IN EUROPEAN COURT OF HUMAN RIGHTS App Nos: 60367/08 961/11

KHAMTOKHU AND AKSENCHIK Applicants

-and-

RUSSIA Respondent

WRITTEN SUBMISSIONS OF THE EQUAL RIGHTS TRUST

Introduction

1. By letter dated 7 March 2016, the European Court of Human Rights ("the Court") granted the Equal Rights Trust ("the Trust") leave to make written submissions in the above proceedings. The Trust is an independent international organisation working to eliminate discrimination and advance equality worldwide. It has extensive legal expertise on the rights to non-discrimination and equality and their relatedness to all other human rights. The Trust has previously been a Third Party Intervener before this honourable Court in the cases of *Makuc and Others* v *Slovenia* [GC] (App. No. 26828/06), *Mudric v Moldova* (App. No. 74839/10), *Eremia and Others v Moldova* (App. No. 3564/11) and most recently in the ongoing case of *Machina v Moldova* (App. No. 69086/14), making submissions on the relevance of Article 14 to the cases.
2. These proceedings concern a law by which men between the ages of 18 and 65 may be sentenced to life imprisonment but women and those below and above those ages found guilty of the same crimes, may not (Article 57 of the Criminal Code of the Russian Federation). The Trust does not comment on the facts of the case but seeks to make submissions which are relevant to the circumstances.
3. The Trust's submissions concern the relevance of discrimination to the case. It is the Trust's submission that, with the exception of provisions relating to children, blanket rules which target or exempt particular groups from particular sentences of imprisonment cannot be justified under Article 14. It is further submitted that, while states have a margin of appreciation in the sentences they give offenders convicted of particular crimes, an individualised approach to sentencing, which takes into account the particular characteristics of the offender among other factors, must be employed in order to comply with Article 14. In its submission, the Trust refers to international human rights law and relevant regional and domestic law and best practice.

Sentencing laws "within the ambit" of Article 5

4. It is well rehearsed that Article 14 is engaged and applies to matters "within the ambit" of another Convention right (*Stec and Others v the United Kingdom* [GC], App. Nos. 65731/01 and 65900/01). It does not necessarily presuppose a violation of another Convention right (*Thlimmenos v Greece* [GC], App. No. 34369/97, Para. 40; *Kafkaris v Cyprus* [GC], App. No. 21906/04, Para. 159; and *Carson and Others v the United Kingdom* [GC], App. No. 42184/05, Para. 63). Even if a measure is in conformity with another Convention right, if it is discriminatory in nature it may infringe that right when taken together with Article 14 (e.g. *Case "Relating to certain aspects of the laws on the use of languages in education in Belgium" v Belgium (merits),* App. Nos. 1474/62, 1677/62, 1691/62, 1769/63, 1994/63, 2126/64).
5. The question of whether detention of a prisoner in accordance with national law is arbitrary is a matter squarely within the ambit of Article 5(1). While states are entitled to determine their own

penal policy (*Achour v France* [GC], App. No. 67335/01, Para. 44), they must comply with Convention rights (*Maktouf and Damjanovi v Bosnia and Herzegovina,* App. Nos. 2312/08 and 34179/08, Para. 75). The Court has been clear that, for the purpose of Article 5(1), "the 'lawfulness' of detention primarily requires any arrest or detention to have a legal basis in domestic law, but also relates to the quality of the law" and "any deprivation of liberty should be in keeping with the purpose of Article 5, namely to protect the individual from arbitrariness" (*Streicher v Germany*, App. No. 40384/04, Admissibility Decision); "[i]t is a fundamental principle that no detention which is arbitrary can be compatible with Article 5(1)" and "a deprivation of liberty may be lawful in terms of domestic law but still arbitrary and thus contrary to the Convention" (*Creanga v Romania* [GC], App. No. 29226/03, Para. 84).

6. The operation of a discriminatory sentencing policy exposes individuals to arbitrary detention in contravention of Article 5. While the Court has not yet had cause to consider discriminatory sentencing policies, cases in which it considers other aspects of penal policy are instructive. In a case concerning early release of prisoners, the Court held that while Article 5 did not grant a right to automatic parole, where "procedures relating to the release of prisoners appear to operate in a discriminatory manner, this may raise issues under Article 5 of the Convention taken together with Article 14" (*Clift v the United Kingdom*, App. No. 7205/07, Para. 42). The Court went on:

> *Where an early release scheme applies differently to prisoners depending on the length of their sentences, there is a risk that, unless the difference in treatment is objectively justified, it will run counter to the very purpose of Article 5, namely to protect the individual from arbitrary detention.* (Para. 62).

