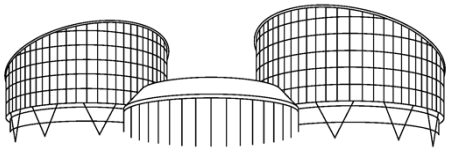

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FOURTH SECTION

CASE OF CARVALHO PINTO DE SOUSA MORAIS v. PORTUGAL

(Application no. 17484/15)

JUDGMENT

This version was rectified on 3 October 2017
under Rule 81 of the Rules of Court.

STRASBOURG

25 July 2017

FINAL

25/10/2017

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

COUNCIL OF EUROPE
CONSEIL DE L'EUROPE

In the case of Carvalho Pinto de Sousa Morais v. Portugal,

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

Ganna Yudkivska, *President,*
Vincent A. De Gaetano,
Paulo Pinto de Albuquerque,
Faris Vehabović,
Iulia Motoc,
Georges Ravarani,
Marko Bošnjak, *judges,*

and Andrea Tamietti, *Deputy Section Registrar,*

Having deliberated in private on 20 June 2017,

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

PROCEDURE

1. The case originated in an application (no. 17484/15) against the Portuguese Republic lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Portuguese national, Ms Maria Ivone Carvalho Pinto de Sousa Morais ("the applicant"), on 1 April 2015.

2. The applicant was represented by Mr V. Parente Ribeiro, a lawyer practising in Lisbon. The Portuguese Government ("the Government") were represented by their Agent, Ms M. F. da Graça Carvalho, Deputy Attorney General.

3. The applicant alleged that the Supreme Administrative Court's decision to reduce the amount initially awarded to her in respect of non-pecuniary damage had amounted to discrimination on the grounds of sex and age, in breach of Article 14 in conjunction with Article 8 of the Convention.

4. On 16 June 2016 the complaints concerning Article 14 in conjunction with Article 8 of the Convention were communicated to the Government and the remainder of the application was declared inadmissible pursuant to Rule 54 § 3 of the Rules of Court.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1945 and lives in Bobadela.

A. The background to the case

6. In December 1993 the applicant became a patient of the gynaecology department of the Alfredo da Costa Maternity Hospital (since renamed the Central Lisbon Hospital – *Centro Hospitalar de Lisboa Central*, hereinafter "the CHLC").

7. On 9 December 1993 the applicant was diagnosed with bartholinitis, a gynaecological disease, on the left side of her vagina (*bartholinite à esquerda*). She started treatment, which included drainages (*drenagens*). After each drainage the Bartholin gland would swell, causing the applicant considerable pain. She would thus require a second drainage and painkillers.

8. She was offered surgery for the condition during a consultation at the beginning of 1995.

9. On 21 May 1995 the applicant was admitted to the CHLC for a surgical procedure to remove the left Bartholin gland. On 22 May 1995 the applicant had both glands, on the left and right sides of the vagina, removed.

10. On an unknown date after being discharged, the applicant began to experience intense pain and a loss of sensation in the vagina. She also suffered from urinary incontinence, had difficulty sitting and walking, and could not have sexual relations.

11. On an unknown date the applicant was informed after being examined at a private clinic that the left pudendal nerve (*nervo pudenda do lado esquerdo*) had been injured during the operation.

B. Domestic proceedings against the hospital

12. On 26 April 2000 the applicant brought a civil action in the Lisbon Administrative Court (*Tribunal Administrativo do Círculo de Lisboa*) against the CHLC under the State Liability Act (*ação de responsabilidade civil extracontratual por facto ilícito*), seeking damages of 70,579,779 escudos (PTE), equivalent to 325,050,020 euros (EUR), of which PTE 50,000,000 (EUR 249,399) was in respect of non-pecuniary damage owing to the physical disability caused by the operation.

13. On 4 October 2013 the Lisbon Administrative Court ruled partly in favour of the applicant. It established, *inter alia*, the following facts:

(i) that the applicant had suffered since 1995 from a physical deficiency which had given her an overall permanent degree of disability of 73% and that the disability had resulted from the left pudendal nerve being cut;

(ii) after being discharged from hospital, the applicant had complained of pain associated with insensitivity in the part of the body which had been operated on and which had become swollen;

(iii) the left pudendal nerve had been injured during the operation, which had caused the pain from which the applicant was suffering, the loss of sensitivity and the swelling in the vaginal area;

(iv) the applicant had suffered from a decrease in vaginal sensitivity due to the partial lesion to the left pudendal nerve.

14. On the merits, the Lisbon Administrative Court found that the surgeon had acted recklessly by not fulfilling his objective duty of care, in breach of *leges artis*, and established that there was a causal link between his conduct and the injury to the applicant's left pudendal nerve. The Lisbon Administrative Court also established that it was that injury which caused her, among other problems, the pain and loss of sensation in the vagina and urinary incontinence. As a consequence, she had difficulty walking, sitting and having sexual relations, which, all together, made her feel diminished as a woman. Consequently, the applicant was also depressed, had suicidal thoughts and avoided contact with members of her family and friends. For those reasons the Lisbon Administrative Court considered that the applicant should be awarded EUR 80,000 in compensation for non-pecuniary damage. In respect of pecuniary damage, the Lisbon Administrative Court awarded her EUR 92,000, of which EUR 16,000 was for the services of a maid the applicant had had to hire to help her with household tasks.

15. On an unknown date the CHLC appealed to the Supreme Administrative Court (*Supremo Tribunal Administrativo*) against the judgment of the Lisbon Administrative Court. The applicant lodged a counter-appeal (*recurso subordinado*), arguing that she should have received EUR 249,399 in compensation and that the CHLC's appeal should be declared inadmissible. An opinion from the Attorney General's Office attached to the Supreme Administrative Court (*Procuradora Geral Adjunta junto do Supremo Tribunal Administrativo*) stated that the CHLC's appeal should be dismissed because it had been established that there had been a violation of *leges artis*. As a consequence, the various requirements of the obligation to pay compensation had been verified and the first-instance court had decided on compensation in an equitable and proper way.

16. On 9 October 2014 the Supreme Administrative Court upheld the first-instance judgment on the merits but reduced, *inter alia*, the amount that had been awarded for the services of the maid from EUR 16,000 to EUR 6,000 and the compensation for non-pecuniary damage from EUR 80,000 to EUR 50,000. The relevant part of the judgment on those points reads as follows:

> "... with respect to damages related to the charges for the maid ... [the plaintiff] could not show the amount paid under that head. Also ... we consider that the award of EUR 16,000 under that head is manifestly excessive.
>
> Indeed, (1) it has not been established that the plaintiff had lost her capacity to take care of domestic tasks, (2) professional activity outside the home is one thing while domestic work is another, and (3) considering the age of her children, she [the plaintiff] probably only needed to take care of her husband; this leads us to the conclusion that she did not need to hire a full-time maid ...

Lastly, as regards non-pecuniary damage, it is important to set an amount which compensates the plaintiff for her pain and loss of sensation and swelling in the vaginal area, and for the difficulty sitting and walking, which causes her distress and prevents her from going about her everyday life, forcing her to use sanitary towels on a daily basis to conceal urinary and faecal incontinence and which has limited her sexual activity, making her feel diminished as a woman. In addition, there is no medical solution to her condition. All this has caused her severe depression, expressing itself in anxiety and somatic symptoms manifested in the difficulty she has sleeping, deep disgust and frustration with the situation in which she finds herself, which has turned her into a very unhappy person and which inhibits her from establishing relationships with others and has caused her to stop visiting family and friends, from going to the beach and theatre and which has given her suicidal thoughts.

It should be noted, however, that the plaintiff has been suffering from the gynaecological condition for a long time (at least since 1993) and that she had already undergone various kinds of treatment without any acceptable result and that it was that lack of results and the impossibility of curing the condition otherwise that was the motivation for surgery. She had already had unbearable pain and symptoms of depression before [surgery]. This means that the plaintiff's complaints are not new and that the surgical procedure only aggravated an already difficult situation, a fact which cannot be ignored when setting the amount of compensation.

Additionally, it should not be forgotten that at the time of the operation the plaintiff was already 50 years old and had two children, that is, an age when sex is not as important as in younger years, its significance diminishing with age.

Thus, having regard to all those aspects, we believe that the compensation awarded at first instance exceeded what could be considered reasonable and, as such, the plaintiff should be awarded EUR 50,000 in compensation [in respect of non-pecuniary damage]."

17. On 29 October 2014 the Attorney General's Office attached to the Supreme Administrative Court applied to the Supreme Administrative Court to have the judgment of 9 October 2014 declared null and void (*nulidade do acórdão*) in the part concerning the amount awarded for non-pecuniary damage. It argued that the reasoning in the judgment and the decision on the amount of compensation were contradictory. It further submitted that the compensation award should not have taken account of the applicant's symptoms before the medical intervention, as if only a worsening of those symptoms had been at stake. The relevant parts of the application read as follows:

"...

III – In the instant case, we are dealing with surgical intervention which aimed exclusively at extracting the Bartholin glands.

...

During that surgical procedure the left pudendal nerve was partly damaged.

The pudendal nerve ... is a different organ from the one which was the object of the surgical intervention.

Following the extraction of the glands the plaintiff suffered damage which was considered as being established and which specifically arose from the lesion in question.

IV- In view of the factual basis of the judgment and having regard to the fact that 'in the absence of unlikely and unexpected occurrences doctors would have cured the plaintiff's illness and she could have returned to her normal life', the decision setting the amount of compensation for non-pecuniary damage should not have taken account of the plaintiff's pain and symptoms of depression prior to the surgical intervention as if they had worsened.

That is because, according to the judgment, they would have disappeared once the Bartholin glands had been removed and the plaintiff's condition cured by surgery.

V – The reasoning in the judgment leads logically to a different decision.

That would be to set compensation for non-pecuniary damage on the basis of the fact that the plaintiff would have been cured if the pudendal nerve had not been injured."

18. On 4 November 2014 the applicant applied to the Supreme Administrative Court to join the Attorney General's appeal of 29 October 2014, arguing that the judgment of 9 October 2014 should be declared null and void in the part concerning the amount of non-pecuniary damage she had been awarded.

