divorced women to obtain a court decision based on a medical certificate proving they were not pregnant, which would disclose their sex life, in order to be able to remarry before the expiry of the waiting period was deeply and systematically discriminatory with regard to women and constituted a human rights violation. This rule, she claimed, also discriminated against divorced women as compared with women who had never been married.

63. She further argued that neither divorce nor pregnancy could be regarded as justifying a restriction of women's right to marry. She added that there was no objective or reasonable justification for the impugned difference in treatment between men and women as regarded their right to marry, which was based on sex. She also criticised the Family Court's reasoning, which she submitted had been contrary to the principle of sexual equality and other universally accepted principles in that domain.

64. The applicant therefore considered that the application of Article 132 of the Civil Code, which, in her view, was incompatible with the letter and spirit of the international instruments adopted in order to ensure gender equality and to eliminate all discrimination against women, had entailed a violation of Article 14 of the Convention in conjunction with Article 12.

(b) The Government

65. The Government submitted firstly that the requirement that divorced women observe a 300-day waiting period before remarrying was not without exception, since it could be waived in certain circumstances. They added that the waiting period, which was provided for in Article 132 of the Civil Code, was based on a biological characteristic innate to women, namely the ability to become mothers, and that it could therefore not be regarded as a measure that undermined gender equality.

66. In the Government's view, the measure pursued a legitimate aim, namely the determination of the status and parentage of any child born during that period and the prevention of any confusion in that regard. The aim of the waiting period before remarrying was thus purportedly to protect the public interest and in particular that of the unborn child. The Government therefore argued that the difference in treatment between women and men resulting from the waiting period in issue had an objective and reasonable justification and that there was a reasonable relationship of proportionality between the legitimate aim pursued and the means employed to achieve it.

67. Consequently, the Government considered that the applicant had not been discriminated against on grounds of sex.

2. The Court's assessment

(a) General principles

68. The Court reiterates that Article 12 secures the fundamental right of a man and woman to marry and found a family. The exercise of the right to marry gives rise to social, personal and legal consequences. It is subject to national laws of the Contracting States but the limitations thereby introduced must not restrict or reduce the right in such a way or to such an extent that the very essence of the right is impaired (see *O'Donoghue and Others v. the United Kingdom*, no. 34848/07, § 82, ECHR 2010, and *Chernetskiy v. Ukraine*, no. 44316/07, § 28, 8 December 2016).

69. In consequence, the matter of conditions for marriage in the national laws is not left entirely to Contracting States as being within their margin of appreciation. This would be tantamount to finding that the range of options open to a Contracting State include an effective bar on any exercise of the right to marry. The margin of appreciation cannot extend so far (see *Delecalle v. France*, no. 37646/13, § 55, 25 October 2018).

70. The Convention institutions have accepted, however, that limitations on the right to marry laid down in the national laws may comprise formal rules, but also substantive provisions based on generally recognised considerations of public interest, in particular concerning legal capacity (see *Frasik*, cited above, § 89).

71. Although a right to divorce cannot be derived from Article 12 of the Convention, where national legislation allows divorce, that provision secures for divorced persons the right to remarry without unreasonable restrictions (see *F. v. Switzerland*, 18 December 1987, § 38, Series A no. 128). In particular, the Court has found a three-year prohibition on remarriage that was imposed as a civil sanction to be in breach of Article 12 (*ibid.*, §§ 33-40).

72. In the enjoyment of the rights and freedoms guaranteed by the Convention, Article 14 affords protection against different treatment, without objective and reasonable justification, of persons in relevantly similar situations (see, among many other authorities, *Burden*, cited above, § 60). However, only differences in treatment based on an identifiable characteristic, or “status”, are capable of amounting to discrimination within the meaning of Article 14 (see *Carson and Others v. the United Kingdom* [GC], no. 42184/05, § 61, ECHR 2010; *Fábián v. Hungary* [GC], no. 78117/13, § 113, 5 September 2017; and *Molla Sali v. Greece* [GC], no. 20452/14, § 134, 19 December 2018). Furthermore, not every difference in treatment will amount to a violation of Article 14. A difference of treatment based on a prohibited ground is discriminatory if it has no objective and reasonable justification; in other words, if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realised (see *Andrejeva v. Latvia* [GC], no. 55707/00, § 81, ECHR 2009; *Fabris v. France* [GC], no. 16574/08, § 56, ECHR 2013; *Fábián*, cited above, § 113; and *Molla Sali*, cited above, § 135).

