



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

FOURTH SECTION

CASE OF OGANEZOVA v. ARMENIA

(Applications nos. 71367/12 and 72961/12)

JUDGMENT

Art 3 (+ Art 14) • Inhuman or degrading treatment • Positive obligations • Discrimination on the basis of sexual orientation • State's failure to protect LGBT bar owner and activist from homophobic arson, physical and verbal attacks and to carry out effective investigation • Absence of effective domestic criminal-law mechanism for investigating discrimination complaints

STRASBOURG

17 May 2022

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Oganezova v. Armenia,

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

Yonko Grozev, *President*,

Tim Eicke,

Faris Vehabović,

Iulia Antoanella Motoc,

Armen Harutyunyan,

Gabriele Kucsko-Stadlmayer,

Ana Maria Guerra Martins, *judges*,

and Ilse Freiwirth, *Deputy Section Registrar*,

Having regard to:

the applications (nos. 71367/12 and 72961/12) against the Republic of Armenia lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by an Armenian national, Ms Armine Oganezova (“the applicant”), on 8 November 2012 and 15 January 2013 respectively;

the decision to give notice to the Armenian Government (“the Government”) of the complaints concerning Articles 3, 8, 13 and 14 of the Convention, and to declare inadmissible the remainder of the applications;

the observations submitted by the Government and the observations in reply submitted by the applicant;

the comments submitted by the non-governmental organisations the European Region of the International Lesbian, Gay, Bisexual, Trans and Intersex Association (ILGA-Europe), the Advice on Individual Rights in Europe Centre (AIRE Centre), Human Rights Watch and the International Commission of Jurists, all represented by ILGA-Europe, who were granted leave to intervene by the President of the Section;

Having deliberated in private on 5 October 2021 and 5 April 2022,

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

INTRODUCTION

1. The application concerns the State’s alleged failure to protect the applicant from harassment, homophobic attacks and threats because of her sexual orientation and to conduct an effective investigation into her complaints. The applicant relied on Articles 3, 8, 13 and 14 of the Convention.

THE FACTS

2. The applicant was born in 1980 and lives in Nacka, Sweden. She was represented by Ms H. Petrosyan, a lawyer practising in Yerevan, Mr M. Hovsepyan, Director of PINK Armenia (Public Information and Need

of Knowledge), a non-governmental organisation (NGO), Mr P. Leach, Ms J. Gavron, Ms K. Levine and Ms R. Remezaite, lawyers from the European Human Rights Advocacy Centre (EHRAC) based in London, and Ms J. Evans, also from EHRAC.

3. The Government were represented by their Agent, Mr Y. Kirakosyan, Representative of the Republic of Armenia on International Legal Matters.

4. The facts of the case, as submitted by the parties, may be summarised as follows.

I. BACKGROUND TO THE CASE

5. The applicant, who is also known by the name “Tsomak”, is a well-known member of the lesbian, gay, bisexual and transgender (LGBT) community in Armenia. She has been involved in promoting the rights of LGBT persons in Armenia and internationally.

6. The applicant co-owned and managed a bar called the DIY Club (“the club”) in the centre of Yerevan, a place where members of the LGBT community would meet to socialise.

7. In June 2011 the applicant participated in a gay pride march in Istanbul. While in Istanbul, she gave an interview to a local newspaper criticising Armenia’s human rights record.

8. In August 2011 the applicant was contacted by Yerkir Media, a television channel associated with the Armenian Revolutionary Federation Party, and asked to give an interview to discuss her visit to Istanbul.

9. After the interview was broadcast, the applicant became the subject of an online hate campaign, intimidation and threats on the basis of her sexual orientation.

10. Shortly thereafter several persons entered the club to harass and intimidate the people gathered there. Fearing that the club would become a target for homophobic attacks, the applicant and the two other co-owners of the club, A.P. and N.D., arranged a meeting with A.K. and H.K., who were brothers, and two others who had been identified as the perpetrators of the incident. It was agreed during the meeting that there would be no further attacks.