19. On 29 January 2015 the Supreme Administrative Court dismissed the appeals by the Attorney General's Office and the applicant and upheld its judgment of 9 October 2014. It considered that the causal link between the injury to the pudendal nerve and the alleged damage had been established. However, that injury had not been the only cause of damage to the applicant. In the opinion of the judges of the Supreme Administrative Court, the applicant's health problems prior to the operation, and her gynaecological and psychological symptoms in particular, could not be ignored and had been aggravated by the procedure.

II. RELEVANT DOMESTIC LAW AND PRACTICE

A. The Constitution of the Portuguese Republic

20. The relevant provisions of the Constitution read as follows:

Article 13 – Principle of equality

"1. All citizens possess the same social dignity and are equal before the law.

2. No one may be privileged, favoured, prejudiced, deprived of any right or exempted from any duty for reasons of ancestry, sex, race, language, territory of origin, religion, political or ideological beliefs, education, economic situation, social circumstances or sexual orientation."

Article 16 – Scope and interpretation of fundamental rights

"1. The fundamental rights enshrined in the Constitution shall not exclude any others set out in applicable international law and legal rules.

2. The constitutional precepts concerning fundamental rights must be interpreted and construed in harmony with the Universal Declaration of Human Rights."

Article 18 – Legal force

"1. The constitutional norms with regard to rights, freedoms and guarantees are directly applicable to and binding on public and private entities.

2. The law may only restrict rights, freedoms and guarantees in cases expressly provided for in the Constitution, and such restrictions must be limited to those needed to safeguard other constitutionally protected rights and interests.

3. Laws that restrict rights, freedoms and guarantees must have a general and abstract nature and shall not have retroactive effect or reduce the extent or scope of the essential content of constitutional norms."

Article 25 – Right to personal integrity

"1. Every person's moral and physical integrity is inviolable.

2. No one shall be subjected to torture or to cruel, degrading or inhuman treatment or punishment."

B. Portuguese Civil Code

21. The relevant provisions of the Code reads as follows:

Article 70 – protection of personality

1. The law protects individuals against any unlawful offence or threat of offence against their physical or moral person.

2. Regardless of any civil liability which may arise, the person threatened or offended against may request measures that are appropriate to the circumstance of the case in order to avoid the realisation of the threat or to mitigate the effects of an offence already committed."

Article 483

"1. Whosoever, either intentionally or recklessly (*mera culpa*), unlawfully violates the rights of others or any legal provision intended to protect the interests of others is obliged to compensate the injured party for the damage resulting from that breach."

Article 487

"1. It is for the injured party to prove liability for damage through negligence (*culpa*), unless there is a legal presumption of it.

2. In the absence of any other legal criteria, negligence is assessed with reference to the diligence of a *bonus pater familias*, given the circumstances of the case."

C. Legislative Decree no. 48051 of 21 November 1967

22. Legislative Decree no. 48051, in force at the time the proceedings were instituted by the applicant, governs the State's non-contractual civil liability. It contains the following provisions of relevance to the instant case:

Article 2 § 1

"The State and other public bodies shall be liable to compensate third parties in civil proceedings for breaches of their rights or of legal provisions designed to protect the interests of such parties caused by unlawful acts committed with negligence (*culpa*) by their agencies or officials in the performance of their duties or as a consequence thereof."

Article 4

"1. The negligence (*culpa*) of the members of the agency or of the officials concerned shall be assessed in accordance with Article 487 of the Civil Code."

Article 6

"For the purposes of this Decree, legal transactions which infringe statutory provisions and regulations or generally applicable principles, and physical acts which infringe such provisions and principles or the technical rules and rules of general prudence that must be observed, shall be deemed unlawful.

In accordance with the case-law concerning the State's non-contractual liability, the State is required to pay compensation only if an unlawful act has been committed with negligence and there is a causal link between the act and the alleged damage."

D. Case-law

23. In a judgment of 4 March 2008 the Supreme Court of Justice considered allegations of medical malpractice and had to assess whether the amount the plaintiff had been awarded in respect of non-pecuniary damage had been excessive. The plaintiff alleged that he had been subjected to a full prostatectomy (*prostatectomia radical*) in which his prostate gland had been removed and he had become impotent and incontinent as a result. The Supreme Court of Justice found that there had been a medical error and awarded the plaintiff EUR 224,459.05 in compensation for non-pecuniary damage. To justify the amount awarded the court stated:

"It is irrefutable that the plaintiff has suffered non-pecuniary damage which was caused by the defendant. The devastating and irreversible consequence was a complete prostatectomy which left the plaintiff impotent and incontinent. The medical intervention was not even required given that the plaintiff had only been suffering from inflammation of the prostate.

...

It is clear that because of the defendant's actions, the plaintiff, who at the time was almost 59 years old, underwent a radical change in his social, family and personal life

as he is impotent and incontinent and will never again be able to live life as he used to. He is now a person whose life is physically and psychologically painful, and has therefore suffered irreversible consequences.

It is not unreasonable to assert that his self-esteem has suffered a tremendous blow."

24. The Supreme Court of Justice considered another case of alleged medical malpractice and its consequences on 26 June 2014. The plaintiff in question had been wrongly diagnosed with cancer and had consequently had a prostatectomy. The court considered that the compensation set by the Lisbon Court of Appeal in respect of non-pecuniary damage (EUR 100,000) was not excessive given that the plaintiff, 55 years old at the time, had suffered severe mental trauma for two months as a result of the defendant's actions in erroneously diagnosing cancer, which had caused him great physical suffering. In addition, the prostatectomy had had a permanent effect on his sex life.

III. RELEVANT INTERNATIONAL LAW

A. The United Nations Convention on the Elimination of All forms of Discrimination against Women

25. The relevant Articles of the 1970 UN Convention on the Elimination of all Forms of Discrimination against Women, ratified by Portugal on 30 July 1980, read as follows:

Article 1

"For the purposes of the present Convention, the term 'discrimination against women' shall mean any distinction, exclusion or restriction 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

"State 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..."

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 prejudice 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."

26. In its Concluding Observations on the combined eighth and ninth periodic reports on Portugal, adopted at its 1337th and 1338th meetings on 28 October 2015 (CEDAW/C/PRT/CO/8-9), the CEDAW Committee stated, in particular, as follows:

"...

Stereotypes

20. The Committee welcomes the State party's efforts to combat gender stereotypes through education in schools, promotional materials and legislation prohibiting sex-based and gender-based discrimination in the media. It notes with concern, however, that gender stereotypes continue to persist in all spheres of life, as well as in the media, and that the State party lacks a comprehensive strategy for addressing discriminatory stereotypes.

21. The Committee recommends that the State party further strengthen its efforts to overcome stereotypical attitudes regarding the roles and responsibilities of women and men in the family and in society by adopting a comprehensive strategy addressing the issue and continuing to implement measures to eliminate discriminatory gender stereotypes, educating the public and establishing, as soon as possible, a mechanism for regulating the use of discriminatory gender stereotypes in the media."

B. Council of Europe Convention on preventing and combating violence against women and domestic violence (Istanbul Convention)

27. On 5 May 2011 the Council of Europe adopted the Convention on preventing and combating violence against women and domestic violence, which entered into force on 1 August 2014. It was ratified by Portugal on 5 February 2013. The relevant parts of the Convention read as follows:

Article 1 – Purposes of the Convention

1. The purposes of this Convention are to:

...

b) Contribute to the elimination of all forms of discrimination against women and promote substantive equality between women and men, including by empowering women"

Article 12 – General Obligations

"1. Parties shall take the necessary measures to promote changes in the social and cultural patterns of behaviour of women and men with a view to eradicating prejudices, customs, traditions and all other practices which are based on the idea of the inferiority of women or on stereotyped roles for women and men."

C. Report of the UN Human Rights Council's Special Rapporteur on the Independence of Judges and Lawyers

28. The relevant parts of the Report by the UN Human Rights Council's Special Rapporteur on the Independence of Judges and Lawyers, Gabriela Knaul, concerning her visit to Portugal from 27 January to 3 February 2015 (United Nations Human Rights Council, document A/HRC/29/26/add4 of 29 June 2015), reads as follows:

"72. The Special Rapporteur notes that the proper education and awareness-raising of judges and prosecutors are paramount for a better performance of judicial actors in the treatment of all victims of crimes. This is especially needed as a means to avoid the reproduction of prejudices in court rulings or the adoption of contradictory measures, for instance in relation to custody, which could facilitate the access of known aggressors to their victims. The Special Rapporteur appreciates the efforts made by the Centre for Judicial Studies in providing training that pays particular attention to human rights and vulnerable groups."

IV. REPORT BY THE PERMANENT OBSERVATORY ON PORTUGUESE JUSTICE

29. A report by the Permanent Observatory on Portuguese Justice (*Observatório permanente da justiça portuguesa*), drafted at the request of the Commission for Citizenship and Gender Equality (*Comissão para a Cidadania e Igualdade de Género*), about how the judicial authorities deal with cases of domestic violence, was published in November 2016[1]. It pointed out that the approach of magistrates to cases often differed, depending on the economic, cultural and social background of the accused. The report also expressed concerns over prevailing legal and institutional sexism. It referred by way of example to a judgment concerning a man who had physically assaulted his wife and the fact that she was having sexual intercourse with other men was viewed as a mitigating factor (pp. 231-32 of the report).

1. *Violência doméstica: Estudo avaliativo das decisões judiciais*, Conceição Gomes, Paula Fernando, Tiago Ribeiro, Ana Oliveira e Madalena Duarte, Comissão para a Cidadania e Igualdade de Género, Novembro 2016.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 14 OF THE CONVENTION, READ IN CONJUNCTION WITH ARTICLE 8

30. The applicant complained that the Supreme Administrative Court's judgment in her case had discriminated against her on the grounds of her sex and age. She complained, in particular, about the reasons given by the Supreme Administrative Court for reducing the amount awarded to her in respect of non-pecuniary damage and about the fact that it had disregarded the importance of a sex life for her as a woman. She relied on Articles 8 and 14 of the Convention, which read as follows:

Article 8

"1. Everyone has the right to respect for his private and family life, his home and his correspondence.

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."