73. The Contracting States enjoy a certain margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify different treatment. The scope of the margin will vary according to the circumstances, the subject matter and the background (see *Stummer v. Austria* [GC], no. 37452/02, § 88, ECHR 2011). First and foremost, the nature of the status upon which differential treatment is based weighs heavily in determining the scope of that margin (see *Bah v. the United Kingdom*, no. 56328/07, § 47, ECHR 2011). The margin is very narrow if the distinction is based on an inherent or immutable personal characteristic such as race or sex (see, for example, *D.H. and Others v. the Czech Republic* [GC], no. 57325/00, § 196, ECHR 2007-IV, and *J.D. and A v. the United Kingdom*, nos. 32949/17 and 34614/17, § 89, 24 October 2019). Conversely, the margin of appreciation will be considerably wider, and the justification required will not be as weighty, if the status in question is subject to an element of personal

choice (see *Bah*, cited above, § 47, and, *mutatis mutandis*, *Makarčeva v. Lithuania* (dec.), no. 31838/19, § 68, 28 September 2021).

74. The Court further reiterates that the advancement of gender equality is a major goal in the member States of the Council of Europe and very weighty reasons would have to be put forward before such a difference of treatment could be regarded as compatible with the Convention (see *Burghartz v. Switzerland*, 22 February 1994, § 27, Series A no. 280-B, and *Schuler-Zgraggen v. Switzerland*, 24 June 1993, § 67, Series A no. 263). In particular, references to traditions, general assumptions or prevailing social attitudes in a particular country are insufficient justification for a difference in treatment on grounds of sex. For example, States cannot impose traditions deriving from the idea that the man plays a predominant role and the woman a secondary role in the family (see *Konstantin Markin v. Russia* [GC], no. 30078/06, § 127, ECHR 2012, and *Ünal Tekeli v. Turkey*, no. 29865/96, § 63, ECHR 2004-X).

75. This means that, outside the context of transitional measures designed to correct historic inequalities (see *J.D. and A.*, cited above, § 89), very weighty considerations would have to be advanced before a difference in treatment on the ground of sex could be regarded as being compatible with the Convention (see *Abdulaziz, Cabales and Balkandali v. the United Kingdom*, 28 May 1985, § 78, Series A no. 94, and *Carvalho Pinto de Sousa Morais*, cited above, § 46). Consequently, where a difference in treatment is based on sex the State's margin of appreciation is narrow (see *Beeler v. Switzerland* [GC], no. 78630/12, § 96, 11 October 2022) and in such situations the principle of proportionality does not merely require that the measure chosen should in general be suited to the fulfilment of the aim pursued, but it must also be shown that it was necessary in the circumstances (see *Emel Boyraz v. Turkey*, no. 61960/08, § 51, 2 December 2014, and *Jurčić v. Croatia*, no 54711/15, § 65, 4 February 2021).

76. Irrespective of the scope of the State's margin of appreciation, the final decision as to the observance of the Convention's requirements rests with the Court (see, among many other authorities, *Konstantin Markin*, cited above, § 126).

77. Lastly, as regards the burden of proof in relation to Article 14 of the Convention, the Court has previously held that once the applicant has shown a difference in treatment between persons in relevantly similar situations, it is for the Government to show that it was justified (see *D.H. and Others*, cited above, § 177; *Kurić and Others v. Slovenia* [GC], no. 26828/06, § 389, ECHR 2012; and *Guberina v. Croatia*, no. 23682/13, § 74, 22 March 2016).

