



Inadequate legal protection in the issuing of a police caution against stalking

In today's **Chamber** judgment¹ in the case of [Giuliano Germano v. Italy](#) (application no. 10794/12) the European Court of Human Rights held, unanimously, that there had been:

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

The case concerned a police caution (*ammonimento*) issued against Mr Germano at his wife's request in 2009 after she had left him and when she complained that he was harassing and intimidating her. The caution warned the applicant to obey the law and not to repeat such behaviour; any breach would make it possible to prosecute Mr Germano for stalking even in the absence of a criminal complaint and would trigger the automatic application of an aggravating circumstance in the event of conviction. He appealed against the measure, in vain.

The Court found in particular that the national authorities had failed to give relevant and sufficient reasons justifying the measure, that, in view of how the *Consiglio di Stato* had carried out the review of the matter, any safeguards it provided had been limited, and that Mr Germano had been excluded from the decision-making process to a significant degree without proof that that was necessary because of the urgency of the situation. In sum, the national authorities had not given Mr Germano the adequate legal protection against abuse to which he was entitled. The interference with his right to private and family life could not therefore be said to have been "necessary in a democratic society".

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

Principal facts

The applicant, Giuliano Germano, is an Italian national who was born in 1956 and lives in Savona (Italy).

In May 2009 Mr Germano's wife moved out of the family home with their seven-year-old daughter. Three days later she lodged a criminal complaint against her husband for ill-treatment that she claimed he had inflicted on her the night she left. (Some years later she withdrew that complaint). In November 2009, she reported him for harassing her, her daughter's babysitter and some friends with phone calls and text messages. Alleging that he was trying to control her personal life and was isolating and intimidating her, she asked for him to be cautioned.

The police opened an inquiry and collected 17 witness statements from people referred to in the complaint. Three persons partly corroborated Mrs Germano's version of events whereas 14 refuted them. Notwithstanding, in view of the circumstances and the fact that criminal proceedings against Mr Germano for physical assault were ongoing, the police issued him with a police caution. He was warned to obey the law and not to repeat the type of behaviour that had led to the caution; any breach would automatically lead to his prosecution for stalking and any penalty incurred would be

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.

increased due to the automatic application of an aggravating circumstance in the light of his having received a caution.

Mr Germano appealed against the measure. He complained that he had not been notified that a caution had been requested and therefore had not been allowed to provide his version of events, that the caution lacked reasoning, that the inquiries undertaken by the police were inaccurate, and that the legal conditions for the imposition of the caution had not been met. He further raised the issue of the constitutionality of the specific law, arguing that it was at odds with the adversarial principle, the rights of defence and equality of arms. He also claimed compensation for the damage he claimed he had suffered.

The court dismissed his request for the caution order to be suspended whilst his appeal was ongoing but, in its judgment of 30 September 2010, found that Mr Germano's participation and defence rights had been violated. It annulled the police caution but dismissed his claim for compensation.

The Ministry of the Interior appealed before the *Consiglio di Stato* arguing that the first-instance court had not considered the urgency of stalking-prevention proceedings and that the participation of Mr Germano in the administrative proceedings would not have changed the outcome, as the local police authority had found his wife's request to be well founded.

Subsequently, in its judgment of 19 July 2011, the *Consiglio di Stato* upheld the Ministry's appeal and confirmed the police caution. It acknowledged that that meant that Mr Germano could be prosecuted for the crime of stalking even in the absence of a criminal complaint and that the automatic application of an aggravating circumstance would be triggered in the event of conviction. However, the aim behind it was to protect his wife from potentially serious and irreparable harm. It therefore considered that the fact that Mr Germano had not been given prior notice of the administrative proceedings and had not had a chance to be heard had not violated his participation rights. In any event, he could have obtained a full review of the decision by directly addressing such a request to the police authority or by lodging an appeal with the local prefect. It further noted that the caution had not lacked reasoning and had not been unfounded as the investigations undertaken by the police had demonstrated the insulting and intimidating behaviour of Mr Germano towards his wife.

Complaints, procedure and composition of the Court

Relying on Article 8 (right to respect for private, professional and family life) and Article 6 § 1 (right to a fair trial), Mr Germano alleged that the law regulating such cautions had not been clear enough for him to understand what behaviour on his part would lead to the caution being issued or what he had to do to once it had been issued, that it had not provided for sufficient procedural safeguards as he had not been heard in the decision-making process, that insufficient justification for the measure had been given and that the review of the decision to issue the caution had been inadequate. He complained that the measure could have been detrimental to his private life, in particular, to his being able to have contact with his daughter. He highlighted that, in the absence of a time-limit for the measure and the way in which he had been notified of it (by the anti-crime division of the local police station), the caution had seriously damaged his reputation as an individual and as a lawyer.

The application was lodged with the European Court of Human Rights on 5 January 2012.

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

Marko **Bošnjak** (Slovenia), *President*,
Krzysztof **Wojtyczek** (Poland),
Alena **Poláčková** (Slovakia),
Ivana **Jelić** (Montenegro),
Gilberto **Felici** (San Marino),

Erik **Wennerström** (Sweden),
Raffaele **Sabato** (Italy),

and also Renata **Degener**, *Section Registrar*.

Decision of the Court

Article 8

The Court reiterated that in cases raising issues of domestic violence, States had a duty under Articles 2, 3 and 8 of the Convention to take measures to protect victims, or potential victims, from real and immediate risks to their life and from physical and psychological harm. The decision by the authorities as to which measures to take required a careful weighing of the competing rights at stake – all the while ensuring that the police exercised their powers in a manner which fully respected due process. The Court noted that Italy had ratified the Council of Europe Convention on preventing and combating violence against women and domestic violence (“the Istanbul Convention”), and that one of the aims behind the police caution had been compliance with its obligations in that respect.