11. On the evening on 7 May 2012, A.P. saw a group of men loitering around the club premises. The group of men, which included A.K. and H.K., harassed and intimidated the club’s staff members. They were all wearing similar jackets with the logo “Black Ravens Armenia” which is associated with a neo-Nazi group operating in Armenia.

II. THE ARSON ATTACK ON THE CLUB AND THE ENSUING INVESTIGATION

12. At around 5 a.m. on 8 May 2012 an arson attack was carried out on the club. The applicant was informed of the attack by a friend who happened to be passing by and saw that the club was on fire and that the fire brigade was at the scene. Upon arrival the applicant discovered that the interior of the club had been badly damaged.

13. Shortly after her arrival, the applicant called the police. A number of forensic experts arrived and informed the applicant that no fingerprints had been found.

14. At 5 p.m. two police officers arrived at the club. They entered the premises, gave a contact telephone number and left immediately without asking any questions.

15. After the police officers left, the employees of a nearby business came to speak with the applicant and suggested watching the footage from their security camera, which showed a person breaking through the door of the club and throwing an explosive substance inside. A.P. then recognised A.K. on the footage.

16. Subsequently the applicant called the police again to describe what she had seen on the security camera footage. The police later arrived and took the security camera footage away.

17. On 9 May 2012 N.D. arranged a meeting between her, the applicant and A.K. and H.K. They informed the police of the location the meeting was to take place, where the two brothers were eventually apprehended. On the same date they were questioned and confessed to having set the club on fire after making sure that there was no one left inside. In their statement the brothers stated that the reason for the arson attack was the fact that the club was a gathering place for LGBT persons who brought shame on Armenia, and that the applicant was a lesbian who had participated in a gay pride march in Istanbul.

18. Later on the same day, the applicant and N.D. went to the police station to file a report. They were informed that A.K. and H.K. had confessed to the arson attack and the reasons behind it. According to the applicant, the police officers made it clear that they agreed with the actions of the two men. In her observations submitted after the Government had been notified of the application, the applicant claimed that the police officers had “justified the attack, condemning [her] activities ... commenting that as if it wasn’t enough that [she] was a homosexual, [she had also gone] to Turkey and performed music there”. The Government contested this.

19. During his interview on 10 May 2012, A.K. reaffirmed that he and his brother had carried out the arson attack on the club because it was a gathering place for homosexuals and, besides, the applicant had participated in a gay

pride march in Turkey. A.K. also identified the third person (G.K.) who had been with them when carrying out the attack.

20. On the same date H.K. was also questioned and made similar statements. He stated that he had helped A.K. break the glass and that G.K. had only watched.

21. On the same date the police ordered a forensic fire examination. The results, including the estimation of the amount of pecuniary damage to be paid to the club, were issued on 21 July 2012.

22. On 11 May 2012 the police instituted criminal proceedings for intentional property damage under Article 185 of the Criminal Code. On the same date A.K. was arrested.

23. On 12 May 2012 A.K. was questioned again and submitted that he had made his previous statements under duress. He had been ill-treated at the police station and forced to make self-incriminatory statements on his and his brother's behalf. He refused to provide any details concerning the alleged perpetrators or to describe the circumstances of the alleged incident.

24. On 14 May 2012 A.K. was released on bail, sureties having been provided by A.M. and Hr.K., parliamentarians from the Armenian Revolutionary Federation Party.

25. Subsequently A.K. and H.K. refused to make any further statements and denied the charges throughout the investigation.

26. On an unspecified date the applicant joined the criminal proceedings as civil party, requesting that the damage caused to the club be compensated.

27. On 13 May 2012 charges were brought against A.K. and H.K. under Article 185 § 3 of the Criminal Code (intentional property damage resulting in substantial loss).

28. On 11 June 2012 the investigator ordered a forensic technical examination of A.K.'s and H.K.'s mobile telephones. The relevant expert report, which was received on 26 July 2012, indicated that the mobile telephones in question contained a number of swastika symbols, notes such as "White pride", "Armenian pride, *heil* Armenia", "We are fighting" (translation from Armenian written in Latin letters) and so on.