(b) Application of those principles to the present case

78. The Court observes at the outset that the parties did not dispute the applicability of Article 14 of the Convention, read in conjunction with Article 12, to the circumstances of the present case. It reiterates that it has

already found that, although the applicant produced no substantive evidence that she had had any plans to remarry after her divorce and refused to procure the medical certificate she had been asked to produce as part of the proceedings she had initiated in the national courts to seek exemption from the waiting period, the requirement imposed on her to observe that 300-day waiting period following her divorce fell within the scope of her right to marry (see paragraph 29 above). Accordingly, Article 14, read in conjunction with Article 12, is applicable in the present case.

79. The Court notes that the applicant complained that she had been subjected to a difference in treatment on the ground of her sex, namely the obligation, following her divorce, to observe a 300-day waiting period before remarrying or, if she wished to remarry prior to the expiry of that period, to have it waived by producing a medical certificate in support of her request that proved she was not pregnant.

80. The Court notes that only women are subject to the waiting period under Article 132 of the Civil Code, unlike men, who are free to remarry without any such condition.

81. It reiterates its previous finding that only women can be treated differently on grounds of pregnancy and that, for this reason, such a difference in treatment will amount to direct discrimination on grounds of sex if it is not justified (see *Napotnik v. Romania*, no. 33139/13, § 77, 20 October 2020). This finding is also valid for the present case in so far as the primary reason for the difference in treatment complained of by the applicant was, according to the domestic authorities, the possibility that a woman wishing to remarry following her divorce might be pregnant.

82. In the present case, the applicant, who was subject to the waiting period under Article 132 of the Civil Code, saw her request for authorisation to remarry before its expiry dismissed on the grounds that she had refused to undergo a medical examination to determine whether she was pregnant. The Court notes that the decision delivered in the present case could only have been adopted in respect of women, since only women can become pregnant and that, in any event, the relevant legislation required only women to observe the waiting period. It therefore finds that in the applicant's case, that decision constituted a difference in treatment on grounds of sex (see, *mutatis mutandis*, *Jurčić*, cited above, § 70).

83. It remains to be determined whether this difference in treatment was objectively and reasonably justified.

84. The Government submitted that imposing a 300-day waiting period on divorced women was justified by the need to determine, in an unambiguous manner, the parentage of any child to which a recently divorced woman might give birth.

85. The Court would point out that it previously found, in a case which concerned a temporary prohibition on remarriage that had been imposed on the applicant as a civil sanction following his divorce (see *F. v. Switzerland*,

cited above), that such a waiting period no longer existed under the laws of other Contracting States, but that the fact that, at the end of a gradual evolution, a country found itself in an isolated position with regard to one aspect of its legislation did not necessarily imply that that aspect offended against the Convention, particularly in a field – matrimony – which was so closely bound up with the cultural and historical traditions of each society and its deep-rooted ideas about the family unit (*ibid.*, § 33).

86. The Court notes in this connection that the Government's submission to the effect that the aim of the obligation to observe the impugned waiting period was to determine the biological parentage of a possible unborn child and to prevent uncertainty in that regard rests on a traditional concept of the family as based on the official institution of marriage and does not necessarily reflect the way modern European societies have evolved. In these societies, a significant number of families are founded on forms of union other than civil marriage, for instance civil partnerships or non-marital cohabitation, and many children are even conceived out of wedlock or by anonymous sperm donations.

87. However, given the important and sensitive place that the family unit and marriage can have in the cultural traditions of certain societies, the Court is willing to accept that the public or the child in question might have an interest in easily ascertaining his or her biological parentage and in avoiding uncertainty in that respect. Working on the assumption that determining parentage constitutes a legitimate aim in the pursuit of which the waiting period under dispute might be imposed on divorced women, the Court must determine, taking into account the narrow margin of appreciation afforded to States with regard to unequal treatment on grounds of sex, whether the disputed measure was necessary to achieve that aim.