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, religion, political or other opinion, national or social origin, association with a minority, property, birth or other status."

A. Admissibility

1. Applicability of Article 14 of the Convention taken in conjunction with Article 8

(a) The parties' submissions

31. The Government contended that the concept of private life was very broad and did not lend itself to an exhaustive definition. An individual's physical and moral integrity fell within the notion of "private life" and was protected by Article 8 of the Convention. In that regard, they noted that the judgment of the Supreme Administrative Court had sought, *inter alia*, to provide the applicant with adequate compensation for the damage caused by the surgical procedure to her physical and psychological integrity, which had had an impact on both her health and her well-being. In addition, the Government observed that the applicant had complained of discriminatory treatment on the grounds of sex and age, elements which formed part of an individual's personality and therefore included the concept of private life.

The Government concluded therefore that the circumstances of the case fell within the scope of Article 8.

32. The applicant did not submit observations on the applicability of Article 8 to the facts of the case.

(b) The Court's assessment

33. The Court must determine at the outset whether the facts of the case fall within the scope of Article 8 and hence of Article 14 of the Convention (see *Konstantin Markin v. Russia* [GC], no. 30078/06, § 129, ECHR 2012 (extracts)).

34. It reiterates that Article 14 of the Convention complements the other substantive provisions of the Convention and its Protocols. It has no independent existence since it has effect solely in relation to "the enjoyment of the rights and freedoms" safeguarded by those provisions. However, the application of Article 14 does not necessarily presuppose the violation of one of the substantive rights guaranteed by the Convention, and to this extent it is autonomous. A measure which in itself is in conformity with the requirements of the Article enshrining the right or freedom in question may, however, infringe that Article when read in conjunction with Article 14 for the reason that it is discriminatory in nature. Accordingly, for Article 14 to become applicable, it is enough that the facts of the case fall "within the ambit" of another substantive provision of the Convention or its Protocols (see, among many other authorities, *Khamtokhu and Aksenchik v. Russia* [GC], nos. 60367/08 and 961/11, § 53, 24 January 2017, and *Fabris v. France* [GC], no. 16574/08, § 47, ECHR 2013 (extracts)).

35. In this connection the Court has on many occasions held that the notion of "private life" within the meaning of Article 8 is a broad concept which does not lend itself to exhaustive definition. It covers the physical and psychological integrity of a person and, to a certain extent, the right to establish and develop relationships with other human beings. It can sometimes embrace aspects of an individual's physical and social identity (see *Paradiso and Campanelli v. Italy* [GC], no. 25358/12, § 159, 24 January 2017). The concept of private life also encompasses the right to "personal development" or the right to self-determination (*ibidem*) and elements such as gender identification, sexual orientation and sex life, which fall within the personal sphere protected by Article 8 (see *E.B. v. France*, no. 43546/02, § 43, 22 January 2008).

36. In the present case the domestic proceedings aimed to establish liability for medical malpractice and an adequate amount of compensation for the physical and psychological consequences of the operation. Therefore, the facts at issue fall within the scope of Article 8 of the Convention. It follows that Article 14, taken together with Article 8, is applicable.

2. Conclusion

37. The Court notes that the application is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

B. Merits

1. The parties' submissions

38. The applicant contended that the various health conditions from which she suffered had been caused by the medical intervention of May 1995. She also argued that those specific conditions had not resulted from her previous health problems, contrary to the findings of the Supreme Administrative Court. In fact, her faecal and urinary incontinence, the difficulty in having sex and her depression had been caused exclusively by the medical error which had occurred during the operation.

39. Moreover, the applicant pointed to the fact that the Portuguese State, through the State Attorney's Office attached to the Supreme Administrative Court, had argued that the Supreme Administrative Court judgment should be made null and void and that the amount awarded in respect of non-pecuniary damage should not have been reduced.

40. Lastly, the applicant argued that the Supreme Administrative Court had clearly discriminated against her on the grounds of her sex and age. In the applicant's opinion, by expressly referring to the fact that she was fifty the Supreme Court had implied that if she had been younger and had had no children, she would most certainly have been awarded a higher amount. Moreover, the Supreme Administrative Court had made an assumption which had lacked a scientific basis. By disregarding her right to a sex life, the Supreme Administrative Court had breached one of the most basic principles of human dignity and had violated Articles 8 and 14 of the Convention. The applicant contended that the analysis of Portuguese case-law referred to above (see paragraphs 23 and 24) led to the conclusion that there was an obvious difference in treatment regarding compensation for men and women in situations involving their sex life. In particular, the amount awarded to men for non-pecuniary damage seemed to be manifestly higher in situations where plaintiffs had similar problems to those the applicant had suffered from following the medical intervention in question.

41. The Government argued that the Supreme Administrative Court's decision to decrease the amount awarded by the first-instance court in respect of non-pecuniary damage had not been governed by prejudice or an intention to discriminate against the applicant on the grounds of her sex or age. On the contrary, it had been based on the fact that the Supreme Administrative Court had considered that the medical intervention had not

been the only cause of the physical and psychological damage which the applicant had complained of. In that regard the Government emphasised that the amount awarded by the Supreme Administrative Court had been attributable to the fact that the applicant's gynaecological problem had developed a long time earlier, that she had already been treated unsuccessfully several times and that she had already been suffering unbearable pain and symptoms of depression before the operation. For the Supreme Administrative Court, therefore, the applicant's complains had not been new and surgery had merely aggravated what had already been a difficult situation. Moreover, the Government pointed out that the Supreme Administrative Court had also taken into account the fact that the applicant had become very unhappy and that she had felt "diminished as a woman" in the wake of the injury she had suffered.

42. The Government acknowledged that reading the impugned passage in the Supreme Administrative Court's judgment out of context could indicate prejudice and a belittling of the applicant's suffering, in particular because of her age. They further acknowledged that there had been an unfortunate use of terms. They observed, however, that the passage should be read on the understanding that the Supreme Administrative Court had also taken the above-mentioned factors into account.

43. In addition, the Government argued that comparing cases that had come before Portuguese courts was difficult and was liable to lead to errors because the clinical conditions of the plaintiffs seeking compensation were different and, as such, the physical and psychological consequences of the damage involved also differed. They noted that several factors had to be taken into account when assessing appropriate levels of compensation for non-pecuniary damage. These included any life-threatening risks; the number of medical procedures plaintiffs had undergone; the kind of treatment (the degree of pain) applied; whether the injuries caused by the medical error could be reversed; and the degree of loss of autonomy and subsequent dependence on others in the essential tasks of everyday life. In that regard, the applicant could not be considered as being in the same position as other plaintiffs (including the male plaintiffs referred to in the two Supreme Court of Justice judgments in paragraphs 23 and 24 above). As such, the amount awarded in respect of non-pecuniary damage had not amounted to an unjustifiable difference in treatment on account of her sex and age as it had been proportionate to the damage suffered.

2. The Court's assessment

(a) General principles

44. The Court has established in its case-law that in order for an issue to arise under Article 14, there must be a difference in treatment of persons in analogous or relevantly similar situations. Such a difference in treatment 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 no reasonable relationship of proportionality between the means employed and the aim sought to be realised. Contracting States enjoy a certain margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a difference in treatment (see, *inter alia*, *Biao v. Denmark* [GC], no. 38590/10, §§ 90 and 93, ECHR 2016, and *Sousa Goucha v. Portugal*, no. 70434/12, § 58, 22 March 2016). The notion of discrimination within the meaning of Article 14 also includes cases where a person or group is treated, without proper justification, less favourably than another, even though the more favourable treatment is not called for by the Convention (see *Khamtokhu and Aksenchik v. Russia* [GC], nos. 60367/08 and 961/11, § 64, ECHR 2017).

45. Article 14 does not prohibit all differences in treatment, but only those differences based on an identifiable, objective or personal characteristic, or "status", by which individuals or groups are distinguishable from one another. It lists specific grounds which constitute "status" including, *inter alia*, sex, race and property. The words "other status" have generally been given a wide meaning, and their interpretation has not been limited to characteristics which are personal in the sense that they are innate or inherent (see *Carson and Others v. the United Kingdom* [GC], no. 42184/05, §§ 61 and 70, ECHR 2010, and *Clift v. the United Kingdom*, no. 7205/07, §§ 56-58, 13 July 2010). In this regard, the Court has recognised that age might constitute "other status" for the purposes of Article 14 of the Convention (see, for example, *Schwizgebel v. Switzerland*, no. 25762/07, § 85, ECHR 2010 (extracts)), although it has not, to date, suggested that discrimination on grounds of age should be equated with other "suspect" grounds of discrimination (*British Gurkha Welfare Society and Others v. the United Kingdom*, no. 44818/11, § 88, 15 September 2016).

46. The Court further reiterates that the advancement of gender equality is today a major goal for 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 *Konstantin Markin*, cited above, § 127, with further references; see also *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 the grounds of sex. For example, in a case concerning the bearing of a woman's maiden name after marriage, it considered that the importance attached to the principle of non-discrimination prevented States from imposing traditions that derive from the man's primordial role and the woman's secondary role in the family (see *Ünal Tekeli v. Turkey*, no. 29865/96, § 63, ECHR 2004-X (extracts)). The Court has also

considered that the issue with stereotyping of a certain group in society lies in the fact that it prohibits the individualised evaluation of their capacity and needs (see, *mutatis mutandis, Alajos Kiss v. Hungary*, no. 38832/06, § 42, 20 May 2010, with further references).

47. Lastly, as concerns the burden of proof in relation to Article 14 of the Convention, the Court reiterates that once the applicant has demonstrated a difference in treatment, it is for the Government to show that it was justified (see *Khamtokhu and Aksenchik*, § 65, and *Biao*, § 92, both cited above).

(b) Application of those principles to the instant case

48. In the present case the Court observes that the first-instance court awarded the applicant EUR 80,000 in respect of non-pecuniary damage, referring to criteria such as the physical and mental suffering caused by the medical error. It considered in particular that the injury to the left pudendal nerve caused during the operation had left the applicant in pain, led to a loss of sensation in the vagina, incontinence, difficulty walking and sitting, and in having sexual relations (see paragraph 14 above).