7. It is submitted that this reasoning applies to differences of treatment in sentencing as well as release. Even if the Court does not consider the imposition of a life sentence in and of itself, to contravene Article 5, where the sentence is applied in a discriminatory manner, this contravenes Article 5 of the Convention taken together with Article 14.

Relevant principles of non-discrimination

8. In *D.H. v Czech Republic* [GC] (App. No. 57325/00, Para. 175), the Court confirmed that Article 14 prohibits:

    a. 'treating differently, without an objective and reasonable justification, persons in relevantly similar situations' ['direct' discrimination];

    b. 'a general policy or measure that has [without an objective and reasonable justification] disproportionately prejudicial effects on a particular group' ['indirect' discrimination];

    c. '[an unjustified] failure to attempt to correct inequality through different treatment' ['*Thlimmennos*' discrimination].[1]

9. This interpretation of Article 14 is consistent with the Preamble to Protocol 12, which establishes that "the principle of non-discrimination does not prevent States Parties from taking measures in order to promote full and effective equality, provided that there is an objective and reasonable justification for those measures".

10. There is no dispute in the present case that the law in question treats the applicants differently from people within three (partially overlapping) groups: (i) people under the age of 18; (ii) women; and (iii) people over the age of 65. It is clearly established that Article 14 prohibits discrimination on the grounds of sex and age in the enjoyment of Convention rights, the former in Article 14 itself and the latter as included within the scope of "other status" under Article 14 (*Schwizgebel v Switzerland,* App. No. 25762/07). However, it is the state's position that the differential treatment on these grounds in this case can be justified under international law as "positive discrimination" designed to make up for the naturally vulnerable position of women, under 18s and over 65s as a result of the "biological, psychological, sociological and other particularities inherent to [these groups]" (Russia's observations to the Court, 14 March 2016, Para. 56).

[1] *Thlimmenos v Greece,* App. No. 34369/97.

11. The key question for the Court is whether the distinctions made under Article 57 can be justified. In assessing whether a difference in treatment is justified the state is afforded a margin of appreciation (e.g. *Gaygusuz v Austria*, App. No 17371/90, Para. 42). However, the scope of that margin varies according to the circumstances, the subject matter and its background (*Qing v Portugal,* App. No. 69861/11, Para. 82; *Andrejeva v Latvia* [GC], App. No. 55707/00, Para. 82).

12. The Court has held that "very weighty reasons would have to be advanced before a difference of treatment on the ground of sex could be regarded as compatible with the Convention" (*Abdulaziz, Cabales, and Blakandali v the United Kingdom*, App. Nos. 9214/80, 9473/81, 9474/81, Para. 78). Further, in two cases relating to differential treatment in respect of detention, the Court has subjected such measures to strict scrutiny (*Clift v the United Kingdom, App. No. 7205/07* and *Qing v Portugal, App. No. 69861/11*). In *Qing v Portugal*, the Court noted that "while in principle a wide margin of appreciation applies in questions of prisoner and penal policy, the Court must nonetheless exercise close scrutiny where there is a complaint that domestic measures have resulted in detention which was arbitrary or unlawful" (Para. 82, citing *Clift v the United Kingdom*). It is the Trust's submission that this strict scrutiny should be applied to prisoner and penal policy which is arbitrary as a result of its discriminating on the basis of any ground protected under Article 14 of the Convention, including not only the sex but also the age of the individual.

13. It is well-established by the Court that "once the applicant has shown a difference in treatment it is for the Government to show that it was justified" (*D.H. v Czech Republic* [GC], App. No. 57325/00, Para. 177).[2]

Principles of international law on non-discrimination – justifying differential treatment

14. In determining the extent of the state's obligations under the Convention, the Court has consistently held that it will "look for any consensus and common values emerging from the practices of European States and specialised international instruments, including CEDAW, as well as giving heed to the evolution of norms and principles in international law" (*Opuz v Turkey*, App. No. 33401/02, Para. 164). It will also consider other relevant sources, including the jurisprudence of other regional bodies, such as the Court of Justice of the European Union[3] and the Inter-American Court of Human Rights,[4] and national courts[5], as well as other relevant sources of expertise,[6] in reaching a determination as to common values and standards.[7]

15. It is the Trust's submission that references to "positive discrimination" in the context of the present case are misplaced and not in accordance with the notion as it is understood in international law. The importance of taking positive action to ensure equality is recognised in international law and is a concept which continues to be developed. The Human Rights Committee, in its General Comment on the scope of protections from discrimination under Article 2(1) and 26 of the International Covenant on Civil and Political Rights (ICCPR), has noted that:

> *[T]he principle of equality sometimes requires States parties to take affirmative action in order to diminish or eliminate conditions which cause or help to perpetuate discrimination prohibited by the Covenant. For example, in a State where the general conditions of a certain part of the population prevent or impair their enjoyment of human rights, the State should take specific action to correct those conditions. Such action may involve granting for a time to the part of the population concerned certain preferential treatment in specific matters as compared with the rest*

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[2] See also: *Chassagnou and Others v. France* [GC], App. Nos. 25088/94, 28331/95 and 28443/95, Paras. 91-91; and *Timishev v Russia*, App. Nos. 55762/00 and 55974/00, Para. 57.

[3] *Guberina v Croatia*, App. No. 23682/13, Paras. 41-42.

[4] *Varnava and Others v Turkey*, App. Nos. 16064/90, 16065/90, 16066/90, 16068/90, 16069/90, 16070/90, 16071/90, 16072/90 and 16073/90, Paras. 93-98.

[5] *Sergey Zolotukhin v Russia* [GC], App. No. 14939/03, Paras. 41-44; *Palomo Sanchez and Others v Spain* [*GC*], App. Nos. 28955/06, 28957/06, 28959/06 and 28964/06, Paras. 29-32.

[6] See *Kiyutin v Russia*, App. No. 2700/10, Para. 67, where the Court referred to World Health Organisation standards, and *Demir and Baykara v Turkey* [GC], App. No.34503/97, Paras. 100-103, where the Court referred extensively to International Labour Organisation standards.

[7] See *Kiyutin v Russia*, App. No. 2700/10, Para. 67.

of the population. However, as long as such action is needed to correct discrimination in fact, it is a case of legitimate differentiation under the Covenant.[8]

16. It is submitted that the *Declaration of Principles on Equality*, an instrument of international best practice, represents the current consensus. Agreed by 128 human rights and equality experts from 47 countries in different regions of the world, the Declaration promotes a unified approach to equality and non-discrimination. Its principles are "based on concepts and jurisprudence developed in international, regional and national contexts".[9] In 2011, the Parliamentary Assembly of the Council of Europe called on Council of Europe member states to take the Declaration into account when developing equality law and policy.[10]

17. Principle 3 of the Declaration states:

    To be effective, the right to equality requires positive action.

    Positive action, which includes a range of legislative, administrative and policy measures to overcome past disadvantage and to accelerate progress towards equality of particular groups, is a necessary element within the right to equality.

18. It is clear that, for the purpose of "positive action", measures must be designed to overcome past disadvantage. Accordingly, they must be temporally limited and cease when the disadvantage is corrected. The measures taken must be designed to address the disadvantage identified and the state must be able to show on what basis they have concluded that the measures chosen will do this.

19. Where a distinction does not amount to "positive action" in accordance with the abovementioned principles, then international law largely supports the law of this Court, namely that the distinction can only be justified if it is a proportionate means of achieving a legitimate aim.

    a) Children

20. International human rights law clearly acknowledges that states are not just justified but indeed obliged to treat children (defined in Article 1 UN Convention on the Rights of the Child (CRC) as those under 18) who come into conflict with the law differently from adults. The CRC provides specific rights for such children. For example, Article 37(a) CRC explicitly prohibits giving a life sentence without possibility of release to a child. Additionally, Article 14(4) ICCPR requires that the adjudication of juveniles "take account of their age and the desirability of promoting their rehabilitation." Article 40(3) CRC details requirements for juvenile justice and General Comment 10 of the Committee on the Rights of the Child sets out, in detail, children's rights in juvenile justice. General Comment 10 identifies that differences in development and needs between adults and children are part of the reason for needing a separate approach. These distinctions require that children have a lesser culpability and are subjected to a separate juvenile justice process (UN Committee on the Rights of the Child, *General Comment No. 10: Children's rights in juvenile justice*, UN Doc CRC/CGC/10, 2007, Para. 10). In addition, there is an increasing consensus for the need to abolish life imprisonment for children, particularly where there is no possibility of release.[11] Accordingly, it is submitted that exempting children from a life sentence is considered appropriate and necessary under international human rights law and cannot amount to a violation of Article 14.