III. EVENTS FOLLOWING THE ARSON ATTACK

29. On 10 May 2012 the applicant was informed that several young people had gathered in front of the club, acting aggressively and writing homophobic graffiti on the walls, much of which was directed specifically at the applicant, making it clear that she would not be allowed to reopen the club and that a further attack would be organised. The applicant called the police, who arrived following a considerable delay and did not undertake any measures to investigate the threats made to her.

30. In the following days, groups of people gathered outside the club seeking to intimidate and harass the applicant and supporters of the club. They

also destroyed much of what was left in the club, spilling paint over the fixtures. They also left threatening homophobic comments on the walls, such as “Go to hell Tsomak”, “We will kill you Tsomak”, and so on.

31. On 11 May 2012 two human rights activists gave an interview to an online publication in which they discussed the arson attack on the club and the attitudes of society in general towards the LGBT community. Following the interview, an online group called “No to homosexuality” was created on Facebook and pictures of the applicant and several LGBT rights activists were posted online. A stream of insulting and threatening messages was posted about those individuals and members of the LGBT community generally.

32. On the same date the applicant gave a television interview in which she discussed the arson attack and the homophobic attitude towards the LGBT community. Following the interview, a significant number of threats and homophobic comments addressed to the applicant personally were posted mainly on Facebook and YouTube. In particular, the posts on Facebook included, among others, comments that the applicant “should die”, “should be burnt”, “[should be] put in an electric chair”. The comments posted on YouTube under a video concerning the arson attack, many of which contained severely abusive language, included, *inter alia*, the following:

“good job, they should have put you [the applicant] inside and then set the [club on] fire”

“... there is no place in our holy land for those like them [LGBT persons]”

“... [the applicant] should be burnt”

“you [LGBT persons] should get out of this city, Armenia is for Armenians not sluts”

33. In an interview given on 15 May 2012 A.M., when asked about the reasons for providing surety for the two men accused of the arson attack on the club, he stated, in particular, the following:

“... in this case, I am sure that these young people behaved in the context of our societal and national ideology, in a right way.

... I consider that her type, I do not want to say a rude word, are destroying Armenian society ...”

34. In the evening of the same date, a group of men entered the club. They broke some of the remaining fixtures and drew swastikas and left threatening homophobic messages on the wall.

35. On 17 May 2012 three men, one adult and two teenagers, in black fascist uniform T-shirts, entered the club and began shouting abuse and threatening the applicant. They smashed some of the furnishings, spat at the applicant and blew cigarette smoke on L.A., an LGBT rights activist. The applicant was terrified and thought that she was going to be physically harmed.

36. On the same date the applicant and L.A. lodged a complaint with the chief of police. They described the incident that had taken place earlier that day, including the age and the clothing worn by the three men in question and the name of one of them. They submitted that the attackers had insulted them and threatened to return, adding that they would blow up the club anyway and that people like them should be annihilated. They requested that the assailants be identified and prosecuted and that their own safety be ensured in view of the fact that the attacks on them had already become regular.

37. In an interview published on the same date in an online newspaper, H.S., a parliamentarian from the then ruling political party, stated the following:

“As a citizen I welcome those young persons [namely, A.K. and H.K.] ... in all countries there are groups of young persons who, by using the available means, fight against harmful manifestations, diversions and morbid manifestations threatening national and societal values. ... Sects and sexual deviants should be fought against by even more rigorous means ... At the same time, I call on people to refrain from extreme actions ...”

38. In a further request to the chief of police dated 18 May 2012, the applicant sought protection from regular attacks and harassment for her and her staff members. She also sought to prevent further damage to the property of the club.

39. On the same date E.S., the Deputy Speaker of the National Assembly, made the following statement:

“As an Armenian citizen and member of a national conservative party, I find the rebellion of two young Armenians against the homosexuals who have created a den of perversion in our country and have the goal of alienating society from its moral values completely right and justified ...”