49. While confirming the findings of the first-instance court, the Supreme Administrative Court reduced the award to EUR 50,000. It relied on the same elements, but considered that the applicant's physical and mental suffering had been aggravated by the operation, rather than caused exclusively by the injury to the left pudendal nerve during surgery. Moreover, the Supreme Administrative Court relied on the fact that the applicant "[had been] already fifty years old at the time of the surgery and had two children, that is, an age when sexuality [was] not as important as in younger years, its significance diminishing with age" (see paragraph 16 above).

50. The Court notes that the Supreme Administrative Court also reduced the amount that had been awarded to the applicant in respect of the costs of a maid on the grounds that she was not likely to have needed a full-time maid (see paragraph 16 above) at the material time as, considering the age of her children, she "probably only needed to take care of her husband".

51. In the present case the Court's task is not to analyse the actual amounts awarded to the applicant by the Supreme Administrative Court. In that connection the Court reiterates that as a general rule it is for the national courts to assess the evidence before them, including the means used to ascertain the relevant facts (see *Sahin v. Germany* [GC], no. 30943/96, § 73, ECHR 2003-VIII, and *Vidal v. Belgium*, 22 April 1992, § 33, Series A no. 235-B). The national authorities are thus, in principle, better placed than an international court to evaluate what is adequate compensation for the specific damage suffered by an individual. The issue which has to be determined, however, is whether or not the Supreme Administrative Court's

reasoning led to a difference of treatment of the applicant based on her sex and age, amounting to a breach of Article 14 in conjunction with Article 8.

52. The Court acknowledges that in deciding claims related to non-pecuniary damage within the framework of liability proceedings, domestic courts may be called upon to consider the age of claimants, as in the instant case. The question at issue here is not considerations of age or sex as such, but rather the assumption that sexuality is not as important for a fifty-year-old woman and mother of two children as for someone of a younger age. 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. Apart from being, in a way, judgmental, it omitted to take into consideration other dimensions of women's sexuality in the specific case of the applicant. In other words, in the instant case the Supreme Administrative Court made a general assumption without attempting to look at its validity in the specific case of the applicant herself, who was fifty at the time of the operation at issue (see, *mutatis mutandis*, *Schuler-Zgraggen*, cited above, § 67).

53. In the Court's view, the wording of the Supreme Administrative Court's judgment when reducing the amount of compensation in respect of non-pecuniary damage cannot be regarded as an unfortunate turn of phrase, as asserted by the Government. It is true that in lowering the amount the Supreme Administrative Court also took it for granted that the pain suffered by the applicant was not new. Nevertheless, the applicant's age and sex appear to have been decisive factors in the final decision, introducing a difference of treatment based on those grounds (see, *mutatis mutandis*, *Salgueiro da Silva Mouta v. Portugal*, no. 33290/96, § 35, ECHR 1999-IX; *Schuler-Zgraggen*, cited above, § 67; and, conversely, *Sousa Goucha,* cited above, §§ 64-65). This approach is also reflected in the decision of the Supreme Administrative Court[2] to lower the amount awarded to the applicant in respect of the costs of a maid on the grounds that she "probably only needed to take care of her husband" given her children's age at the material time (see paragraph 16 above).

54. In the Court's view, those considerations show the prejudices prevailing amongst the judiciary in Portugal, as pointed out in the report of 29 June 2015 by the UN Human Rights Council's Special Rapporteur on the Independence of Judges and Lawyers (see paragraph 28 above) and in the CEDAW's Concluding Observations on the need for the respondent State to address the problem of gender-based discriminatory stereotypes (see paragraph 26 above). They also confirm the observations and concerns expressed by the Permanent Observatory on Portuguese Justice regarding the prevailing sexism within judicial institutions in its report of November 2006 on domestic violence (see paragraph 29 above).

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2. Rectified on 3 October 2017: the former text was "Supreme Court of Justice".

55. In this well-established factual context, the Court cannot but note the contrast between the applicant's case and the approach taken in two judgments of 2008 and 2014, which concerned allegations of medical malpractice by two male patients who were fifty-five and fifty-nine years old respectively. The Supreme Court of Justice found in those cases that the fact that the men could no longer have normal sexual relations had affected their self-esteem and resulted in a "tremendous blow" and "severe mental trauma" (see paragraphs 23 and 24 above). In view of its findings, the Supreme Court of Justice awarded EUR 224,459 and EUR 100,000 to the two male plaintiffs respectively. It follows from those cases that the domestic courts took into consideration the fact that the men could not have sexual relations and how that had affected them, regardless of their age. Contrary to the applicant's case, the Supreme Court of Justice did not take account of whether the plaintiffs already had children or not, or look at any other factors. In particular, in the judgment of 4 March 2008, it found that the fact that the impugned surgical procedure had left the plaintiff impotent and incontinent was enough to consider that non-pecuniary damage had been caused.

56. In view of the foregoing considerations, the Court concludes that there has therefore been a violation of Article 14 of the Convention taken in conjunction with Article 8.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

57. 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

58. The applicant claimed 174,459.05 euros (EUR) in respect of non-pecuniary damage. She did not claim an amount in respect of pecuniary damage.

59. The Government considered the applicant's claim excessive.

60. The Court considers that the applicant must have suffered distress and frustration as a result of the violation found. Making its assessment on an equitable basis, the Court awards the applicant EUR 3,250 for non-pecuniary damage, plus any tax that may be chargeable on the above amount.

B. Costs and expenses

61. The applicant also claimed EUR 2,460 for the costs and expenses incurred before the Court.

62. The Government, referring to *Antunes and Pires v. Portugal* (no. 7623/04, § 43, 21 June 2007), left the matter to the Court's discretion.

63. According to the Court's case-law, 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. 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 claimed in full.

C. Default interest

64. 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,

1. *Declares*, by a majority, the application admissible;

2. *Holds*, by five votes to two, that there has been a violation of Article 14 of the Convention read together with Article 8;

3. *Holds*, by five votes to two,
   (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, the following amounts:
      (i) EUR 3,250 (three thousand two hundred and fifty euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;
      (ii) EUR 2,460 (two thousand four hundred and sixty euros), plus any tax that may be chargeable to the applicant, in respect of costs and expenses;
   (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

4. *Dismisses*, unanimously, the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 25 July 2017, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Andrea Tamietti	Ganna Yudkivska
Deputy Registrar	President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the following separate opinions are annexed to this judgment:

(a) concurring opinion of Judge Yudkivska;
(b) concurring opinion of Judge Motoc;
(c) joint dissenting opinion of Judges Ravarani and Bošnjak.

G.Y.
A.N.T.

CONCURRING OPINION OF JUDGE YUDKIVSKA

"...The absence of the rights of woman does not consist in the fact that she has not the right to vote, or the right to sit on the bench, but in the fact that in her affectional relations she is not the equal of man... They excite woman, they give her all sorts of rights equal to those of men, but they continue to look upon her as an object, and thus they bring her up from infancy and in public opinion..."

Leo Tolstoy, "The Kreutzer Sonata"

"...Has not a woman the same needs as a man, but without the same right to make them known?..."

Jean-Jacques Rousseau, "Emile"

When Anton Chekhov read Tolstoy's "The Kreutzer Sonata", he was astonished, being a doctor by education, by how little the "Titan" of Russian literature knew about women's sexuality. According to Chekhov, Tolstoy's judgments in this respect "are not only questionable, but also clearly betray an ignorant person who has not even bothered to read two or three books written by specialists"[1].

If such ignorant judgments come not from writers but from judges, the consequences are more worrying.

Tolstoy had done nothing more or less than reproduce the stereotypes developed for centuries in patriarchal societies about the essence of women and their corresponding role. These stereotypes should never come from a courtroom.

For centuries a woman's entire life was confined to the production of children and to their care. "Kinder, Küche, Kirche" as the only permissible areas for female activity. A woman was not respected as a human being. Her desires were ignored. "For a woman ... to explore and express the fullness of her sexuality, her ambitions, her emotional and intellectual capacities, her social duties, her tender virtues, would entail who knows what risks and who knows what truly revolutionary alteration to the social conditions that demean and constrain her...", as brilliantly explained by the well-known author and psychologist Louise J. Kaplan[2]. She was just a reproductive machine (in some old dictionaries it is even argued that the very word "woman" in English derives from "man with a womb").

1. A. Chekhov, Letter to A.N. Pleshcheyev of 15 February 1890, in Anton Pavlovich Chekhov, Complete Works and Letters in Thirty Volumes, Letters, vol. 4, p. 18, Nauka (1976).
2. Louise J. Kaplan's, Female Perversions: The Temptations of Emma Bovary, New York, Doubleday, 1991.

There is a great temptation to believe that all of these millennia-old social stereotypes, persistent ideas and practices are nowadays just "water under the bridge", at least in Europe.

Unfortunately, they are not. Even in 21st century Europe, age-old prejudices may rear their ugly heads.

In the present case, it is clear that out-dated gender stereotypes have influenced a judicial decision and this in itself amounts to a violation of the applicant's Convention rights.

The applicant discovered from the judgment of the Supreme Administrative Court that she had reached an age and family situation (two children) "when sex is not as important as in younger years". This passage is shocking to a modern reader. Although characterised by the Government as "an unfortunate use of terms", it amounts to a humiliating and insolent intrusion into the most intimate sphere of the applicant's private life. The court reduced the amount of compensation awarded for the applicant's physical injury, at least in part, because: (1) she had already had children, so sex is now less important for her; and (2) she had most probably lost fertility and so sex is less significant.

In other words, the Supreme Administrative Court, in the best patriarchal traditions, connected the woman's sexual life with procreation. This was precisely the point at which gender-based discrimination occurred. Even though the court referred to her age only – which led my respected dissenting colleagues to assume that it was "apparently a difference in treatment of people having a different *age*" - it was the specific combination of *female* gender and age that concerned the Portuguese court. This is particularly clear in light of the two cited judgments of 2008 and 2014 (see paragraphs 23-24), where in similar cases concerning male claimants their age was not mentioned at all in the reasoning.