    b) Women

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[8] UN Human Rights Council, *General Comment No. 18: Non-Discrimination*, 1989, Para. 10.
[9] The Equal Rights Trust, *Declaration of Principles on Equality*, London, 2008, p. 2.
[10] Parliamentary Assembly of the Council of Europe, *The Declaration of Principles on Equality and activities of the Council of Europe,* Resolution 1844, 2011.
[11] Parliamentary Assembly of the Council of Europe, *Child-friendly juvenile justice: from rhetoric to reality,* Resolution 2010, 2014; UN Human Rights Council, *Resolution 18/12: Human Rights in the administration of justice, in particular juvenile justice,* UN Doc A/HRC/RES18/12; UN General Assembly, *Draft resolution on Promotion and protection of human rights: human rights questions, including alternative approaches for improving the effective enjoyment of human rights and fundamental freedoms,* UN Doc A/C.3/67/L.34/Rev.1, November 2012, Para. 18.

21. International human rights law clearly prohibits discrimination against women and both international [12] and regional [13] bodies and courts have, like the Court, [14] been clear that any discrimination on grounds of sex must be treated with suspicion and subjected to strict scrutiny.

22. A number of factors are offered by the government by way of justification for Article 57's distinction on grounds of sex, against the above backdrop. In addition to the general comment that the biological, psychological, sociological and other particularities "inherent to minors, women and seniors", justify the exemption for women from life sentences, the government also submits that it is justified on the following bases: (a) international law supports a more "humane" approach for women; (b) women constitute the minority of prisoners serving life sentences around the world; (c) women have a "special role in society" as mothers; (d) 85-90% of women committing serious offences having a history of domestic physical or mental and sexual abuse which contributes to their criminal behaviour and serves as a factor confirming their vulnerability; (e) women face barriers on release from prison which affects their ability to provide for themselves and their children. As set out above, it is for the state to demonstrate that Article 57 not only pursues a legitimate aim but also is a proportionate means of achieving that aim. It is the Trust's submission that international and regional human rights law and jurisprudence is an instructive and important consideration for the Court when determining whether the state has made this case.

23. Contrary to the submission of the government, international law does not apply different standards of treatment to different groups such that it takes a more "humane" approach to women. The central tenets of international human rights law are the dignity, worth and equality of all people (Preamble, clauses 1 and 5, and Article 1, Universal Declaration of Human Rights (UDHR); Preamble, ICCPR). Instead, international human rights law recognises differential treatment of women as a group to be appropriate only when positive action (temporary special measures) is needed to achieve gender equality. Article 4(1) of the Convention on the Elimination of All forms of Discrimination against Women (CEDAW) provides that:

> *Adoption by States Parties of temporary special measures aimed at accelerating de facto equality between men and women shall not be considered discrimination as defined in the present Convention, but shall in no way entail as a consequence the maintenance of unequal or separate standards; these measures shall be discontinued when the objectives of equality of opportunity and treatment have been achieved.*

24. A blanket exemption of women from receiving a certain type of sentence cannot be defined as a *temporary* special measure falling within Article 4(1) CEDAW; there is no objective tied to equality of opportunity or treatment capable of justifying the differential treatment in this case.

25. International human rights law also allows for distinctions based on biological difference between pregnant women and new mothers and other people (including women who are not pregnant or recently mothers and men). Article 4(2) CEDAW, to which the government refers, provides that measures aimed at protecting maternity will not be considered discriminatory. The Committee for the Elimination of Discrimination Against Women has explained that the provision provides for non-identical treatment of men and women due to their biological differences (Committee on the Elimination of Discrimination against Women, *General recommendation No. 25, on article 4, paragraph 1, of the Convention on the Elimination of All Forms of Discrimination against Women, on temporary special measures*, Para. 16). But this is a narrow provision relating to treatment of pregnant women and new mothers and cannot be used to justify a difference in treatment of women on the basis of biological difference outside this context nor to justify differences in treatment based on a perceived "social role" of women as mothers. Jurisprudence of international and regional

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[12] UN Committee on the Elimination of Discrimination Against Women, *Concluding observations on the fifth periodic report of Uzbekistan,* UN Doc CEDAW/C/UZB/CO/5, Paras 25-26.

[13] From the Court of Justice of the European Union, see *Johnston v. Chief Constable of the Royal Ulster Constabulary,* Case C-222/84, Paras. 44-46; and *X*, Case C-318/13, Paras, 37-38.

