



Violation of Convention resulting from discriminatory, unjustified statute prescribing waiting period for divorced women wishing to remarry

In today's **Chamber judgment**¹ in the case of [Nurcan Bayraktar v. Türkiye](#) (application no. 27094/20) the European Court of Human Rights held, unanimously, that there had been:

a violation of Article 8 (right to respect for private life) of the European Convention on Human Rights, and

a violation of Article 14 (prohibition of discrimination) in conjunction with Article 12 (right to marry).

The case concerned the legal obligation for divorced women to observe a 300-day waiting period before remarrying – to someone other than their ex-husband – unless they could prove they were not pregnant by undergoing a medical examination.

The Court held that imposing a 300-day waiting period and requiring the applicant to produce a medical certificate in order to have it curtailed did not serve any pressing social need, was not proportionate to the legitimate aims pursued and was not justified on sufficient and relevant grounds. The resulting interference with the applicant's right to respect for her private life had not therefore been necessary in a democratic society.

The Court further found that this practice imposed on divorced women constituted a form of direct, sex-based discrimination that could not be justified by the aim of preventing uncertainty as to the parentage of an unborn child. The unequal treatment to which the applicant had been subjected on the grounds of her sex had been neither necessary nor objectively justified.

The Court moreover specified that the aim of preventing “the mixing-up of bloodlines” – in other words of determining biological paternity – seemed obsolete in a modern society. It found that, even assuming that the purpose of the waiting period had been to preserve the ex-husband's presumption of paternity with regard to any child born in that period, it would still have been superfluous given that other legal avenues were available under current systems of law for recognising and determining paternity.

Lastly, the Court found that the proceedings before the Constitutional Court had not been unreasonable in length and accordingly dismissed the applicant's complaint under Article 6 § 1 of the Convention (right to a fair hearing within a reasonable time) as manifestly ill-founded.

A legal summary of this case will be available in the Court's database HUDOC ([link](#)).

Principal facts

The applicant, Nurcan Bayraktar, is a Turkish national who was born in 1973 and lives in İzmir (Türkiye).

1. Under Articles 43 and 44 of the Convention, this Chamber judgment is not final. During the three-month period following its delivery, any party may request that the case be referred to the Grand Chamber of the Court. If such a request is made, a panel of five judges considers whether the case deserves further examination. In that event, the Grand Chamber will hear the case and deliver a final judgment. If the referral request is refused, the Chamber judgment will become final on that day.

Once a judgment becomes final, it is transmitted to the Committee of Ministers of the Council of Europe for supervision of its execution. Further information about the execution process can be found here: www.coe.int/t/dghl/monitoring/execution.

In December 2012, the Family Court declared the applicant and her husband divorced. A judgment of the Court of Cassation rendered that decision final on 21 January 2014.

Article 132 of the Turkish Civil Code provides that divorced women are required to observe a waiting period of 300 days before remarrying – to someone other than their ex-husband – unless they prove they are not pregnant by undergoing a medical examination. The waiting period begins on the date that the divorce decision delivered by the court becomes final.

In July 2014 the applicant asked the Family Court to curtail the 300-day waiting period before its expiry, without her having to undergo a medical examination to prove she was not pregnant. The court, however, ordered her to obtain a medical certificate from a hospital to the effect that she was not pregnant, specifying that if she failed to comply, it would dismiss her request on procedural grounds.

In September 2014, as the applicant had refused to undergo the required medical examination, her application was dismissed by the court. That judgment was upheld by the Court of Cassation.

In January 2016 the applicant lodged an individual application with the Turkish Constitutional Court, which was declared inadmissible in April 2020.

Complaints, procedure and composition of the Court

Relying on Article 8 (right to respect for private life), the applicant complained of the requirement to undergo a medical examination to verify whether or not she was pregnant so that she could remarry before the expiry of the 300-day waiting period which had commenced on the date of her divorce (final decision of 21 January 2014).