For the esteemed dissenting judges, the majority's reasoning fails to perform a comparative exercise "in order to identify the existence of two sets of case-law that would show a difference in treatment based on gender". In my view, this is a case where prejudicial stereotypes have *affected the judicial assessment* of evidence, which is perfectly sufficient to find a violation of Article 14.

Although the Supreme Administrative Court took into account a number of other factors, such as the applicant's health problems prior to the operation, it is impossible to determine how much weight was accorded to each factor. The court's wording proves that sex stereotypes certainly played some role in its decision-making, since after the impugned passage the court explained that it had "regard to all those aspects". Even if their role was a minor one, they still represented an attack on the applicant's human dignity, and as such were a negation of her rights. The point is that prejudicial stereotypes and antiquated perception of gender roles had no place in a rational judicial assessment.

It can be argued that the majority's judgment presents a somewhat novel approach to discrimination cases. However, a closer look suggests that it merely addresses the reality - the more equality is provided for by law, the more subtle gender discrimination becomes, precisely because stereotypes about the "traditional" roles of men and women are so deeply rooted. That is exactly what Tolstoy explains in the above epigraph – all the myriad legal instruments guaranteeing equality for men and women are merely paying lip service to the rights and freedoms they espouse so long as a woman remains no more than a function. If this attitude is not criticised, factual discrimination will never be eliminated.

Judges fail in their role if they "facilitate the perpetuation of stereotypes by failing to challenge stereotyping"[3]. The UN High Commissioner for Human Rights, Navi Pillay, expressed this in the following terms: ".... Explicit action is required to ensure that government officials, *especially those working in the justice system*, do not deliver decisions based on harmful stereotypes and undermine the human rights of women and girls. Rather, officials should be identifying and challenging such negative beliefs, to help create environments that more fully respect the human rights of women and girls and build a culture of equality. If we are serious about achieving gender equality... we must devote more energy to dismantling prejudicial presumptions about women and men. We must stop perpetuating misguided ideas of what women should or should not be or do, based solely on the fact of being female... This is the demand of equality, which is the foundation of human rights law"[4].

I admit, as my dissenting colleagues explained, that we do not have a sufficient "series of [Portuguese] cases treating women and men systematically differently" and this makes it harder to establish a difference in treatment. Undoubtedly, discrimination is much easier to identify when there is an accumulation of comparable cases rather than just single examples. An individual instance of discrimination can be explained away as, to quote the dissenters, nothing more than "an erroneous judgment".

It is also true that this Court has commonly interpreted Article 14 as requiring a *discriminatory intent and result*. For example, in the case of *Aksu v. Turkey*[5], which concerned publications depicting derogatory stereotypes of Roma, the Grand Chamber declined to examine Article 14, observing that:

"... the case does not concern a difference in treatment, and in particular ethnic discrimination, as the applicant has not succeeded in producing *prima facie* evidence that the impugned publications had a discriminatory intent or effect."

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3. Simone Cusack, *Eliminating Judicial Stereotyping* (2014)
4. Navi Pillay, "Equality and Justice in the Courtroom", *Huffington Post*, 3 March 2014.
5. *Aksu v. Turkey* [GC], nos. 4149/04 and 41029/04, § 45, ECHR 2012.

Nonetheless, as noted by one of the commentators, "this interpretation of discrimination is too narrow. By equating discrimination with differential treatment, the Court missed the point here. *The wrongs of stereotyping are not comparative in nature*: they do not derive from a comparison with another group that has been treated better."[6]

The wrongs of stereotyping have long been acknowledged by, for example, the US Supreme Court. In *Price Waterhouse v. Hopkins*[7] it expressly held that gender stereotyping was evidence of sex discrimination even in the absence of an adequate comparator[8]. In *U.S. v. Virginia Military Institute,* it found that when different roles are assigned based on gender, this can "create or perpetuate the legal, social, and economic inferiority of women".[9]

The US Supreme Court often quotes from Justice Bradley's infamous concurring opinion in the case of *Bradwell v. Illinois*, as an example of how harmful stereotypes infected judicial reasoning in the past and to remind us to always remain vigilant against them. Justice Bradley referred to the separate spheres of men and women and how "[t]he paramount destiny and mission of woman are to fulfil the noble and benign offices of wife and mother. This is the law of the Creator[10]". Fortunately, most court systems have come a long way since then, and yet are there not echoes of this pervasive stereotyping in the judgment of the Supreme Administrative Court of Portugal?

The European Court of Human Rights has also been explicit in condemning stereotypes. In the above-cited case of *Konstantin Markin v. Russia* it was held that States "may not impose traditional gender roles and gender stereotypes" (§ 142) and that "gender stereotypes, such as the perception of women as primary child-carers and men as primary breadwinners, cannot, by themselves, be considered to amount to sufficient justification for a difference in treatment, any more than similar stereotypes based on race, origin, colour or sexual orientation" (§ 143).[11]

In the case at hand we do not require a long list of similar cases for comparison in order to find discrimination, the language of the judgment of 9 October 2014 being discriminatory in and of itself. It does not refer to any differential physical needs of men and women, but to the persistent

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6. A Timmer, "Judging Stereotypes: What the European Court of Human Rights Can Borrow from American and Canadian Equal Protection Law" (2015) 63 *The American Journal of Comparative Law* 239, 252.

7. 490 U.S. 228 (1989).

8. Zachary A. Kramer, Note, *The Ultimate Gender Stereotype: Equalizing Gender-Conforming and Gender-Nonconforming Homosexuals Under Title VII,* 2004 U. ILL. L. REV. 465, 471 (2004)

9. U.S. v. Virginia, 518 U.S. 515, 533 - 534 (1996).

10. Bradwell v. Illinois, 83 U.S. (16 Wall.) 130, 141 (1873).

11. *Konstantin Markin v. Russia* [GC], no. 30078/06, § 77, ECHR 2012 (extracts)

perception that the primary focus of a woman's sexual life is the reproductive function.

It might generally be reasonable to take into account a claimant's age when determining the amount of damages to be awarded – it is evident that a younger claimant will probably have to live with a given injury for longer than an older claimant. It might even be reasonable, in a case involving a physical loss of ability to have sex, to consider whether or not a claimant is affected by the inability to have children. However, it was both irrational and degrading for the Administrative Court to speculate as to the applicant's sex life in general and to make any presumption in this respect based on a generalisation.

As the majority underlined in paragraph 52, the Supreme Administrative Court in the impugned statement did not take the trouble to assess in principle the applicant's individual situation, and was led exclusively by a harmful cliché. A paper on Eliminating Judicial Stereotyping, submitted to the Office of the High Commissioner for Human Rights in this respect, confirms that "stereotyping excludes any individualised consideration of, or investigation into, a person's actual circumstances and their needs or abilities. So, *when a judge engages in stereotyping, he or she reaches a view about an individual based on preconceived beliefs about a particular social group* and not relevant facts or actual enquiry related to that individual or the circumstances of their case."[12]

In sum, concurring with my colleagues in the majority, I am convinced that stereotypical reasoning in the present case led to discrimination. As mentioned in the academic literature in this field, "judicial tone and attitude undoubtedly play an important part in cases involving issues of sexual autonomy"[13].

The rejection of women's sexuality can take very subtle forms, as in the present case, but in the extreme it may transform into the most inhuman forms, such as a failure to condemn a rape or performing FGM. Prejudice, passed down through millennia, is a heavy burden that threatens both the present and the future. It must therefore be prevented in the strongest possible manner.

12. Simone Cusack, *Eliminating Judicial Stereotyping* (2014)
13. Elizabeth Wicks, *The state and the body: legal regulation of bodily autonomy*, Oxford; Portland, Oregon: Hart Publishing, 2016, p.104

CONCURRING OPINION OF JUDGE MOTOC

A. Preliminary remarks

1. A number of studies have arisen out of the famous essay by Jorge Luis Borges *El idioma analítico de John Wilkins* ("The Analytical Language of John Wilkins"). In order to illustrate the arbitrariness and cultural specificity of any human attempts to categorise the world and the challenges associated with such attempts, Borges describes this example of an alternative taxonomy, supposedly taken from an ancient Chinese encyclopaedia entitled *Celestial Emporium of Benevolent Knowledge*: "Animals are divided into: (a) belonging to the Emperor, (b) embalmed, (c) tame, (d) suckling pigs, (e) sirens, (f) fabulous, (g) stray dogs, (h) included in the present classification, (i) frenzied, (j) innumerable, (k) drawn with a very fine camelhair brush, (l) *et cetera*, (m) having just broken the water pitcher, (n) that from a long way off look like flies".

2. Stereotypes are also attempts at categorisation that we use in everyday life. There is no explicit or agreed legal definition of stereotypes. In the context of gender discrimination the definition proposed by Rebecca Cook and Simone Cusack is widely accepted: "A stereotype is a generalized view or preconception of attributes or characteristics possessed by, or the roles that are or should be performed by, members of a particular group".[1]

3. The case of *Carvalho Pinto de Sousa Morais v Portugal* is another attempt by the Court to deal with the question of stereotypes in the field of gender. It can be viewed as one step towards the establishment of "freedom from prejudice and stereotypes" and away from the traditional conception of gender equality. The case also shows the methodological difficulties in identifying the connection between discrimination and stereotyping and the danger of self-enforcing the invidious circle.

4. Addressing stereotypes can be seen as a way of achieving transformative equality. Clearly, the principle of transformative equality embodies a change stance. According to Andrew Byrnes,[2] transformative equality "might also be seen as a form of substantive equality with systemic and structural dimensions". As CEDAW General Recommendation No. 25 affirms,

> "The lives of women and men must be considered in a contextual way, and measures adopted towards a real transformation of opportunities, institutions and systems so that they are no longer grounded in historically determined male paradigms of power and life patterns."

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1. Rebecca Cook and Simone Cusack, *Gender Stereotyping: Transnational Legal Perspectives*, 2010.
2. A. Byrnes, "Article 1" in M.A. Freeman et al. (eds.), *The UN Convention on the Elimination of All Forms of Discrimination Against Women: A Commentary*, 2012.

5. Gender equality is still a goal for member States, even if significant progress has already been made. The Court as a human rights court can and should also address the deep roots of discrimination. Given the relative novelty of its approach to this question, I shall set out in this opinion to give a description of the Court's precedents in the area of gender discrimination and, more broadly, stereotypes (II), and of the relationship between stereotypes and discrimination in the present case (III).