40. On 21 May 2012 a Diversity march took place in Yerevan which was attacked by a group protesting against it. According to the applicant, she was informed that a group of protesters had threatened to damage the club. Later that evening the applicant received a telephone call from the owners of a business next to the club informing her that around fifty men had entered the club and that they could hear considerable noise from the premises, mainly of objects being smashed. When the applicant arrived, there was no one left and there was a large poster hanging outside the building with an abusive message. The fixtures and furniture had been broken and the walls vandalised with threatening messages and swastikas.

41. The applicant reported the attack to the police, who arrived some time later. The police officers took a look around the club and left.

42. The applicant and many of her friends were subjected to homophobic abuse and threats online in the days following the Diversity march, to the extent that they were afraid to walk around the city and feared for their safety. The applicant's sister also received threatening correspondence. A week after the arson attack, the applicant's sister was asked to resign from her job as a

waitress in a restaurant since the management did not want anyone to know that she worked there, because of the potential danger of the restaurant being attacked.

43. The applicant submitted to the police material printed out from various web pages which contained the relevant homophobic comments. At some point during the investigation into the arson attack, that material was transmitted by the department dealing with the case to the relevant police department with the request to undertake the necessary measures to identify the authors of certain comments which directly concerned the arson and the applicant.

44. On 25 May 2012 the police put in place protection measures in respect of the applicant and her closest relations. Those measures were implemented for a five-day period.

45. In response to an enquiry by the NGO PINK Armenia, in a letter of 11 June 2012 the police informed them that the applicant had lodged criminal complaints with regard to the incidents of 17 and 21 May 2012. Having regard to the pending investigation (into the arson attack) and the material gathered in respect of the incidents of 15, 17 and 21 May 2012, there was nothing to indicate that the police officers who had arrived at the scene had demonstrated an indifferent attitude. The police had reacted promptly when called in relation to the incidents and a relevant operational unit had been dispatched to the scene. Also, during that period a round-the-clock police patrol had been assigned to the club. Furthermore, considering that there existed a real danger threatening the applicant's life, health and property as well as those of her closest relations, a decision had been taken to put in place protection measures in respect of them in response to the applicant's request.

46. On 23 June 2012 the applicant and her sister left Armenia for Sweden. The applicant applied for asylum on the basis of persecution due to her sexual orientation. According to the applicant, her decision to leave Armenia was motivated by the constant threats that she was receiving online and from the stress and fear brought about by the people who gathered at the club for weeks after the arson attack. She was no longer able to earn a living after what had happened to the club, and was being supported by her sister until the latter lost her job.

IV. THE TRIAL

47. On 31 May 2013 the bill of indictment was finalised and the case was sent to the Kentron and Nork-Marash District Court of Yerevan ("the District Court") for examination. The relevant parts of the indictment read as follows:

"... [A.K.] and [H.K.] are members of a 'Fascist' group operating in [the Republic of Armenia] and are guided by the ideology of that group, that is, among other convictions, to be against homosexuality, therefore for the sake of the 'high' values of that ideology, having learnt that [the club] was a gathering place for homosexuals and that the manager of the club [the applicant] had visited Turkey and participated in an event dedicated to

homosexuals, they had visited [the club] numerous times ... had spat on [the club], vomited in front of the door, thereby causing nuisance to the [club's] management and expressing their discontent towards homosexuals ...

... on 7 May 2012 [A.K.], [H.K.] and an unidentified person, having come to a prior agreement to set [the club] on fire ... at around 4 a.m. on 8 May 2012 arrived at [the club] and ... intentionally set [the club] on fire using fuel that they had brought with them ... they then escaped, having caused property damage in the amount of 3,227,563 Armenian drams [AMD] ...”

48. In the proceedings before the District Court, A.K. and H.K. admitted the charges and requested that the case be examined in an expedited procedure.

49. It appears that at some point during the proceedings before the District Court, the mother of A.K. and H.K. transferred to the court's deposit account an amount exceeding the estimated property damage to the club.

50. By a judgment of 25 July 2013, the District Court found A.K. and H.K. guilty as charged and sentenced them to two years' imprisonment. At the same time, the District Court decided to impose a suspended sentence with two years' probation. The District Court also granted the applicant's civil claim in the amount of AMD 3,227,563, that is the estimated property damage.

