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

Press Release
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ECHR 189 (2021)
15.06.2021

The Austrian authorities did not fail in their obligation under the Convention to protect the lives of the applicant and her children

In today's **Grand Chamber** judgment[1] in the case of Kurt v. Austria (application no. 62903/15) the European Court of Human Rights held, by ten votes to seven, that there had been:

no violation of Article 2 (right to life) of the European Convention on Human Rights.

The case concerned the applicant's complaint that the Austrian authorities had failed to protect her and her children from her violent husband, which had resulted in his murdering their son.

In this judgment the Grand Chamber clarified for the first time the general principles applicable in domestic violence cases under Article 2 of the Convention. It expanded on those principles on the basis of the "Osman test" (Osman v. the United Kingdom, 28 October 1998). The Court reiterated that the authorities had to provide an immediate response to allegations of domestic violence and that special diligence was required from them in dealing with such cases. The authorities had to establish whether there existed a real and immediate risk to the life of one or more identified victims; to that end they were under a duty to carry out a risk assessment that was autonomous, proactive and comprehensive. They had to assess the reality and immediacy of the risk taking due account of the particular context of domestic violence cases. If the outcome of the risk assessment was that there was a real and immediate risk to life, the authorities' obligation to take preventive operational measures was triggered. Such measures had to be adequate and proportionate to the level of the risk assessed.

The Court agreed with the Government that, on the basis of what had been known to the authorities at the material time, there had been no indications of a real and immediate risk of further violence against the applicant's son outside the areas for which a barring order had been issued, let alone a lethality risk. The authorities' assessment had identified a certain level of non-lethal risk to the children in the context of the domestic violence perpetrated by the father, the primary target of which had been the applicant. The measures ordered by the authorities appeared to have been adequate to contain any risk of further violence against the children and the authorities had been thorough and conscientious in taking all necessary protective measures. No real and immediate risk of an attack on the children's lives had been discernible. Therefore, in the circumstances of the present case, there had been no obligation incumbent on the authorities to take further preventive operational measures specifically with regard to the applicant's children, whether in private or public spaces, such as issuing a barring order in respect of the children's school.

Taking into account the requirements of Austrian criminal law and those flowing from Article 5 of the Convention safeguarding the rights of the accused, the Court found no reason to question the findings of the Austrian courts, which had decided not to order E.'s pre-trial detention. In that connection the Court reiterated that under Article 5 no detention was permissible unless it was in compliance with domestic law.

1. Grand Chamber judgments are final (Article 44 of the Convention).
All final judgments are transmitted to the Committee of Ministers of the Council of Europe for supervision of their execution. Further information about the execution process can be found here: www.coe.int/t/dghl/monitoring/execution.

Principal facts

The applicant, Senay Kurt, is an Austrian national who was born in 1978 and lives in Unterwagram (Austria). Ms Kurt married E. in 2003. They had two children: A., born in 2004 and B., born in 2005.

On 10 July 2010 Ms Kurt called the police and reported that her husband had beaten her. Pursuant to section 38a of the Security Police Act, the police handed the applicant a leaflet informing her, among other things, of the possibility of seeking a temporary restraining order against her husband.

A barring and protection order in accordance with section 38a of the Security Police Act was issued against E. This order obliged him to stay away for fourteen days from the family apartment as well as from the applicant's parents' apartment, and the areas surrounding both. The police submitted a report to the public prosecutor's office, which brought criminal charges against E. on 20 December 2010.

On 10 January 2011 the Graz Regional Criminal Court convicted E. of bodily harm and making dangerous threats, and sentenced him to three months' imprisonment, suspended for three years with probation.

On 22 May 2012 the applicant, accompanied by her counsellor from the Centre for Protection from Violence, went to the St Pölten District Court and filed for divorce.

On the same day, at 1.05 p.m., the applicant reported her husband to the police for rape and making dangerous threats.

After the applicant had reported the matter to the police, two police officers (one male and one female) took her to the family home, where E. and the children were present. E. accompanied the police officers voluntarily to the police station, where he was questioned. The police officers issued a barring and protection order against E. obliging him to leave the family home and prohibiting him from returning to it or to the surrounding areas for two weeks. It also barred him from the applicant's parents' apartment and the surrounding areas. His keys to the family home were taken from him.

At 6.10 p.m. on the evening of 22 May 2012 the police informed the public prosecutor on duty of the situation in a phone call. From 6.50 p.m. until 7.25 p.m. the children A. and B. were questioned in detail by the police at their grandparents' home concerning the violence they had been subjected to by their father. At 11.20 p.m. the competent police officer emailed a report on the findings of the criminal investigations concerning the applicant's husband to the public prosecutor, together with transcripts of the applicant's, her children's and E.'s questioning.