B. Relevant precedents of the Court

6. The Court has discussed stereotypes in some recent judgments concerning, particularly, race and gender equality. In earlier cases in the field of discrimination (see, for example, *Marckx v. Belgium*, 13 June 1979, Series A no. 31; *Abdulaziz, Cabales and Balkandali v. the United Kingdom*, 28 May 1985, Series A no. 94; and *Karlheinz Schmidt v. Germany*, 18 July 1994, Series A no. 291-B) the Court found a violation of Article 14 but did not acknowledge stereotyping as part of the discriminatory conduct.

7. The question of gender discrimination in connection with judgments of the national courts was dealt by the Court in two important early precedents: *Schuler-Zgraggen v. Switzerland* (24 June 1993, Series A no. 263) and *Salgueiro da Silva Mouta v. Portugal* (no. 33290/96, ECHR 1999-IX). In *Schuler-Zgraggen* (cited above, § 67) the Court dealt with discrimination in the context of Article 6:

> "In this instance, the Federal Insurance Court adopted in its entirety the Appeals Board's assumption that women gave up work when they gave birth to a child. It did not attempt to probe the validity of that assumption itself by weighing arguments to the contrary.
>
> As worded in the Federal Court's judgment, the assumption cannot be regarded – as asserted by the Government – as an incidental remark, clumsily drafted but of negligible effect. On the contrary, it constitutes the sole basis for the reasoning, thus being decisive, and introduces a difference of treatment based on the ground of sex only."

8. In *Salgueiro da Silva Mouta* (cited above) the Court found a violation of Article 8 in conjunction with Article 14 because the Lisbon Court of Appeal based its decision on the prejudice that homosexuals could not be good fathers.

9. Important precedents in the field of discrimination where the respondent Government attempted to provide a "reasonable and objective justification" include *Ünal Tekeli v. Turkey* (no. 29865/96, ECHR 2004-X). Other notable precedents in the field of stereotyping are *Aksu v. Turkey* ([GC], nos. 4149/04 and 41029/04, ECHR 2012); *Kiyutin v. Russia* (no. 2700/10, ECHR 2011); and *Alajos Kiss v. Hungary* (no. 38832/06, § 49, 20 May 2010), even if the last-mentioned case was not analysed under Article 14. In *Aksu* (cited above, § 58) the Grand Chamber stated:

"... any negative stereotyping of a group, when it reaches a certain level, is capable of impacting on the group's sense of identity and the feelings of self-worth and self-confidence of members of the group. It is in this sense that it can be seen as affecting the private life of members of the group."

10. The most important precedent of relevance to the present case is *Konstantin Markin v. Russia* ([GC], no. 30078/06, ECHR 2012), where the Grand Chamber stated (§ 143):

> "The Court agrees with the Chamber that gender stereotypes, such as the perception of women as primary child-carers and men as primary breadwinners, cannot, by themselves, be considered to amount to sufficient justification for a difference in treatment, any more than similar stereotypes based on race, origin, colour or sexual orientation."

The Court has thus recognised that stereotypes can be wrongfully used by the State as a means of rationalising discrimination. The two major stereotypes that the Court referred to in *Konstantin Markin* were that women did not play an important role in the military and that women had a special role associated with motherhood.

11. We can only agree with the authors who consider the case-law in the field of discrimination and stereotypes to be piecemeal.[3] In this respect the judgment in the present case, once it becomes final, can be an important example of the Court addressing stereotypes and discrimination in a proper way in order to achieve substantive equality among people.

C. Stereotypes and discrimination

12. We cannot entirely refute the practice of generalisations about a group of people. It is not hard to reach an intuitive understanding of the term "stereotype" – it is a type of generalisation that concerns qualities or attributes assigned to a category of people. As Frederick Schauer has underlined, rules based on overbroad generalisations about classes of people are made all the time without being struck down by anti-discrimination law.

13. Stereotypes can be inaccurate, but they can also be statistically correct – for example, "women are mothers first, and workers second" or "the family is the women's domain". Such stereotypes can in turn further discrimination by "forcing women to continue to assume the role of primary family caregiver" (see *Nevada Department of Human Resources v. Hibbs*, 538 US 721(2003)).

14. In the present case the Portuguese Supreme Administrative Court used two stereotypes in relation to the applicant: the sexual stereotype, concerning physical and biological difference, and the **gender role stereotype**, ascribing a certain role and behaviour to women. The Supreme

3. A. Timmer, *Toward an Anti-Stereotyping Approach for the European Court of Human Rights*, 2011.

Administrative Court stated, as regards the first stereotype, that "at the time of the operation the [applicant] plaintiff was already 50 years old and had two children, that is, an age when sex is not as important as in younger years, its significance diminishing with age", and, as regards the second, that the applicant was not likely to have needed a full-time maid as she "probably only needed to take care of her husband" (see paragraph 16 of the judgment).

15. There can be a fine line between perpetuating a harmful stereotype and using that stereotype to abolish *de facto* inequality by identifying gender stereotypes and exposing their harm.

16. In the words of Catherine MacKinnon, "You can't change a reality you can't name". What is wrongful has to be diagnosed as a "social harm"; otherwise it will not be possible to determine its treatment and bring about its elimination. The first phase should be **naming the stereotypes**. For instance, the European Court of Justice held as follows in the *Marschall* case (ECJ, C-409/95, *Hellmut Marschall v. Land Nordrhein-Westfalen*, judgment of 11 November 1997, § 29):

> "... it appears that even where male and female candidates are equally qualified, male candidates tend to be promoted in preference to female candidates particularly because of prejudices and stereotypes concerning the role and capacities of women in working life and the fear, for example, that women will interrupt their careers more frequently, that owing to household and family duties they will be less flexible in their working hours, or that they will be absent from work more frequently because of pregnancy, childbirth and breastfeeding."

17. The Court identifies the "prejudices" in the Supreme Administrative Court's language (see paragraph 54 of the judgment) and states that "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 paragraph 52), without paying attention to the fact that these prejudices may have a statistical basis in reality.

18. The second phase involves **contesting the stereotypes** once it has been established that they are harmful. The Court has developed different approaches to this issue. *What is methodologically important in the contesting phase is that we are not using a comparator as in other discrimination cases.* ***The test of comparability is not suited to cases of stereotyping***.[4] Stereotypes affect the autonomy of groups and individuals. For the disadvantage test it is enough to prove that the stereotypes are harmful to the group to which the applicant belongs and that the rule or practice applied by the State is based on such stereotypes. "Discrimination must be understood in the context of the experience of those on whom it impacts" (South African Constitutional Court, *National Coalition for Gay*

4. J.H. Gerards, *Judicial Review in Equal Treatment Cases*, 2005.

and Lesbian Equality and Others v. Minister of Home Affairs and Others, [1999] ZACC 17).

19. Contesting the prejudices it has identified, the Court alludes in paragraph 54 of the judgment to the context of the prejudices in the judiciary in Portugal by making references to the report by the UN Human Rights Council's Special Rapporteur and the CEDAW's concluding observations. The reference to similar decisions concerning men is not used as a comparator but also as a contextual element, as the Court makes clear that its "task is not to analyse in itself the amounts awarded to the applicant" (see paragraph 51 of the judgment), while correctly stating that the domestic authorities do not assess the question of the number of children men have when considering matters concerning their sexuality.

D. Conclusion

20. "The devastating effects of modern man's effort to transcend the contingency of the human condition by overpowering and dominating nature (and the human beings who are symbolically identified with nature: the nature: the savage, the child, the women) have become only too obvious at the end of the century", wrote the German philosopher Cornelia Klinger.[5] Gender equality is still a goal to be achieved, and addressing the deep roots of inequality in the form of stereotyping is an important means of pursuing this goal.

5. C; Klinger, "The concepts of the sublime and the beautiful in Kant and Lyotard", *Constellations* no. 2, 1995.

JOINT DISSENTING OPINION OF JUDGES RAVARANI AND BOŠNJAK

1. We unfortunately cannot share the views of our esteemed Colleagues in the present case because we do not think that the applicant has been the victim of discrimination. We therefore respectfully disagree with the judgment.

2. If we do not express any views on the general problem of discrimination against women in Portugal, it is certainly not because we would negate its existence or its importance, but simply because we have the firm conviction that in the present case no discrimination has been identified.

3. ***A problem of methodology.*** The arguments supporting such conclusion are essentially methodological.

4. ***Definition.*** Equality and its negation, discrimination[1], be it direct or indirect, are relational notions and presuppose the existence of comparable or at least analogous situations, as Article 14 obviously does not protect persons who are in totally distinct situations from the reference group.

5. ***Principles established by the Court.*** The Court has established in its case-law that only differences in treatment based on an identifiable characteristic, or "status", are capable of amounting to discrimination within the meaning of Article 14. In order for an issue to arise under Article 14 there must be a difference in the treatment of persons in analogous, or relevantly similar, situations. Although the list of potential discriminations is long[2], not every difference in treatment will amount to a violation of Article 14. It must be established that other persons in an analogous or relevantly similar situation enjoy preferential treatment and that this distinction is discriminatory (see *Konstantin Markin v. Russia* [GC], no. 30078/06, § 125, ECHR 2012). It is moreover obvious that discrimination is prohibited only if it is related to certain protected grounds[3]. Such difference in treatment is discriminatory if it has no objective and reasonable justification; in other words, if it does not pursue a

1. The following developments will be about negative discrimination only, as the case does not raise any issue under its positive aspect.
2. Reference is made to the non-exhaustive enumeration of prohibited grounds in Article 14, flowing from the use of "other status" at the end of the provision. For the present case, it is relevant that the Court has recognised that age may be covered by "other status" (see *Schwitzgebel v. Switzerland*, no. 25762/07, § 85, ECHR 2010).
3. Tarunabh Khaitan, *A Theory of Discrimination Law*, Oxford University Press 2015, p. 28 *in fine*.

legitimate aim or if there is no reasonable relationship of proportionality between the means employed and the aim sought to be realised (*Carson and Others v. the United Kingdom* [GC], no. 42184/05, § 61, ECHR 2010).