Relying on Article 12 (right to marry) together with Article 14 (prohibition of discrimination), she submitted that the waiting period in Türkiye for women who wished to remarry after divorcing, unless they could prove they were not pregnant by undergoing a medical examination, constituted discrimination on the grounds of sex and an infringement of their right to marry.

Relying on Article 6 (right to a fair hearing within a reasonable time), she complained of the length of the proceedings before the Turkish Constitutional Court.

The application was lodged with the European Court of Human Rights on 27 June 2020.

Judgment was given by a Chamber of seven judges, composed as follows:

Arnfinn **Bårdsen** (Norway), *President*,
Jovan **Ilievski** (North Macedonia),
Pauliine **Koskelo** (Finland),
Saadet **Yüksel** (Türkiye),
Lorraine **Schembri Orland** (Malta),
Frédéric **Krenc** (Belgium),
Davor **Derenčinović** (Croatia),

and also Hasan **Bakırcı**, *Section Registrar*.

Decision of the Court

Article 8

The Court held that the waiting period imposed on the applicant and the requirement, should she wish to have it curtailed, that she undergo a medical examination to verify that she was not pregnant constituted interference with her right to respect for private life. Such interference had been in accordance with the law (Article 132 of the Civil Code). While having reservations as to the

legitimacy of the aim pursued by the disputed provision, the Court nevertheless proceeded on the assumption that such interference pursued the legitimate aims of protecting the rights and freedoms of others and of preventing disorder.

As to whether the interference had been necessary, the Court noted that the Family Court had essentially held that the medical certificate proving that a woman was not pregnant – which was required for the waiting period to be waived – was of particular importance for the protection of the interests of a possible unborn child and of other relevant members of society in the accurate determination of that child’s biological parentage. The definition of the waiting period as set out in the regulation on marriage appeared to show that, in imposing such a rule, the authorities had sought to avoid “the mixing-up of bloodlines”.

If, as the domestic authorities had asserted, the principal aim – of the waiting period and of making the waiver of this requirement conditional upon the woman’s not being pregnant – was to determine accurately the biological parentage of a possible unborn child, then it was necessary to distinguish biological paternity from the legal presumption of paternity.

While it was true that, in most legal systems, the legal father of a child born in wedlock was presumed to be the husband, a child’s biological father could nevertheless, regardless of whether the child was born in or out of wedlock, recognise or claim paternity of that child at any time upon presentation of scientific proof in support of his claim, in particular a DNA test.

Likewise, under Article 285 of the Civil Code, in the event that a woman who had just divorced had been pregnant and gave birth to a child during the waiting period before remarrying, such a situation could not have given rise to anything more than a presumption of paternity with regard to the ex-husband and would not necessarily have affected the determination of the biological father.

In this sense, the goal of preventing “the mixing-up of bloodlines”, in other words of determining biological paternity, seemed obsolete in a modern society. Moreover, even assuming the purpose of the waiting period had been to preserve the ex-husband’s presumption of paternity with regard to any child born in that period, it would still have been superfluous given that other legal avenues were available under current systems of law for recognising and determining paternity.

Moreover, the waiting period only commenced on the date on which the divorce decision became final whereas, in most cases, the spouses no longer lived together in practice as of the start of the divorce proceedings, which could sometimes last for years.

Furthermore, the Court underscored that the question whether a woman was pregnant had to be regarded as closely tied to the intimacy of her private life, irrespective of whether or not she had recently divorced. It held that making a divorced woman’s ability to remarry, without observing the waiting period, conditional upon her producing a medical certificate to the effect that she was not pregnant amounted to violating that intimacy and placing her intimate private life, including her sex life, under the scrutiny of the authorities. In its judgment, the Family Court did not appear to have taken into account the aspects of the case bearing on the applicant’s private life.

Lastly, the Court expressed its concern as to the assumptions underlying the conclusion reached by the Family Court, which implied that divorced women, owing to the particularities of their female biology, especially the role they might play as mothers and their capacity to give birth, had a duty to society to disclose any pregnancy before remarrying and should be burdened with the disadvantage of a waiting period for the sake of protecting the interests of a possible unborn child and those of other relevant parties. That assumption reflected a traditional view of female sexuality – as essentially being tied to the woman’s reproductive function – and disregarded its physical and psychological importance for her personal fulfilment.