On 23 May 2012 the St Pölten Federal Police Department assessed the lawfulness of the barring and protection order against E. It found that the evidence showed "coherently and conclusively" that E. had used violence against his family and that the barring and protection order was therefore lawful.

On 24 May 2012 at 9 a.m. E. went to the police station on his own initiative to enquire whether it would be possible for him to contact his children. The police took the opportunity to question him. Following the above-mentioned questioning, additional charges were brought against E. for torment or neglect of under-age, young or defenceless persons, under Article 92 of the Criminal Code.

On 25 May 2012 E. went to A. and B.'s school. He asked A.'s teacher if he could speak briefly to his son in private because he wanted to give him money. The teacher, who later stated that she had not been informed of the problems in the family, agreed. When A. did not return to class, she started looking for him. She found him in the school's basement; he had been shot in the head. His sister B., who had witnessed the scene, was not injured. E. had gone. A warrant for E.'s arrest was issued immediately. A. was taken into intensive care. The applicant's counsellor from the Centre for Protection from Violence stated that she had never thought that E. would commit such a crime. A.'s teacher said that she had never noticed any injuries on the boy or any other indications that he

could have been a victim of domestic violence. On the same day, at 10.15 a.m., E. was found dead in his car, having committed suicide by shooting himself. On 27 May 2012 A. succumbed to his injuries and died.

On 11 February 2014 Ms Kurt instituted official liability proceedings. She argued that the public prosecutor's office should have requested that E. be taken into pre-trial detention on 22 May 2012 after she had reported him to the police and that there had been a real and immediate risk that he would reoffend against his family. In her view, it should have been clear to the authorities that the barring and protection order would not offer sufficient protection.

On 14 November 2014 the St Pölten Regional Court dismissed the applicant's claim.

Ms Kurt appealed, reiterating her claim that the public prosecutor's office should have been aware that there had been an increased risk of further violent acts by E. after she had filed for divorce.

On 30 January 2015 the Vienna Court of Appeal dismissed her appeal. It found that, for the reasons already set out by the St Pölten Regional Court, there had not been sufficiently specific grounds to assume the existence of such a risk, in particular in a public space. On 23 April 2015 the Supreme Court rejected an extraordinary appeal on points of law by the applicant.

Complaints, procedure and composition of the Court

Relying on Articles 2 (right to life), 3 (prohibition of inhuman or degrading treatment) and 8 (right to respect for private and family life) of the European Convention on Human Rights, the applicant complained that the Austrian authorities had failed to protect her and her children from her violent husband. She maintained that she had specifically informed the police that she feared for her children's lives.

The application was lodged with the European Court of Human Rights on 16 December 2015. The Court delivered its judgment on 4 July 2019, finding unanimously that there had been no violation of the substantive aspect of Article 2 of the Convention. On 27 September 2019 the applicant requested the referral of the case to the Grand Chamber under Article 43 of the Convention (referral to the Grand Chamber). On 4 November 2019 the Grand Chamber panel accepted the applicant's request. A hearing was held by videoconference in the Human Rights Building, Strasbourg, on 17 June 2020.

Third-party comments were received from the Council of Europe Group of Experts on Action against Violence against Women and Domestic Violence (GREVIO), Women Against Violence Europe (WAVE), Women's Network against Violence (*Donne in Rete Contro la Violenza* – D.i.Re), the Association of Autonomous Austrian Women's Shelters (*Verein Autonome Österreichische Frauenhäuser* – AÖF), the European Human Rights Advocacy Centre (EHRAC) and Equality Now (jointly), the Federal Association of Austrian Centres for Protection from Violence (*Bundesverband der Gewaltschutzzentren Österreichs*), and Women's Popular Initiative 2.0 (*Frauenvolksbegehren 2.0*).