6. ***No self-standing provision.*** Moreover, Article 14 is not a self-standing provision as there is no room for its application unless the facts at issue fall within the ambit of one or more Convention provisions (see *Abdulaziz, Cabales and Balkandali v. the United Kingdom*, 28 May 1985, § 71, Series A no. 94).

7. ***Three-step analysis.*** The Court's case-law shows that three steps are necessary to establish discrimination: first, identifying two categories of persons who are comparable and distinguishable – it flows from the text of Article 14 that discrimination is envisaged in the light of a person's belonging to a group[4]; secondly, ascertaining whether the members of these two categories of people are actually treated in a different way; and thirdly, if so, examining whether the distinction in treatment had an objective and reasonable justification.

8. The following lines will deal with the first two steps and will seek to outline the methodological requirements and the approach taken by the majority in establishing a comparison (A) and identifying potential disadvantageous treatment of persons belonging to comparable groups (B)[5].

A. Comparison

9. The comparative exercise is both delicate and potentially decisive. The choice of the comparator will often change the outcome of the case.

10. ***Identification of two groups of persons.*** As to the identification of the two persons or groups of persons in an analogous or relevantly similar situation, the Court has often formulated the basic principle as follows: "The applicant must demonstrate that, having regard to the particular nature of his complaint, he was in a relevantly similar situation to others treated differently"[6]. It is important to note, in this context, that the applicant cannot dictate the scope of the comparability exercise; this is a legal issue that the judge has to deal with and he has to take "into account the elements that

4. See also Tarunabh Khaitan, *op. cit.*, pp. 30, 42 and 49 ff. The author calls the exercise "Cognate Group Condition".
5. As in the present case, the second step will lead to a negative result, we will not dwell on the third step. It should be noted, however, that the majority, after finding a difference in treatment based on gender, should have addressed, be it only briefly, the question of justification.
6. *Clift v. the United Kingdom*, no. 7205/07, § 66, 13 July 2010.

characterise their circumstances in the particular context" and "in the light of the subject-matter and purpose of the measure which makes the distinction in question"[7].

11. ***Distinction operated by legislation.*** In most cases, the Court has distinguished between two comparable abstract categories[8] of people treated in a different way by domestic legislation (see for example, among many other authorities, *Karlheinz Schmidt v. Germany*, 18 July 1994, Series A no. 291-B, where a violation of Article 14 in conjunction with Article 4 § 3 (d) was found as only men, not women, were obliged to serve as firefighters or, alternatively, had to pay financial compensation; *Burghartz v. Switzerland*, 22 February 1994, Series A no. 280-B, where a violation of Article 14 taken together with Article 8 was found, as domestic law allowed a woman to add her maiden name to that of her husband but a man could not add his name to that of his wife; *Konstantin Markin*, cited above, where Article 14 discrimination was found (also in conjunction with Article 8) as fathers, unlike mothers, were not entitled to take parental leave; *Opuz v. Turkey*, no. 33401/02, ECHR 2009, where the Court found a violation of Article 14 in combination with Articles 2 and 3 as the domestic legislation did not provide for the protection of women against domestic violence; and it is interesting to compare that case to *Rumor v. Italy,* no. 72964/10, 27 May 2014, where a woman had complained about domestic violence, but the Court did not find a violation of Article 14 combined with Article 3 as there was a legal framework in Italy enabling the authorities to take efficient measures against domestic violence and this framework had revealed itself to be efficient).

12. ***The use of stereotypes.*** In other cases, the Court, without finding it necessary to identify two categories of persons, has been satisfied with the identification of a particularly vulnerable group in society which has suffered considerable discrimination in the past. Here, the justification for the differential treatment by domestic law mainly flows from the use of stereotypes, concerning, for example, the mentally disabled (*Alajos Kiss v. Hungary,* no. 38832/06, 20 May 2010), people with a certain sexual orientation (*E.B. v. France* [GC], no. 43546/02, 22 January 2008), race (*D.H. and Others v. the Czech Republic* [GC], no. 57325/00, ECHR 2007-IV) or gender (*Abdulaziz, Cabales and Balkandali,* cited above:

7. *Clift,* cited above, § 121.
8. In some rare cases, the Court has found discriminatory treatment by law where a single category of persons was granted certain rights, one or more individuals in the same situation being excluded from the benefit of these rights without any admissible justification (*Pine Valley Development Ltd v. Ireland*, no. 12742/87, where a single company was excluded by law from the benefit of retroactive validation of building permits).

national legislation made it easier for a man settled in the United Kingdom than for a woman also settled to obtain permission for his or her non-national spouse to enter or remain in the country for settlement, so there was a straightforward and direct discrimination based on gender).

For the sake of the present case, it is important to note that in all cases where the Court has found discrimination based on stereotypes, there has always been a *direct* allusion to the person's belonging to a certain particularly vulnerable group in society.

13. ***Distinctive factual treatment.*** On other occasions, the Court has found a violation flowing not from a difference in treatment by domestic law, but a difference in the factual treatment of two separate categories of persons (see for example *Eremia v. the Republic of Moldova*, no. 3564/11, 28 May 2013, where a violation of Article 14 in conjunction with Article 3 was found as the domestic authorities had not protected the applicants against the violence of their respective husband and father, as a consequence of their failure to measure the extent of domestic violence and its discriminatory effect on women; *Zarb Adami v. Malta*, no. 17209/02, ECHR 2006-VIII, where a violation of Article 14 in conjunction with Article 4 § 3 (d) was found as it was noted that men were significantly more often than women obliged to sit as jurors; *D.H. and Others v. the Czech Republic*, cited above, where a violation of Article 14 together with Article 2 of Protocol No. 1 was found as Roma children were placed systematically in separate schools). In some cases, the Court found discrimination where a national court had used stereotypes in order to justify discriminatory treatment without being obliged to do so by law (see *Schuler-Zgraggen v. Switzerland,* 24 June 1993, Series A no. 263: refusal to grant a woman an invalidity pension on the assumption that, as she had given birth to a child, she probably would have stopped working at any rate, as, according to the domestic judgment, women usually do; *Salgueiro da Silva Mouta v. Portugal*, no. 33290/96, ECHR 1999-IX: change of parental responsibility based on the father's homosexuality; *Di Trizio v. Switzerland*, no. 7186/09, 2 February 2016, where the Court criticised a judgment that had justified the refusal to grant a woman an invalidity pension at least partially by the so-called "sociological reality" that women often work less once they have given birth to a child).

14. ***The comparative exercise in the present case. A legal issue.*** The comparative exercise is an issue that goes to the assessment of the merits of the case and it is the judge's, not the parties', task to define the categories to be compared.

15. ***The claim as a starting point.*** However, the claim can be taken as a starting point. The applicant's complaint appears to be threefold: (1) Her health condition is an exclusive consequence of the negligent medical intervention (paragraph 41); (2) The amount of damages should not have been reduced by the Supreme Administrative Court (paragraph 42); and (3) She was discriminated against on the grounds of sex and age (paragraph 43). The first two arguments have nothing to do with the issue of discrimination; they are rather clear fourth-instance complaints. It is a fact that the judgment does not address them at all.

The third complaint raises a discrimination issue and for the needs of the comparative analysis, there are two possibly comparable categories: (a) men of the applicant's age impaired in their sexual activities due to medical negligence (as far as assertion of gender discrimination is concerned); (b) women younger than the applicant impaired in their sexual activities due to medical negligence (as far as assertion of age discrimination is concerned) (see paragraph 43).

16. ***A gender issue.*** For the assessment of discrimination, the judgment could have tried to assess comparable groups of persons in taking as distinctive criteria either age or gender. As a matter of fact, no comparison regarding the first category is conducted in the judgment. This is a shortcoming but it is not the task of the dissenters to elaborate further on this, as they are not called upon to propose an alternative solution to the applicant's complaint. Instead, the judgment concentrates on the gender issue. Consequently, the discrimination assessment should be conducted on the following grounds: the plaintiff complained of being treated differently from men despite being in the same situation, i.e. asking for compensation for her suffering from physical disability having triggered an inability to have a normal sexual life. In other words, in the present case, the comparison therefore has to be made between women and men suffering physical harm and seeking compensation for non-pecuniary damage.

B. Disadvantageous treatment of the members of one group

17. The second step, which consists in verifying whether there is a difference in treatment entailing a relative disadvantage of one group of persons compared to another, appears to be even more difficult than the identification of two categories of persons for the purposes of comparison.

18. ***The question to be resolved.*** In the present case, in order to find discrimination, it has to be established that in Portugal men suffering from a comparable physical inability to that of the applicant, in their capacity as

men, are treated differently from women suffering from a similar physical incapacity.

19. ***A factual rather than a legal issue.*** There is obviously no legal framework in Portugal that would establish such difference in treatment. It is therefore necessary to find out whether on the facts women are treated differently from men when they are awarded compensation for the relevant damage. This can then only be the fact of the courts granting, in general, different compensation to women who are in the same situation as men.

20. ***The discrimination has to flow from case-law.*** It is therefore methodologically unavoidable to ascertain whether this difference in treatment can be verified in the Portuguese case-law. The two categories to be compared should be based on the case-law as far as men in such situations are concerned, on the one hand, and the case-law as far as women are concerned, on the other.

21. ***Two alternative possibilities of discrimination by case-law.*** (a) There could be a series of cases concerning men and a series concerning women (whereby all relevant circumstances would be equal or substantially similar), where male plaintiffs would regularly be awarded higher damages than female plaintiffs. In such situations, it would not be necessary for the national judgments to allude to the gender of the plaintiff as a relevant factor in awarding damages. (b) There could be a single case where the plaintiff was awarded lower damages than plaintiffs of the opposite sex in comparable cases, where such difference was decided on the basis of a stereotype (e.g. the idea that sex is less important for women than for men).

22. ***A series of cases treating women and men systematically differently.*** In following the exercise outlined above under (a), it is necessary, in principle, to identify two separate sets of case-law that show that men are generally awarded higher damages than women in the field of physical harm impairing sexual life.