88. In this regard, the Court considers that it suffices to refer to the finding it has already made as to the pointlessness and ineffectiveness, for the purpose of achieving the aforementioned aim, of applying a waiting period to divorced women and of requiring them to present the authorities with a medical certificate to the effect that they are not pregnant in order to have it waived (see paragraphs 54 and 55 above). Accordingly, the practice of imposing a waiting period on divorced women on the basis that they might be pregnant and of requiring them, should they wish to have it waived, to prove that they are not, constitutes direct discrimination on grounds of sex (see, *mutatis mutandis*, *Jurčić*, cited above, § 81).

89. In the Court's view, the sexist stereotypes on which the Family Court relied in dismissing the applicant's claim in the present case (see paragraph 8 above), such as the notion that women have a duty to society on account of their potential role as mother and their ability to give birth, constitute a serious obstacle to achieving real, substantive, gender equality, which, as the Court has already asserted, is one of the major goals of the member States of the Council of Europe (see paragraph 74 above). In addition, such considerations

on the part of the domestic authorities also appear to run counter to relevant international standards in matters of gender equality (see the Convention on the Elimination of All Forms of Discrimination against Women and the concluding observations of the Committee on the Elimination of Discrimination against Women in respect of Türkiye, cited in paragraphs 19 and 20 above, respectively).

90. Consequently, the Court concludes that the requirement that divorced women, on account of potential pregnancy, observe a 300-day waiting period before remarrying unless they can prove by way of a medical examination that they are pregnant constitutes direct discrimination on grounds of sex that is not justified by the aim of preventing uncertainty as to the parentage of a possible unborn child.

91. In the light of the above, in the specific circumstances of the present case, the Court finds that the unequal treatment to which the applicant was subjected on the ground of her sex was neither objectively justified nor necessary.

92. There has therefore been a violation of Article 14 read in conjunction with Article 12 of the Convention.

93. Having regard to this finding of a violation, the Court considers that there is no need to examine separately the applicant's complaint under Article 12 taken separately.

IV. ALLEGED VIOLATION OF ARTICLE 6 § 1 OF THE CONVENTION

94. The applicant also complained of the length of the proceedings in the Constitutional Court. She relied on Article 6 § 1 of the Convention, the relevant parts of which read as follows:

“In the determination of his civil rights and obligations ... everyone is entitled to a ... hearing within a reasonable time by [a] tribunal ...”

95. The Government submitted that the Constitutional Court's delay in dealing with the applicant's individual application had not created a disadvantage for her given that the 300-day waiting period had already expired by the time she had lodged that application. They further explained that, following the attempted *coup* of 15 July 2016, and as a result of the violent incidents that had occurred in the southern and south-eastern regions of Türkiye in that same period, the Constitutional Court's workload had substantially and unpredictably increased and that priority had been given to a significant number of individual applications involving the right to life, allegations of ill-treatment and the right to liberty. They argued that, under the circumstances, the time the Constitutional Court had taken to deal with the applicant's individual application, namely some four years, should be regarded as having met the reasonable-time requirement.

96. The applicant alleged that the Constitutional Court had had sufficient time to examine her individual application, which had been lodged roughly

six months prior to the attempted *coup* of 15 July 2016; that her case had not been particularly complex; and that there had therefore been no justification for the time it had taken the Constitutional Court to examine her application.

97. The Court points out that it has had occasion to examine the question of the applicability of Article 6 § 1 of the Convention to proceedings in a Constitutional Court in a number of cases. It notes that Constitutional Court proceedings do not in principle fall outside the scope of Article 6 § 1 of the Convention (see, *mutatis mutandis*, *Süßmann v. Germany*, 16 September 1996, § 39, *Reports of Judgments and Decisions* 1996-IV). In the present case, having regard to its case-law, according to which the “civil” limb covers cases which might not initially appear to concern a civil right but which may have direct and significant repercussions for a private pecuniary or non-pecuniary right belonging to an individual (see *De Tommaso v. Italy* [GC], no. 43395/09, § 151, 23 February 2017, and the authorities cited therein, and *Altay v. Turkey* (no. 2), no. 11236/09, § 66, 9 April 2019), the Court finds that the applicant’s individual application concerning the authorities’ refusal to authorise her to remarry following her divorce until the expiry of the waiting period undeniably concerned a civil right within the meaning of Article 6 § 1 of the Convention.