Judgment was given by the Grand Chamber of 17 judges, composed as follows:

Robert **Spano** (Iceland), *President*,
Jon Fridrik **Kjølbro** (Denmark),
Ksenija **Turković** (Croatia),
Paul **Lemmens** (Belgium),
Branko **Lubarda** (Serbia),
Armen **Harutyunyan** (Armenia),
Georges **Ravarani** (Luxembourg),
Gabriele **Kucsko-Stadlmayer** (Austria),
Alena **Poláčková** (Slovakia),
Pauliine **Koskelo** (Finland),

Jovan **Ilievski** (North Macedonia),
María **Elósegui** (Spain),
Gilberto **Felici** (San Marino),
Darian **Pavli** (Albania),
Erik **Wennerström** (Sweden),
Raffaele **Sabato** (Italy),
Saadet **Yüksel** (Turkey),

and also Marialena **Tsirli**, *Registrar.*

Decision of the Court

Article 2

The Court noted that the issue of domestic violence – which could take various forms, ranging from physical assault to sexual, economic, emotional or verbal abuse – transcended the circumstances of an individual case. It was a general problem which affected, to a varying degree, all member States and which did not always surface into the public sphere since it often took place within personal relationships or closed circuits and affected different family members, although women made up an overwhelming majority of victims. Children who were victims of domestic violence were particularly vulnerable individuals and were entitled to State protection, in the form of effective deterrence, against such serious breaches of personal integrity, notably as a consequence of the States' positive obligations under Article 2 of the Convention.

The Court reiterated at the outset that the authorities had to provide an immediate response to allegations of domestic violence and that special diligence was required from them in dealing with such cases. Where it had found that the authorities had failed to act promptly after receiving a complaint of domestic violence, the Court had held that this failure to act deprived such complaint of any effectiveness, creating a situation of impunity conducive to the recurrence of acts of violence. In order to be in a position to know whether there was a real and immediate risk to the life of a victim of domestic violence, the authorities were under a duty to carry out a lethality risk assessment which was autonomous, proactive and comprehensive. The existence of a real and immediate risk to life had to be assessed taking due account of the particular context of domestic violence. In such a situation it was above all a question of taking account of the recurrence of successive episodes of violence within the family unit. The Court observed that persons with a history of domestic violence presented a significant risk of further violence, sometimes of a potentially lethal nature. It considered that the use of standardised checklists indicating specific risk factors could contribute to the comprehensiveness of the authorities' risk assessment. The Court recognised that it was important for the authorities dealing with victims of domestic violence to receive regular training and awareness-raising in order to understand the dynamics of domestic violence, thus enabling them to better assess and evaluate any existing risk, respond appropriately and ensure prompt protection of the victims. If the authorities established that there was a real and immediate risk to the life of one or more identified individuals, they had a positive obligation to take operational measures. With regard to preventive operational measures, the Court emphasised that such measures must offer an adequate and effective response to the risk to life as identified, while remaining in compliance with States' other obligations under the Convention.

The Court reiterated that in order to be permissible under Article 5 of the Convention, any deprivation of liberty had to be both lawful under the domestic law of the State and in compliance with the exhaustively enumerated grounds for detention set out in paragraph 1 of that provision.

In this connection the Court reiterated, firstly, that for the purposes of Article 5 § 1 (b) the obligation not to commit a criminal offence could only be considered "specific and concrete" if the place and

time of the imminent commission of the offence and its potential victim or victims had been sufficiently specified. Secondly, the Court observed that the second limb of Article 5 § 1 (c) (detention necessary to prevent a person from committing an offence) applied to preventive detention outside criminal proceedings. However, in the context of the second limb the Court had previously held that this provision did not permit a policy of general prevention directed against individuals who were perceived by the authorities as being dangerous or having the propensity to commit unlawful acts. This ground of detention did no more than afford the Contracting States a means of preventing a concrete and specific offence as regards, in particular, the place and time of its commission and its potential victims. In its case-law the Court had authorised such detention for preventive purposes only for very short periods of time (four hours in its judgment in *Ostendorf*, and eight hours in its judgment in *S., V. and A*.). Thirdly, with regard to the first limb of Article 5 § 1 (c), which governed pre-trial detention, the Court reiterated that this provision could only apply in the context of criminal proceedings relating to an offence that had already been committed.

As far as decisions on pre-trial detention under Article 5 § 1 (c) were concerned, the Court noted that pre-trial detention could never be used as a purely preventive measure. Deprivations of liberty on this ground always required an adequate basis in domestic law. Failure to meet the national standard for pre-trial detention did not relieve the authorities of their responsibility to take other, less intrusive, measures within the scope of their powers which responded adequately to the level of risk identified.

The Court emphasised at the outset that in the instant case, unlike in many other cases of domestic or gender-based violence before it, there had been no delays or inactivity on the part of the national authorities in responding to the applicant's allegations of domestic violence.

In her observations the applicant did not complain about any delay or inactivity on the part of the authorities, but rather about the choice of the measures taken.