51. The applicant lodged an appeal against the District Court's judgment of 25 July 2013, arguing against the imposition of a conditional sentence. She submitted, *inter alia*, that the sentence imposed on A.K. and H.K. was too lenient in comparison to the gravity of the hate crime that they had committed and that the discriminatory aspect of the offence had neither been considered nor taken into account when assessing their actions.

52. On 23 October 2013 the Criminal Court of Appeal rejected the applicant's appeal. In doing so, it upheld the District Court's judgment in full. At the same time, it decided to exempt A.K. and H.K. from serving their punishment by virtue of the Amnesty Act adopted by the National Assembly on 3 October 2013.

53. The applicant lodged an appeal on points of law.

54. On 25 December 2013 the Court of Cassation declared the applicant's appeal on points of law inadmissible for lack of merit.

RELEVANT LEGAL FRAMEWORK

I. RELEVANT DOMESTIC LAW

A. The Constitution of 1995

1. *Including the amendments introduced through a referendum on 27 November 2005*

55. Article 14.1 read as follows:

“Everyone shall be equal before the law.

Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or other personal or social circumstances shall be prohibited.”

2. Including the amendments introduced through a referendum on 6 December 2015

56. Article 29 (prohibition of discrimination) reads as follows:

“Discrimination based on sex, race, skin colour, ethnic or social origin, genetic features, language, religion, world view, political or other views, belonging to a national minority, property status, birth, disability, age, or other personal or social circumstances shall be prohibited.”

B. The Criminal Code

57. The relevant provisions of the Criminal Code read as follows:

Article 63

Circumstances aggravating criminal liability and punishment

“1. Circumstances aggravating criminal liability and punishment:

...

(6) offence motivated by ethnic, racial or religious hatred, religious fanaticism, retribution for other persons’ legitimate actions;

...

(8) offence committed against an apparently pregnant woman, as well as a child, other vulnerable person or persons dependent on the offender;

...

(12) offence committed in a manner endangering the public;

...”

Article 185

Intentional property destruction or damage

“1. Intentional destruction or damaging of a person’s property which causes significant harm, shall be punishable by a fine from fifty to one hundred times the minimum salary or ... imprisonment for up to two years.

2. The same offence which:

(1) was committed by arson, explosion or in another manner endangering the public;

...

(4) was motivated by ethnic, racial or religious hatred or religious fanaticism, shall be punishable by imprisonment for up to four years.

3. Offences envisaged in the first and second paragraphs of this Article which:

(1) caused particularly grave harm;

...

shall be punishable by imprisonment from two to six years.”

Article 226

Incitement of national, racial or religious hatred

“1. Actions aimed at the incitement of national, racial or religious hatred, at racial superiority or humiliation of national dignity, shall be punishable with a fine from two hundred to five hundred times the minimum salary or imprisonment from two to four years.

2. The actions envisaged in paragraph 1 of this Article, which have been committed:

(1) publicly or by mass media, with violence or threat of violence;

(2) by abuse of official status;

(3) by an organised group,

shall be punishable by imprisonment from three to six years.”

58. On 15 April 2020 the Criminal Code was supplemented with Article 226.2, which reads as follows:

Article 226.2

Public calls for violence, public justification or propaganda of violence

“1. Public calls for violence based on gender, race, skin colour, ethnic or social origin, genetic characteristics, language, religion, world view, political or other views, ethnic minority, property status, birth, disability, age or other personal or social circumstances, and public justification or propaganda of such violence, in the absence of the characteristics of crimes set out in Articles 225 § 4, 226, 226.1, 301, 385, 397.1 of this Code, are punishable by a fine from fifty to one hundred and fifty times the minimum salary, or by detention for up to two months, or by imprisonment for up to one year.

2. The actions envisaged in paragraph 1 of this Article which have been committed:

(1) by a group of persons with prior consent or by an organised group;

(2) by abuse of official status,

are punishable by a fine from one hundred and fifty to three hundred times the minimum salary, or by detention from two to three months, or by imprisonment from one to three years with or without deprivation of the right to hold certain positions or engage in certain activities.”