98. In the present case, the Court notes that the applicant lodged an individual application with the Constitutional Court on 22 January 2016, which delivered its judgment on 3 April 2020. The relevant period thus lasted four years, two months and twelve days.

99. The Court reiterates that the “reasonableness” of the length of proceedings must be assessed in the light of the circumstances of the case and with reference to the criteria established in its case-law, in particular the complexity of the case, the conduct of the applicant and of the relevant authorities and what was at stake for the applicant in the dispute (see, among many other authorities, *Frydlender v. France* [GC], no. 30979/96, § 43, ECHR 2000-VII).

100. It notes that the applicant’s appeal concerned the question whether the waiting period to which she had been subjected, following her divorce, pursuant to Article 132 of the Civil Code and the decisions delivered by the ordinary courts in the context of the proceedings she had brought seeking exemption from that waiting period, had infringed her rights under the Constitution and the Convention. It is beyond dispute that the determination of the issues raised by the applicant had potential implications which went beyond her case and required in-depth assessment of the objectives of the relevant statute and its appropriate interpretation in the light of the Constitution and the Convention, and that these issues were clearly complex (see, *mutatis mutandis*, *A.T. v. Slovenia* (dec.), no. 20952/21, § 19, 20 September 2022).

101. The Court further notes that the applicant cannot be faulted for having pursued her action right up to the level of the Constitutional Court. As

to that court's conduct, the Court would point out that the States' duty to organise their judicial systems in such a way that their courts can meet each of its requirements, including the obligation to hear cases within a reasonable time, cannot be construed in the same way for a Constitutional Court as it is for an ordinary court. Its role as guardian of the Constitution makes it particularly necessary for a Constitutional Court sometimes to take into account considerations other than the mere chronological order in which cases are entered on the list, such as the nature of a case and its importance in political and social terms (see *Süßmann*, cited above, §§ 55-56). In this connection, the Court notes that it previously found that the Constitutional Court had been faced with an exceptionally heavy workload in the period following the declaration of the state of emergency in response to the attempted *coup* of 15 July 2016 (see *Mehmet Hasan Altan v. Turkey*, no. 13237/17, § 165, 20 March 2018). It acknowledges that a large number of individual applications lodged in the context of that state of emergency could, by their very nature, have warranted a certain priority, and indeed urgency, compared with the applicant's individual application.

102. Lastly, the Court must have regard to what was at stake in the proceedings for the applicant. It notes that, at the time of her individual application to the Constitutional Court, the 300-day waiting period had already expired and that the ensuing judgment would therefore have had no impact on her private life at that stage. In any event, it cannot be accepted that the issue raised in the individual application was of such importance as to impose on the Constitutional Court a duty to examine it as a matter of particular urgency (see, *mutatis mutandis*, *A.T. v. Slovenia*, cited above, § 22).

103. In the light of the above, having regard in particular to the extraordinary circumstances in which the applicant's individual application was lodged, the Court finds that the proceedings before the Constitutional Court, while certainly having been unusually protracted, cannot be regarded as having been unreasonable in length (see, *mutatis mutandis*, *Peter v. Germany*, no. 68919/10, § 47, 4 September 2014). Consequently, the Court finds no appearance in the present case of a violation of Article 6 § 1 of the Convention on account of the length of the proceedings in the Constitutional Court.

104. It follows that this complaint is manifestly ill-founded and must be dismissed in accordance with Article 35 §§ 3 and 4 of the Convention.

V. APPLICATION OF ARTICLE 41 OF THE CONVENTION

105. Article 41 of the Convention provides:

“If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only

partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party.”