23. ***Preliminary question: a necessity to identify two categories?*** The question arises whether it is really necessary to identify these two categories of cases or whether it is not sufficient only to identify the case-law relating to men and to compare the amounts granted to men in general to those obtained by the applicant, and if these are lower, to find a difference in treatment. Such a simplified approach seems to be inadequate: if there is a set of judgments that show that men are granted sums in a certain range and that in the applicant's individual case, the amount is lower, this is the result of an erroneous judgment, departing from a more or less well-established case-law. It is admittedly difficult to make a clear-cut separation between an

erroneous and a discriminatory application of a given legal provision to an individual case. At any rate, to find discrimination there has to be more than an individual departure from the case law – to be fixed by the domestic courts, as the European Court would engage in a fourth-instance exercise if it addressed such discrepancy – namely the evidence that such treatment flows from the application of general discriminatory behaviour (the terms of *Konstantin Markin,* cited above, § 125, should be recalled here). The distinction probably has to be made upon careful scrutiny of the reasoning underlying the domestic judgment to be examined. At any rate, however, it flows from the points developed below that in the present case there is not even a category of persons enjoying a certain preferential treatment to which the applicant, taken individually, could be compared. Moreover, a corrective to the absence of categories can be found in stereotyped reasoning amounting to discrimination, an issue dealt with below.

24. ***The concept of case-law.*** That being said, it is necessary, in principle, to identify two sets of case-law, to compare them and to verify whether women are in general treated in a less favourable way than men. In this context, it is important to have a close look at the concept of case-law or "jurisprudence", i.e. a series of judgments that provide the same or a similar answer to a certain legal problem. These judgments should be given by or under the surveillance of the same court, at the top of the hierarchy, and establish or confirm legal principles. Whereas a relatively small number of judgments is necessary to establish case-law as far as *legal* issues are concerned, at least if they emanate from superior courts, when it comes to looking at case-law concerning *factual* issues, e.g. the amount generally granted for a certain type of damage (e.g. the loss of a child), there has to be a much larger number of judgments in order to enable the detection of a general attitude by the courts.

25. ***The existence of case-law in the field of damages for physical injuries impairing sexual life?*** In the present case, this would amount to identifying two series of judgments, in a sufficiently critical number, where women and men respectively were treated differently with respect to the factual issue at stake, i.e. pecuniary compensation for physical harm including difficulties in sexual life. In this respect, the impugned judgment cites two rulings of the Supreme Court of Justice that were given in 2008 and 2014 respectively (see paragraphs 25 and 26 of the judgment) relating to damages granted to two men. It seems highly problematic, if not impossible, to rely on these only two judgments to find discrimination against the applicant.

26. ***A question of numbers.*** First, can two judgments be regarded as establishing case-law? This could possibly be the case if it were on

questions of law, but in a highly factual environment, where there are so many factual elements that had to be weighed against one another, as underlined before, how is it possible to speak about genuine case-law? In matters of fact, there should be a much larger number of judgments that could lead to the identification of trends based on the different factual issues.

27. ***Judgments emanating from different courts.*** Moreover, the two judgments cited originate from the Supreme Court of Justice, which is a different court from the Supreme Administrative Court. If that is the case and if the criticised judgment is from a different last-instance court, there would rather be a question of inconsistency between the case-law of two courts and an issue under Article 6 (compare *Lupeni Greek Catholic Parish and Others v. Romania* [GC], no. 76943/11, § 116, ECHR 2016).

28. ***Absence of case-law on awards of compensation to women.*** On the assumption that the two judgments of the Supreme Court of Justice are relevant to the present case and that no other judgments providing different solutions in this extremely factual context exist (which is unknown to us), it has to be underlined that, by contrast, no judgments are quoted where the question of compensation awarded to women in similar circumstances has been dealt with. Consequently, the comparative exercise in order to identify discrimination cannot be performed.

29. ***Absence of relevance of the judgments serving as comparators. Difference of factual backgrounds.*** Even assuming that the individual judgment of the Supreme Administrative Court of which the applicant is complaining can be compared to the two cited judgments in order to establish discrimination, thus leaving aside the identification of categories and assuming a different treatment of the applicant like one of the two men in the cited cases, it is true that in the three cases in question the plaintiff each time suffered physical harm and had an impaired sexual life. However, the comparability stops there: the factual background of these cases may present a great variety and as the judgments are not available in full text, it is simply unknown whether they are really comparable in all aspects or whether there might be quite important aspects that would entail some differentiation (it is only known that one of the men had simple inflammation of the prostate and the other had been wrongfully diagnosed with cancer).

30. ***An age not a gender issue.*** More importantly, neither of the two judgments cited speaks about gender, in relation to the amount of damages awarded. Each of those judgments highlights the man's respective age without stating that he should have been awarded more or less than women

in the same situation. Moreover, in each of the three judgments, the domestic courts showed great empathy with the victim's sufferings (and not only concerning the sufferings of the two men, see the relevant quotation below). Additionally, in the two cases cited, there is no question of mitigation based on pathological predispositions of the victim, as in the impugned judgment (see paragraphs 35 and 36 below).

31. ***Conclusion: no identification of two comparable sets of case-law.*** The conclusion is straightforward: the majority did not engage in a comparative exercise in order to identify the existence of two sets of case-law that would show a difference in treatment based on gender as far as the amount of compensation for non-pecuniary damage arising from physical harm, including an impaired sexual life, is concerned.

32. ***Alternative exercise: the identification of stereotyped reasoning.*** Instead of performing such comparative exercise, the majority rely on another argument, finding that the criticised judgment showed that the Portuguese judiciary and, beyond that, society as a whole, considered women, in a stereotypical manner, to have a lesser value as people than men, thus avoiding identification of a category upon which to apply the comparison (see paragraph 49 of the judgment). They draw such conclusion from the reference by the Supreme Administrative Court to the fact that the applicant already had two children. Thereby, the majority implicitly assume that women's sexual life is intimately linked to giving birth to children.

33. ***Did the impugned judgment use a gender stereotype?*** What precisely did the Supreme Administrative Court do? It heard a civil compensation claim lodged by a 71-year-old woman who, as a result of surgery she had undergone at the age of 50, had intense pain and loss of sensation in the vagina, suffered from urinary incontinence, had difficulty sitting and walking, and could not have sexual relations (paragraph 10 of the judgment). The first-instance court had found the hospital liable for the victim's sufferings. It had underlined that as a consequence, she was depressed, had suicidal thoughts and avoided contact with members of her family and friends, and it had awarded her EUR 80,000 for non-pecuniary damage and EUR 16,000 for the services of a maid to help her with housework.

34. ***No reduction in compensation but new assessment.*** It is important to stress that the Supreme Administrative Court did not *reduce* the amount of the award for non-pecuniary damage granted to the victim by the first-instance court, as wrongly stated in the judgment (paragraph 56) but, after a new assessment, determined afresh the amount due for the services of a

maid at EUR 6,000[9] and the overall compensation for non-pecuniary damage at an amount of EUR 50,000.

35. ***The amount awarded is based on three different elements of unequal importance.*** To come to the said conclusion, the Supreme Administrative Court took into consideration three elements: first, it described in quite emphatic words the condition of the victim, underlining her miserable life as regards her self-esteem as well as her relationship with others (leaving out her sexual life at this stage); secondly it stated that there had been pathological predispositions in the victim's case as she had already had some problems before the surgery in question (one could perhaps disagree with such assessment of causation but going into this would be fourth instance), and thirdly, it brought into play the victim's age (50 years) and the fact that she had two children, and held that sexual life lost significance with increasing age. There were consequently, in the Supreme Administrative Court's view, two mitigating factors in respect of the overall compensation to be granted to the victim: her condition prior to the intervention and her age. The court added the element relating to the victim's age and to which, as can be seen from the wording of the judgment, it gave less weight than the causation issue: "Additionally, it should not be forgotten...".

36. ***A global assessment.*** At any rate, the court did not indicate how much importance it had paid to each of these factors, its assessment being global. This is quite common in such an essentially factual environment as an assessment of the amount of compensation. It is impossible to second-guess to what extent the age factor concretely intervened in the assessment, it being underlined that at the present stage, the discussion is only about age, not gender.

37. ***Age not gender as a mitigating factor.*** In this context, it has to be noted that the domestic court did make the importance of the applicant's sexual life dependent on her age, not on her gender. The majority do not address the age question but only concentrate on the gender issue. The argument about the gender stereotype used by the majority does not fit in the present case, simply because the impugned judgment does not use a language that points in such a direction; in its criticised part, the judgment only speaks about age. The situation would of course have been completely different, and there would have been a use of stereotype, if the domestic

9. The sum of EUR 6,000 was granted as compensation for pecuniary damage. It clearly flows from the judgment that the applicant only complained about what was, in her eyes, insufficient compensation for non-pecuniary damage in relation to her impaired sexual life. In criticising this part of the judgment by the Supreme Administrative Court, the majority unduly broaden the scope of the review of the impugned judgment.

judgment had stated that women's sexual life is less important than that of men. However, the content of the impugned judgment can even be seen to indicate the contrary: the judgment quotes from the domestic judgments of 2008 and 2014 to the effect "that the fact that the men could no longer have normal sexual relations had affected their self-esteem and resulted in a 'tremendous shock' and 'strong mental shock'". In the criticised judgment, the court underlines, *inter alia*, that the physical disabilities suffered had "...limited her sexual activity, making her feel diminished as a woman" and that she "...felt deep disgust and frustration with the situation in which she finds herself, which has turned her into a very unhappy person ...". The terms used are quite similar. A judgment that is written with an underlying stereotype deeming female sexual life less important than that of men would use different language.

38. ***Conclusion.*** In sum, the judgment of the Chamber:

(a) has failed to apply the well-established three-step methodology as developed in the case-law of the Court without providing any reasons for not doing so;

(b) in particular, it has failed to address the applicant's complaint regarding discrimination on the basis of age, while also failing to perform any convincing analysis of the alleged difference in treatment on the basis of gender;

(c) on the basis of the above, it has produced a result which is inconsistent with the case-law of this Court.

A judge who intends to deliver a message on a legal issue of general importance should wait for the right case to do so; otherwise he or she simply engages in politics. It is no more and no less than a question of legitimacy.