In the Court's view, the authorities had taken due account of the particular context of domestic violence and had displayed the required special diligence in their immediate response to the applicant's allegations of domestic violence.

As to the assessment of the risks by the authorities, the Court considered, firstly, that the latter had carried out their risk assessment autonomously and in a proactive manner.

The police had not merely relied on the account of the events provided by the applicant, but had based their assessment on several other factors and items of evidence. On the day of the applicant's report the police had questioned all the persons directly involved, namely the applicant, her husband and their children. They had drawn up detailed records of their statements and taken evidence in the form of pictures of the visible injuries the applicant had sustained. The applicant had also undergone a medical examination. Moreover, the police had carried out an online search of the records regarding the previous barring and protection orders and temporary restraining orders and injunctions issued against E. They had also checked whether there were any weapons registered in the applicant's husband's name. The Court reiterated that it was important for the authorities to check whether an alleged perpetrator of violence had access to or was in possession of firearms.

Secondly, the Court found that the risk assessment carried out by the police had considered the major known risk factors in this context, as could be seen from the report they had drawn up. They had taken into account the circumstances that a rape had been reported, that the applicant had visible signs of violence in the form of haematomas, that she had been tearful and very scared, that she had been the subject of threats, and that the children had also been subjected to violence. The police had noted a number of other relevant risk factors, namely known reported and unreported previous acts of violence, escalation, stress factors such as unemployment, divorce and/or separation, and a strong tendency by E. to trivialise violence. They had further taken into account E.'s behaviour and had noted that there were no firearms registered in his name. The Court

considered that by identifying the above specific factors, the authorities had demonstrated that they had duly taken into account the domestic violence context of the instant case in their risk assessment.

On the basis of the evidence available to them, the authorities had concluded that the applicant was at risk of further violence, and had issued a barring and protection order against E. under section 38a of the Security Police Act. Police officers with significant relevant experience and training had been involved in making this assessment. While it was true that no separate risk assessment had been explicitly carried out in relation to the children, the Court considered that on the basis of the information available at the relevant time this would not have changed the situation.

The Court saw no reason to call into question the authorities' assessment that, on the basis of the information available to them at the relevant time, it did not appear likely that E. would obtain a firearm, go to his children's school and take his own son's life in such a rapid escalation of events.

The Court agreed with the Government that, on the basis of what had been known to the authorities at the material time, there had been no indications of a real and immediate risk of further violence against the applicant's son outside the areas for which a barring order had been issued, let alone a lethality risk. The authorities' assessment had identified a certain level of non-lethal risk to the children in the context of the domestic violence perpetrated by the father, the primary target of which had been the applicant. The measures ordered by the authorities appeared to have been adequate to contain any risk of further violence against the children and the authorities had been thorough and conscientious in taking all necessary protective measures. No real and immediate risk of an attack on the children's lives had been discernible. Therefore, there had been no obligation incumbent on the authorities to take further preventive operational measures specifically with regard to the applicant's children, whether in private or public spaces, such as issuing a barring order in respect of the children's school. Taking into account the requirements of Austrian criminal law and those flowing from Article 5 of the Convention safeguarding the rights of the accused, the Court found no reason to question the findings of the Austrian courts, which had decided not to order E.'s pre-trial detention. In that connection the Court reiterated that under Article 5 no detention was permissible unless it was in compliance with domestic law.

The authorities had displayed the required special diligence in responding swiftly to the applicant's allegations of domestic violence and in taking due account of the specific domestic violence context of the case. They had conducted an autonomous, proactive and comprehensive risk assessment and had issued a barring and protection order. That risk assessment had not indicated a real and immediate lethality risk to the applicant's son. Consequently, no obligation had been triggered for the authorities to take preventive operational measures in that regard.

There had thus been no violation of the substantive limb of Article 2 of the Convention.

Article 14

This complaint was declared inadmissible as it had been lodged outside the six-month time-limit under Article 35 § 1 of the Convention.

Separate opinions

Judge **Koskelo** expressed a concurring opinion, joined by Judges **Lubarda, Ravarani**, **Kucsko-Stadlmayer**, **Poláčková**, **Ilievski**, **Wennerström** and **Sabato**. Judges **Turković**, **Lemmens**, **Harutyunyan**, **Elósegui**, **Felici**, **Pavli** and **Yüksel** expressed a joint dissenting opinion. Judge **Elósegui** expressed a dissenting opinion. These opinions are annexed to the judgment.

The judgment is available in English and French.

Press contacts
During the current public-health crisis, journalists can continue to contact the Press Unit via echrpress@echr.coe.int.

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