A. Damage

106. The applicant sought 50,000 euros (EUR) in respect of the non-pecuniary damage she alleged to have sustained.

107. The Government submitted that there was no causal connection between the alleged violation and the non-pecuniary damage the applicant claimed to have sustained; that she had not substantiated her claim in this regard; and that the amount claimed was excessive and did not correspond to the amount awarded by the Court in previous cases.

108. The Court finds that, in the specific circumstances of the present case, the finding of a violation constitutes in itself sufficient just satisfaction for any non-pecuniary damage sustained by the applicant.

B. Costs and expenses

109. The applicant claimed EUR 3,148.86 for the costs and expenses she had incurred before the domestic courts and before the Court. In support of this claim, she produced receipts in respect of procedural expenses for a total of EUR 216.80 and receipts for translations to be used in the proceedings before the Court amounting to EUR 347.21. The remainder of the amount sought by the applicant corresponded to the lawyer’s fees she claimed to have incurred, but no supporting documents were provided to substantiate that claim.

110. The Government considered that the applicant’s claim in respect of the procedural expenses she had allegedly incurred in the context of the proceedings before the Court had not been substantiated and was excessive, given the lack of complexity of the procedure and the limited number of issues to be decided. They added that the applicant had failed to produce any documents in support of her claims as to her lawyer’s fees. They argued that the amount claimed in that regard, which they submitted was high compared to the amounts sought in similar proceedings, was unrealistic.

111. The Court reiterates that under Article 41 of the Convention an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum (see *Beeler v. Switzerland* [GC], no. 78630/12, § 128, 11 October 2022). In the present case, regard being had to the documents in its possession and the above criteria, the Court considers it reasonable to award the sum of EUR 564.01 covering costs under all heads, plus any tax that may be chargeable to the applicant.

C. Default interest

112. The Court considers it appropriate that the default interest rate should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Declares* the complaints concerning Article 8 of the Convention and Article 14 of the Convention read in conjunction with Article 12 admissible and the remainder of the application inadmissible;
2. *Holds* that there has been a violation of Article 8 of the Convention;
3. *Holds* that there has been a violation of Article 14 of the Convention in conjunction with Article 12;
4. *Holds* that the finding of a violation constitutes in itself sufficient just satisfaction for any non-pecuniary damage sustained by the applicant;
5. *Holds*,
 - (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 564.01 (five hundred and sixty-four euros and one cent) in respect of costs and expenses, plus any tax that may be chargeable to the applicant, to be converted into the currency of the respondent State at the rate applicable at the date of settlement;
 - (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;
6. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in French, and notified in writing on 27 June 2023, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Hasan Bakırcı
Registrar

Arnfinn Bårdsen
President

NURCAN BAYRAKTAR v. TÜRKİYE JUDGMENT

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the separate opinion of Judge Krenč is annexed to this judgment.

A.R.B.

H.B.

CONCURRING OPINION OF JUDGE KRENC

(*translation*)

1. I fully concur with the findings of the present judgment, which emphasises women’s rights under the Convention in the face of interference with their private life on the part of the authorities and the discrimination to which they all too often remain subject.

2. While I concur with the judgment’s findings, I must nevertheless regretfully dissociate myself from my esteemed colleagues with regard to the following points of the reasoning it contains.

3. Firstly, the respondent Government objected that the applicant had not suffered any “significant disadvantage” and asked the Court to declare the application inadmissible.

Paragraph 31 of the present judgment rejected that objection, stating as follows:

“As to the second objection concerning an alleged lack of a significant disadvantage, the Court notes that the Government complained that the applicant had lodged her request with the national authorities at a late stage, namely four months prior to the expiry of the 300-day waiting period that had been imposed on her. The Court notes that it is not for it to speculate as to the appropriate time for the applicant to have decided to remarry following her divorce. It takes the view that, even though the applicant waited until there were only four months left before the waiting period expired in order to lodge her request for its curtailment, the effect of its imposition on her was to restrict her freedom to choose the date on which she might remarry – which was undeniably a matter of considerable importance for her private life – and that this effect cannot be underestimated (see, *mutatis mutandis*, *Schmidt v. Latvia*, no. 22493/05, §§ 73-75, 27 April 2017). Accordingly, this objection must also be dismissed.”