The Court concluded that it could not be considered that subjecting the applicant to a 300-day waiting period before remarrying following her divorce and requiring her, as part of the proceedings

she had instituted to have that waiting period curtailed, to produce a medical certificate to the effect that she was not pregnant – one which could only be obtained by means of a medical examination – had served any pressing social need, had been proportionate to the legitimate aims pursued or had been justified on sufficient and relevant grounds. Accordingly, the interference with the applicant's right to respect for private life in the present case had not been necessary in a democratic society. **There had thus been a violation of Article 8 of the Convention.**

Article 12 in conjunction with Article 14

The Court noted that only women were subject to the waiting period under Article 132 of the Civil Code, unlike men, who were free to remarry without any such delay.

Working on the assumption that determining parentage constituted a legitimate aim in the pursuit of which the waiting period under dispute could be imposed on divorced women, the Court had to determine, taking into account the narrow margin of appreciation afforded to States with regard to unequal treatment on the basis of sex, whether the disputed measure had been necessary in the light of that aim.

In that regard, the Court found that it sufficed to refer to the conclusions it had already reached as to the pointlessness and ineffectiveness, to that particular end, of applying a waiting period to divorced women and of requiring them to present the authorities with a medical certificate to the effect that they were not pregnant in order to have it waived.

Consequently, the Court found that the practice of imposing a waiting period on divorced women on the basis that they might be pregnant and of requiring them, should they wish to have it waived, to prove that they were not, constituted direct discrimination on the grounds of sex.

In the Court's view, the sexist stereotypes on which the Family Court had relied in dismissing the applicant's claim in the present case, such as the notion that women had a duty to society on account of their potential role as mother and their capacity to give birth, constituted a serious obstacle to achieving real, substantive, gender equality, which, as the Court had previously asserted, was one of the major goals of the member States of the Council of Europe. In addition, such considerations on the part of the domestic authorities also appeared to run counter to relevant international standards in matters of gender equality.

The Court concluded that the requirement that divorced women, on account of potential pregnancy, observe a 300-day waiting period before remarrying, unless they could prove by way of a medical examination that they were not pregnant, constituted direct discrimination on the grounds of sex that was not justified by the aim of preventing uncertainty as to the parentage of a possible unborn child. It followed that the unequal treatment to which the applicant had been subjected on the grounds of her sex had been neither objectively justified nor necessary. **There had thus been a violation of Article 14 read in conjunction with Article 12 of the Convention.**

Article 6

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

It had previously found that the Constitutional Court had been faced with an exceptionally heavy workload in the period following the declaration of the state of emergency in response to the attempted *coup* of 15 July 2016. It acknowledged that a large number of individual applications lodged in the context of that state of emergency could, by their very nature, have warranted a certain priority compared with the applicant's individual application.

The Court further noted that, at the time of the applicant's individual application to the Constitutional Court, the 300-day waiting period had already expired and that the ensuing judgment would therefore have had no impact on the applicant's private life at that stage.

The Court concluded that the proceedings before the Constitutional Court, while certainly having been unusually protracted, could not be regarded as having been unreasonable in length. The complaint as to the length of those proceedings was therefore manifestly ill-founded.

[Just satisfaction \(Article 41\)](#)

The Court held in the present case that the finding of a violation constituted in itself sufficient just satisfaction for any non-pecuniary damage sustained by the applicant. It further held that Türkiye was to pay the applicant the sum of 564.01 euros (EUR) in respect of costs and expenses.

Separate opinion

Judge Krenč expressed a concurring opinion, which is annexed to the judgment.

The judgment is available only in French.

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The European Court of Human Rights was set up in Strasbourg by the Council of Europe member States in 1959 to deal with alleged violations of the 1950 European Convention on Human Rights.