[14] *Emel Boyraz v Turkey*, App. No. 61960/08, Para. 51.

bodies suggests that special measures for pregnant women and new mothers must be limited to what is strictly necessary.[15]

26. By contrast, the reference to a "humane" approach to women as a "vulnerable" group, far from reflecting international human rights law, demands close attention from the perspective of the right to non-discrimination. It is clear that stereotypes about women as a group cannot justify differential treatment. As the Inter-American Court of Human Rights has noted:

> *Gender stereotyping refers to a preconception of personal attributes, characteristics or roles that correspond or should correspond to either men or women (...) the subordination of women can be associated with practices based on persistent socially-dominant gender stereotypes, a situation that is exacerbated when the stereotypes are reflected, implicitly or explicitly, in policies and practices and, particularly, in the reasoning and language of the judicial police authorities.*[16]

27. Not only are stereotypes discriminatory but they also perpetuate gender inequality.[17] They are so invidious as to sometimes be overlooked and even to creep into court judgments.[18] It is respectfully submitted that the strict scrutiny standard adopted by the Court requires that, where a state seeks to justify differential treatment on the basis of characteristics it imbues on women as a class, it must be held to strict proof. International and regional human rights adjudicators have consistently rejected state attempts to justify differential treatment on the basis of apparent psychological, physical or social differences between men and women, noting often that they are drawn on the basis of stereotype and unproved assumptions.[19]

28. Blanket conclusions drawn about the vulnerability of women and a statement that life imprisonment would be particularly harsh for them have, to the Trust's knowledge, never been adequately substantiated by a state nor accepted by any court. By contrast, courts have consistently rejected rules based on paternalism and perceptions that women are more vulnerable than men and need "protecting". For example, courts have rejected: the "protection" of women by exempting them from service compulsory for men on the basis of women's "physical and mental characteristics";[20] rules apparently "protecting" childless women from upset;[21] and restricting recruitment of security officers to men due to risks and night-time working.[22]

29. Courts have also rejected generalisations made about women on the basis of their disparate likelihood of having a particular characteristic as compared to men. For example, in *X*, the Court of Justice of the European Union (CJEU) was required to issue a preliminary ruling on the granting of compensation following an accident at work. The calculation for compensation was based in part

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[15] See, for example, *Johnston v. Chief Constable of the Royal Ulster Constabulary*, Case C-222/84, 15 May 1986, Paras 44-46. Additionally, the CEDAW Committee has criticised States for enacting restrictive employment measures where they "over-emphasise women's role as mothers". Measures aimed at protecting maternity must be "strictly necessary" and "proportionate" to a legitimate aim. UN Committee on the Elimination of Discrimination Against Women, *Concluding observations on the fifth periodic report of Uzbekistan,* UN Doc CEDAW/C/UZB/CO/5, Paras 25-26.

[16] *González et al. ("Cotton Field") v. Mexico*, Inter-American Court of Human Rights, Judgment of November 16, 2009, Para. 401.

[17] An excellent overview of the approach of the Court and international bodies to stereotypes, is provided in the written submissions of the Human Rights Centre of the University of Ghent when it acted as Third Party Intervener in *Konstantin Markin v. Russia*, App. No. 30078/06. The submissions, dated 17 May 2011 are available at http://www.hrc.ugent.be/wp-content/uploads/2015/09/Konstantin_Markin.pdf.

[18] *Karen Tayag Vertido v. The Philippines*, Committee on the Elimination of Discrimination against Women, Communication No.18/2008, UN Doc. CEDAW/C/46/D/18/2008, 2010.

[19] For example, The Committee on the Elimination of Discrimination against Women has acknowledged that stereotyping may affect a woman's right to a fair trial (*R.P.B. v. the Philippines*, Committee on the Elimination of Discrimination against Women, Communication No. 34/2011, UN Doc. CEDAW/C/57/D/34/2011, Para. 8.8, 2014.), whilst the Inter-American Court has recognised the role that that gender stereotypes play in violence against women (*González et al. ("Cotton Field") v. Mexico*, Inter-American Court of Human Rights, Judgment of November 16, 2009).

[20] *Karlheinz Schmidt v. Germany*, App. No. 13580/88, Para. 28.

[21] *Van Raalte v Netherlands*, App. No. 20060/92, Paras. 43-44.

[22] *Emel Boyraz v. Turkey*, App. No. 61960/08, Para. 51.

on the predicted life-expectancy of men and women. The Court found that differential treatment between men and women could not be justified:

> *[T]he calculation of that compensation cannot be made on the basis of a generalisation as regards the average life expectancy of men and women. Such a generalisation is likely to lead to discriminatory treatment of male insured persons as compared to female insured persons. Among other things, when account is taken of general statistical data, according to sex, there is a lack of certainty that a female insured person always has a greater life expectancy than a male insured person of the same age placed in a comparable situation.*[23]

30. Further, courts have rejected justifications based on assumptions about traditional roles of men and women, including the long rejected premise that men are "bread winners" and women are "mothers and homemakers". In *Vrountou v Cyprus*, this Court held that "references to traditions, general assumptions or prevailing social attitudes in a particular country are insufficient justification for a difference in treatment on grounds of sex" (App No. 33631/06, Para 75). While international human rights law protects people who carry and give birth to children, it does not extrapolate from this a "social role" of women whereby all women are defined and treated as potential or actual mothers above and before everything else.