The Court recognised that the police caution had had a basis in national law, namely section 8 of Decree-Law no. 11/2009, which was aimed at combating sexual violence and stalking. The Court found that that text was sufficiently clear to prevent arbitrariness. Conclusive evidence of the commission of a crime was not necessary to issue a caution; serious reasons for believing that the behaviour prohibited by Article 612-*bis* of the Criminal Code had taken place and might take place again in the future sufficed. Also, as the police had to indicate the factual and legal reasons justifying the measure in the minutes accompanying the caution, the Court was satisfied that the competent administrative courts had the power to exercise a sufficient judicial review of those reasons.

However, the Court did find it problematic that the national legal framework at the time had not provided a time-limit for the measure, or the right to obtain a review or revocation if it was no longer justified. Article 53 § 2 of the Istanbul Convention stipulated that restraining or protection orders in cases of domestic violence were to be “issued for a specified period or until modified or discharged”. Nevertheless, this factor alone could not lead to the conclusion that the interference in question was not “in accordance with the law”, within the meaning of Article 8 of the Convention.

At the same time, the Court felt that strict scrutiny was required in this case. First, the police caution entailed the possibility of prosecution for stalking even in the absence of a criminal complaint and would trigger the automatic application of an aggravating circumstance in the event of conviction. Secondly, the obligations imposed on Mr Germano had been worded in very general terms, the measure had had no time-limit, and – at least at the time – there had been no right to obtain a periodic review or reassessment of it. Thirdly, the measure had been adopted without Mr Germano being able to put forward his version of events.

In assessing whether the instructions given to Mr Germano had been sufficiently precise to enable him to know how to regulate his behaviour, the Court considered that, from the text of the caution, it was clear that the behaviour proscribed corresponded to stalking and, in particular, to acts of “threat and harassment” repeated in such a way as to cause his wife a persisting and serious state of anxiety, fear and concern for her personal safety.

As to whether the applicable legal framework had allowed Mr Germano to be involved in the decision-making process sufficiently, the Court reiterated that the effectiveness of a preventive measure frequently depended on the speed of its implementation. Here the aim of the measure fell within the scope of Article 53 of the Istanbul Convention concerning restraining or protection orders in the context of domestic violence, which stipulated that such measures could, if necessary, be issued at the request of one party only, with immediate but temporary effect. The Court accepted

that in cases of urgency, the police authority might decide not to hear the person concerned. However, as a result, Mr Germano had had not an opportunity to defend himself, and no justification had been provided. As the police authorities had heard the witness statements of 17 individuals, the Court saw no reason why the domestic authorities could have not heard Mr Germano as well.

The Court observed that the minutes accompanying the caution had lacked sufficient reasoning and the facts had been worded in an extremely generic fashion. The reasoning started from the hypothesis of the facts as alleged by the applicant's wife, and stipulated that those facts were proven, without mentioning the inquiries that had been undertaken and without assessing how the results of those had confirmed the original hypothesis. Similarly, the description of behaviour carried out with a "potentially threatening attitude" was very vague. Moreover, there was no mention of the fact that most of the witnesses had not confirmed Mr Germano's wife's version of events. The minutes mentioned some "additional documents" but did not indicate what they were and how they corroborated his wife's allegations. Therefore, the minutes shed no light on how the evidence collected through the inquiries had been assessed.

As the caution had been granted only on the basis of the arguments and evidence presented by his wife, the Court reiterated that the authorities had been under a duty to conduct an "autonomous" and "proactive" assessment of the risk; a decision on the measures to be taken had to take into consideration all of the evidence available to the authorities. However, it seemed that no independent assessment had been carried out.

The Court considered that a thorough judicial review had been all the more necessary in this case, given the failure on the part of the local police authority to provide relevant and sufficient reasons for the adopted measure. However, the *Consiglio di Stato* had merely held that the caution was legitimate in the light of the decision taken by the local police authority without undertaking an assessment of the available evidence. The Court was unable to find that this was "sufficient scrutiny", within the meaning of its case-law. The judgment failed, in particular, to examine the critical aspect of the case, namely whether the local police authority had been able to demonstrate the existence of specific facts serving as a basis for the assessment that Mr Germano constituted a danger to his wife.

The Court concluded that the judicial authorities had not carried out a sufficient judicial review of the factual foundation and of the legality, necessity and proportionality of the measure. It found that Mr Germano had been excluded from the decision-making process to a significant degree without proof that that was necessary because of the urgency of the situation, that the domestic authorities had failed to give relevant and sufficient reasons justifying the measure and that, in view of how the *Consiglio di Stato* had carried out the review of the matter, any safeguards it provided the applicant had been limited. In sum, the domestic authorities had not afforded Mr Germano the adequate legal protection against abuse to which he was entitled. The interference with his right to private and family life could not therefore be said to have been "necessary in a democratic society". There had accordingly been a violation of Article 8 of the Convention.

Other articles

The Court did not find it necessary to examine the issues separately under Article 6 § 1.

Separate opinion

Judge Sabato provided a concurring opinion, which is attached to the judgment.

Just satisfaction (Article 41)

The Court held that Italy was to pay the applicant 9,600 euros (EUR) in respect of non-pecuniary damage.

The judgment is available only in English.

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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.