In my view, the “significant disadvantage” suffered by the applicant had less to do with any restriction on “her freedom to choose the date on which she might remarry” than with the court’s requirement that she produce a medical certificate proving that she was not pregnant in order to remarry (see paragraphs 6 and 8 of the judgment). I would therefore have preferred that the Court expressly state that such a requirement constituted a “significant disadvantage” within the meaning of Article 35 § 3 (b) of the Convention. This cannot be regarded as a benign requirement on the part of a court. It affects the very intimacy of the woman concerned and amounts to placing her sex life under the scrutiny of the authorities (to this effect, see paragraph 56 of the judgment).

4. Moreover, this requirement is in my view at the heart of the complaint under Article 8 of the Convention.

In my opinion, there were in effect three issues raised by this case.

The first was whether the imposition of a waiting period before remarrying was, as such, contrary to Article 12 of the Convention, in so far as such a waiting period placed restrictions on the ability to remarry following a divorce.

The second issue was whether the waiting period was discriminatory in the light of Article 14 read in conjunction with Article 12 of the Convention in that it was imposed on women alone, while excluding men from its purview.

The third issue concerned more specifically the requirement imposed on the applicant that she prove in court that she was not pregnant in order to avoid the waiting period. That issue called for separate treatment under Article 8 of the Convention.

5. In this connection, paragraph 56 of the present judgment states as follows:

“In the reasoning of its judgment, the Family Court *does not appear* to have taken into account the aspects of the case bearing on the applicant’s private life in weighing up the various interests at stake in relation to the applicant’s request for exemption from the waiting period” (my emphasis).

I am concerned by the words “*does not appear*”.

When it examines the reasoning of national courts, the Court must take an explicit position on that reasoning in the light of Convention requirements. It cannot dwell at the level of appearances. While it is true that the Court cannot take the place of the national authorities and courts, which make the primary decisions, it nevertheless has, as ultimate arbiter of the Convention, a duty to state clearly whether or not the reasoning of the national decisions before it is compatible with the Convention.

In the present case, it is patently obvious from the Family Court’s judgment (the reasoning of which is cited in paragraph 8 of the judgment) that that court *did not* take into consideration the aspects of the case bearing on the applicant’s private life. I believe that the Court ought to have been more emphatic and clearer on this point, especially since the Family Court’s considerations effectively reduced women to their reproductive function and justified a higher degree of interference with their private life on the grounds of their “ability to give birth” (see paragraph 8).

6. Lastly, to similar effect, paragraph 89 of the present judgment states that the Family Court’s considerations “also *appear* to run counter to relevant international standards in matters of gender equality (see the Convention on the Elimination of All Forms of Discrimination against Women and the concluding observations of the Committee on the Elimination of Discrimination against Women in respect of Türkiye, cited in paragraphs 19 and 20, respectively)” (my emphasis).

In my view, the Family Court’s considerations *did, in actual fact* (and did not merely “appear to”), run counter to relevant international standards in matters of gender equality. Such terminological precaution on the part of the Court is particularly unwarranted given that the position taken by the Committee on the Elimination of Discrimination against Women was clear, calling for the impugned provisions – which it considered “discriminatory” – to be reviewed and amended (see paragraph 20).

7. With all due respect to my colleagues, I regret the Court’s choice of words precisely in an area – namely combatting discrimination against women and sexist stereotypes – where words have tremendous importance.

On such matters involving gender equality, the Court’s speech must be truthful and accurate. Truthful because these issues are fundamental with regard to the Convention; accurate because the Court has a crucial pedagogical role.

This by no means affects the relevance of the judgment’s other findings, with which I concur.