31. In any case, it is the Trust's submission that even if a legitimate aim is being pursued by a blanket distinction between men and women, this cannot be seen as a proportionate means of achieving that aim as opposed to taking an individualised approach which responds to the particular needs of the offender.

c) Over 65s

32. Older people are, like women, often subjected to discrimination on the basis of presumption and stereotype. The development of the understanding and scope of protection from age discrimination in international and regional human rights law is more recent than that of sex discrimination. While some important guidance can be discerned from discussion to date, the Trust acknowledges the need for further elaboration of the state's obligations in respect of age discrimination under Article 14 of the Convention and respectfully submits that the present case provides an opportunity for such elaboration.

33. In addition to its prohibition under Article 14 (as set out above), age discrimination is prohibited under all key international treaties which provide a right to be free from discrimination.[24] It is also encompassed within the general principle of non-discrimination in EU law and Article 21 of the Charter of Fundamental Rights and has been held by the CJEU to be treated as broadly analogous with other forms of prohibited discrimination.[25] This prohibition applies to discrimination on grounds of age whether the discrimination is being faced by younger, older or other persons.

34. There is an increasing international consensus recognising that older people are subjected to discrimination. In 2010, the UN General Assembly recognised the need to strengthen the protection of the human rights of older persons and set up the UN open-ended Working Group on Ageing (UN General Assembly, "Resolution 65/182: Follow-up to the Second World Assembly on Ageing Resolution", 21 December 2010, UN Doc A/RES/65/182) and, in 2014, established an Independent Expert on the enjoyment of all human rights by older persons. With this in mind it is important to scrutinise the differential treatment of older people to determine whether it amounts to positive action to advance equality or unlawful discrimination.

35. The principles militating against the legitimacy of basing differential treatment of groups on stereotypes attached to that group, apply equally in the context of age discrimination. As Colm O'Cinneide has noted:

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[23] *X*, Case C-318/13, 3 September 2014, Paras. 37-38.

[24] For example, under the ICCPR (Article 26)); and ICESCR (Article 2 (2)). Age has been recognised as a form of "other status" by the UN Treaty Bodies. See *Solís v Peru*, Human Rights Committee, Communication No. 1016/2001, UN Doc. CCPR/C/86/D/1016/2001, 2006, Para 6.3.

[25] *Mangold v Helm,* Case C-144/04.

Age is often used unfairly as an arbitrary, irrational and stereotyping tool for making distinctions between individuals. Differences of treatment between different individuals or groups on the grounds of age are often based on generalised assumptions or casual stereotypes, with age used as a "proxy" for other personal characteristics such as maturity, health or vulnerability. For example, (…) older persons are often assumed to lack flexibility, motivation, reliable health, and the ability to absorb new ideas.[26]

36. Any case concerning a difference in sentencing must be subject to a high degree of scrutiny,[27] including those cases concerning a difference in treatment on the grounds of age. Creating distinctions between people above and below a particular age is inherently problematic, requiring a high degree of evidence and justification. Generalisations as to a measure's ability to achieve legitimate objectives are insufficient.[28]

37. A number of factors are offered by the state by way of justification for Article 57's distinction on grounds of older age. In addition to the general comment that the biological, psychological, sociological and other particularities "inherent to minors, women and seniors", justify the exemption for over 65s from life sentences, the state also submits that it is justified on the basis that "seniors": (a) are a vulnerable social group which has an underdeveloped or weakened capacity to understand the implications of their conduct, control it or foresee the consequences; and (b) are prone to compulsive, unconsidered behaviour that could result in criminally reprehensible conduct. As is the case in relation to justifications for sex discrimination (as above) international and regional human rights law and jurisprudence is an instructive and important consideration for the Court when determining whether the state has made this case. No regional or international court has, to the Trust's knowledge, ever made a finding that such characteristics apply to people over the age of 65 as a group and constitute the basis on which a justifiable distinction between over 65s and others might be made.