II. RELEVANT INTERNATIONAL MATERIALS

A. Council of Europe

1. *Recommendation Rec(2010)5 of the Committee of Ministers of the Council of Europe to member States on measures to combat discrimination on grounds of sexual orientation or gender identity*

59. The relevant excerpts from Recommendation Rec(2010)5 adopted by the Committee of Ministers on 31 March 2010 read as follows:

“The Committee of Ministers ...

Recommends that member states:

...

2. ensure that legislative and other measures are adopted and effectively implemented to combat discrimination on grounds of sexual orientation or gender identity, to ensure respect for the human rights of lesbian, gay, bisexual and transgender persons and to promote tolerance towards them;

3. ensure that victims of discrimination are aware of and have access to effective legal remedies before a national authority, and that measures to combat discrimination include, where appropriate, sanctions for infringements and the provision of adequate reparation for victims of discrimination;

...

I. Right to life, security and protection from violence

A. “Hate crimes” and other hate-motivated incidents

1. Member states should ensure effective, prompt and impartial investigations into alleged cases of crimes and other incidents, where the sexual orientation or gender identity of the victim is reasonably suspected to have constituted a motive for the perpetrator; they should further ensure that particular attention is paid to the investigation of such crimes and incidents when allegedly committed by law enforcement officials or by other persons acting in an official capacity, and that those responsible for such acts are effectively brought to justice and, where appropriate, punished in order to avoid impunity.

2. Member states should ensure that when determining sanctions, a bias motive related to sexual orientation or gender identity may be taken into account as an aggravating circumstance.

3. Member states should take appropriate measures to ensure that victims and witnesses of sexual orientation or gender identity related ‘hate crimes’ and other hate-motivated incidents are encouraged to report these crimes and incidents; for this purpose, member states should take all necessary steps to ensure that law enforcement structures, including the judiciary, have the necessary knowledge and skills to identify such crimes and incidents and provide adequate assistance and support to victims and witnesses.

...

5. Member states should ensure that relevant data are gathered and analysed on the prevalence and nature of discrimination and intolerance on grounds of sexual

orientation or gender identity, and in particular on ‘hate crimes’ and hate-motivated incidents related to sexual orientation or gender identity.

B. ‘Hate speech’

6. Member states should take appropriate measures to combat all forms of expression, including in the media and on the Internet, which may be reasonably understood as likely to produce the effect of inciting, spreading or promoting hatred or other forms of discrimination against lesbian, gay, bisexual and transgender persons. Such ‘hate speech’ should be prohibited and publicly disavowed whenever it occurs. All measures should respect the fundamental right to freedom of expression in accordance with Article 10 of the Convention and the case law of the Court.

7. Member states should raise awareness among public authorities and public institutions at all levels of their responsibility to refrain from statements, in particular to the media, which may reasonably be understood as legitimising such hatred or discrimination.

8. Public officials and other state representatives should be encouraged to promote tolerance and respect for the human rights of lesbian, gay, bisexual and transgender persons whenever they engage in a dialogue with key representatives of the civil society, including media and sports organisations, political organisations and religious communities.”

2. Report by the European Commission against Racism and Intolerance

60. The relevant parts of the report on Armenia published by the European Commission against Racism and Intolerance (ECRI) on 4 October 2016 read as follows (footnotes omitted):

“2. ECRI notes that Article 226 of the Criminal Code refers only to nationality, race, and religion as the characteristics of the victims of racist acts that are classified as criminal offences (hereafter ‘prohibited grounds’). ... This list of prohibited grounds does not include colour, language or ethnic origin. It does not refer to sexual orientation and gender identity either ...

...

25. ECRI notes that Article 226 of the Criminal Code, which outlaws public incitement to hatred, does not mention sexual orientation or gender identity among its prohibited grounds. Furthermore, as indicated above (see § 2), the Criminal Code does not contain any provisions stipulating that homo/transphobic motivation constitutes an aggravating circumstance for any ordinary offence ... the Ministry of Justice is in the process of drafting amendments to the Criminal Code, which might include sexual orientation and gender identity in the list of prohibited grounds; they might also add to the Criminal Code a provision stipulating that homo/transphobic motivation constitutes an aggravating circumstance for any ordinary offence. ECRI believes that these additions are essential to ensure an appropriate level of protection for LGBT persons.