38. It is submitted that, even if it is shown that a life sentence would be considered unduly harsh more often in cases of persons over 65 than persons under 65, this does not lead to a conclusion that a blanket exemption is a proportionate means of achieving the aim of not subjecting people to harsh sentences. It is accepted that age is not binary and, as a result, any distinctions on the basis of age where a cut-off point is identified are likely to be difficult to justify. The only context in which such cut-off points in relation to older people have been accepted by courts is in relation to employment for the purpose of workforce planning and in relation to social security.[29] Even here, there is a recognition that distinctions based on age are a blunt instrument of distinction and must be justified to a high degree of surety. Courts have considered whether less restrictive measures are available[30] and have explored comparative state practice and scientific evidence when considering whether a measure is justified.[31]

Remedy

39. It is acknowledged that while an increasing number of states are abolishing life sentences, there is no consensus among member states as to whether the life sentence, in and of itself, violates human rights. Accordingly, as a matter of international law, states currently have the discretion, subject to the limitations placed under Article 3 of the Convention, to hand down a life sentence in appropriate circumstances. However, it is submitted that if a state, acting at its discretion, decides that a life sentence is "inhumane" if given to certain groups, where this has been found to be a violation of Article 14, the principle of "no levelling down" means that a state cannot remedy this discrimination by simply removing the more favourable treatment from the protected group such that they are also subjected to the life sentence. Such an approach is, it is submitted, in accordance with international legal principles, customary international law, as well as Council of Europe and

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[26] O'Cinneide, "The Growing Importance of Age Equality", *Equal Rights Review*, Volume 11, 2013, p. 99.
[27] *Clift v the United Kingdom*, App. No. 7205/07, Para. 62.
[28] *Age Concern*, Case C-388/07, 5 March 2009, Para 51.
[29] *Wolf v Stadt Frankfurt am Main,* Case C-229/08, 12 January 2010.
[30] *Dansk Jurist-og Okonomforbund v Indenrigs- og Sundhedsministeriet*, Case C-546/11, 26 September 2013, Paras 69-73.
[31] *Vital Perez v Ayuntamiento de Oviedo*, Case C-416/13, 13 November 2014, Paras 50-53.

European Union law, and contradicts the object and purpose of national equality legislation adopted by EU member states, as well as other states which have such legislation.

40. It is a well-established principle of international law that the application and implementation of legally binding provisions of international treaties, and, by extension, of binding decisions of international tribunals, should not abolish, restrict, or limit existing legal rights. Article 60 of the Convention provides: "Nothing in this Convention shall be construed as limiting or derogating from any of the human rights and fundamental freedoms which may be ensured under the laws of any High Contracting Party or under any other agreement to which it is a Party".

41. Once the state has reduced the limitations on the right to liberty of a particular group of persons, it is submitted that it may not justify the reversal of this progress by reference to its obligations under the Convention, namely under Article 14 in this case.

42. Elsewhere in international law, discussions of "levelling down" have been restricted to the realm of economic and social rights.[32] In this context, states may not contravene what has been acquired and weaken the scope of rights previously recognised by a national legislation. The principle requires levelling upwards of norms allowing for the strengthening of legal protections accorded to persons rather than alignment with the lowest common denominator of national legislations. In the EU context, the EC Directive establishing a General Framework for Equal Treatment in Employment and Occupation states that "[t]he implementation of this Directive should not serve to justify any regression in relation to the situation which already prevails in each Member State".[33] Similarly, in respect to EU sex discrimination law, the Court of Justice of the European Union does not permit inequality to be eradicated by retrospective "levelling down".[34] Upon a finding of discrimination the treatment of the disadvantaged group must immediately and fully be equalised upwards to the level of the benefitting group. Although the principle that discrimination should not be rectified by "levelling down" has been developed in laws relating to economic and social rights, it is the Trust's submission that it applies to the enjoyment of other rights, including the right not to be subjected to life imprisonment, which has already emerged for certain large groups of the population such as women and this emergence is recognised under national law.

Article 14 compliant sentencing

43. There has been little discussion to date on what a non-discriminatory approach to sentencing requires, beyond a general recognition that sentencing must not breach the fundamental rights of the individual. International, regional and national standards can prove instructive in determining what the state should be expected to do, when determining its sentencing laws and policy, in order to comply with its obligations under Article 14. It is submitted that the above analysis identifies that, with the exception of children, blanket exemptions of whole groups of people from particular sentences are unlikely to comply with Article 14. Instead, it is submitted that in order to comply with Article 14, a state must adopt an individualised approach to sentencing which takes into account, among other things, a person's particular characteristics. An individualised approach would allow a more nuanced calibrating of sentencing to the specific vulnerabilities of narrowly defined categories of persons or individuals, as opposed to the overly broad and therefore arbitrary distinctions on the basis of gender or age.

44. While the Court has not had cause to consider this question in depth, it has made some relevant comments:

    a. In *Farbtuhs v Latvia* (App. No. 4672/02), the Court held that a failure to take into account the age and health of an older person (in this case a 86-year old) in imposing a prison sentence upon him for participating in Stalin's purges in 1940-41 could constitute a violation of Article 3 of the Convention.

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[32] For example, the International Covenant on Economic, Social and Cultural Rights is based on the principle of progressive implementation and non-regression, discouraging "deliberately retrogressive measures" that impede the goal of progressive implementation. See UN Committee on Economic, Social and Cultural Rights, *General Comment 3: The nature of States parties obligations (Art 2, par. 1*), Para. 9. 4.

[33] Council Directive 2000/78/EC, Preamble clause 28.

[34] *Coloroll Pension Trustees Ltd v Russel*, Case C-200/91, 1993.

b. In *Camilleri v Malta* (App. No. 42931/10, Paras 43-44), a lack of sentencing guidelines to assist the Attorney General made it impossible to "determine with any degree of precision the circumstances in which a particular punishment bracket applied" and meant that Malta had failed to provide effective safeguards against arbitrary punishment as required by Article 7.[35]

45. Accordingly, there is a recognition that sentencing guidelines may be required to avoid arbitrariness and, in terms of the substance of factors to take into account when imposing a prison sentence, age and health should be considered.

46. At the international level, there has been some limited guidance in relation to sentencing for particular groups. For example, United Nations Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (the Bangkok Rules)[36] emphasise the importance of considering, where applicable, when sentencing: (a) a woman's pregnancy or position as a child's sole or primary caretaker (Rule 11); and (b) essential information about women's backgrounds, such as violence they may have experienced, history of mental disability and substance abuse (Rule 41).

47. In Europe, the CJEU has held that: "Although in principle criminal legislation is a matter for which the Member States are responsible, the Court has consistently held that Community law sets certain limits to their power, and such legislation may not restrict the fundamental freedoms guaranteed by Community law."[37] This includes the fundamental right to non-discrimination. Additionally, in 1992 the Committee of Ministers adopted a recommendation on "Consistency in Sentencing". The guidelines[38] set out a best practice approach to sentencing. These guidelines recognise, among other things, the inadmissibility of discrimination in sentencing and the need for a consideration of the probable impact of the sentence on the offender.[39]

48. At the national level, it is common for states to provide minimum and maximum sentences in relation to a particular offence and then to recognise the need to take into account a person's particular circumstances, including their protected characteristics, when sentencing. In the UK, for example, factors including mental disability, age and family life may impact on the sentence to be passed.[40]

49. The Trust respectfully submits that, to ensure compliance with Article 14, a sentencing policy must, in determining *inter alia* the nature (custodial or non-custodial, place of detention etc) and length of the sentence, respond to the needs of the individual. This includes a particular focus on their protected characteristics. The individual adjudicator should impose a sentence commensurate both with the individual's culpability and the impact of a sentence on that individual.

50. Such an approach will comply with the modern understanding of the rights to equality and non-discrimination, which has long departed from the rigid approach of formal (procedural) equality in favour of substantive equality in practice. The *Declaration of Principles on Equality*, which is, as set out above, an international instrument of best practice which reflects the modern consensus on this issue, expresses this principle in the following words: "To realise full and effective equality it is necessary to treat people differently according to their different circumstances, to assert their equal worth and to enhance their capabilities to participate in society as equals."[41]

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[35] *Camilleri v Malta,* App. No. 42931/10, Paras. 43-44.
[36] Resolution 2010/16.
[37] *Calfa,* Case C-348/96, Para. 17.
[38] There are set out in Annex 1 to Recommendation No. R (92) 17 on Consistency in Sentencing, available at: http://www.coe.int/t/dghl/standardsetting/prisons/Recommendation%20R%20(92)%2017_E.pdf.
[39] Paras 7 and 8 ibid.
[40] See Schedule 21, Para 11, Criminal Justice Act 2003. Under the Act, age and mental health may operate as a mitigating factor. In *R v Rosie Lee Petherick* [2012] EWCA Crim 2214, Paras 23-4, the Court of Appeal ruled that impact on family life may be taken into account in sentencing.
[41] The Equal Rights Trust, *Declaration of Principles on Equality*, London, 2008, Principle 2, p. 5.