26. ECRI recommends that sexual orientation and gender identity be expressly added to the prohibited grounds in Article 226 of the Criminal Code and that a provision be added to that Code explicitly stipulating that homo/transphobic motivation constitutes an aggravating circumstance for any ordinary offence.

...

90. The little information available comes from various surveys and studies. According to a survey conducted in 2012 by a local NGO, 72% of the Armenian population believe that the state should take measures to ‘fight against homosexuals’. A survey released the same year by OECD and the Caucasus Research Centre revealed that 94% of the persons interviewed in Armenia would not want a gay neighbour. NGOs report that ‘society either believes that homosexuality is a disease to be treated or people simply do not wish to accept something which is different from their traditional understanding of morality and family.’ As a result, LGBT persons living in Armenia ‘exist, but not many are out in the open. They are hiding, though the general attitude is not negative; they are just seen to be ill people who are unfortunate to be born like that.’

Legislation

91. A general equality clause is included in Article 14.1 of the Armenian Constitution, prohibiting discrimination on grounds of, among other things, gender and ‘other personal or social circumstances’. This clause mentions neither the ground of sexual orientation nor that of gender identity. As indicated in the section of this report on civil and administrative legislation, Armenia has no specific antidiscrimination act. However, the authorities have pointed out that, in accordance with Article 15.4 of the Judicial Code, it is possible to refer to the case law of the European Court of Human Rights in proceedings before national courts. Therefore, in principle, persons discriminated against on grounds of sexual orientation or gender identity could use this possibility before national courts. However, ECRI understands that, as was the case for hate speech (see § 46), general antidiscrimination standards have not been applied so far to LGBT persons in court proceedings, and the authorities have not provided ECRI with references to relevant case law in this respect. Moreover, since the burden of proof lies with the victim and there exists neither a legal definition of discrimination in Armenian law nor an adequate mechanism for investigating discrimination complaints, it remains difficult to prove discrimination cases on the grounds of sexual orientation or gender identity. Furthermore, ECRI reiterates that the Criminal Code does not refer to sexual orientation and gender identity as characteristics of the victims of racist acts that are classified as criminal offences (see § 2). Similarly, these grounds are not specified in Article 63 of the Criminal Code stipulating that, for any offence not referred to in relevant specific national law provisions, a racist motivation shall be considered an aggravating circumstance (see § 7 above). In this respect, it refers here to its recommendations in § 26.”

3. Statement by ECRI

61. ECRI published a statement on 7 June 2012 about the events giving rise to the present application. The relevant statement reads as follows:

“[ECRI] wishes to express concern about recent events in Armenia, involving leading political figures openly condoning homophobic violence.

Setting a club on fire was characterised by a high-ranking State official as a rebellion against homosexuals, which was completely right and justified. And one of the persons arrested by the police in connection with the attack was bailed out by two members of parliament, who appeared to provide support for the alleged perpetrators in, *inter alia*, declarations made to the press.

ECRI draws attention to the destructive consequences that such statements – and the various manifestations of hatred they have encouraged – are likely to have for the peaceful and tolerant society it has always tried to foster in Armenia and all other Council of Europe member States.

In ECRI's view, events of this nature create a dangerous sense of impunity which undermines, in a fundamental manner, overall respect for human rights. ECRI, therefore, calls on the Armenian authorities to investigate fully the underlying criminal acts with a view to establishing, *inter alia*, the motives of the alleged perpetrators. It also calls urgently on all Armenian political parties to distance themselves from such extreme forms of expression, which are clearly incompatible with the values that ECRI has always promoted."

B. The United Nations Human Rights Committee

62. The relevant parts of the Concluding Observations adopted by the Human Rights Committee at its 105th session, 9-27 July 2012, following consideration of the report presented by Armenia under Article 40 of the International Covenant on Civil and Political Rights read as follows:

"6. The Committee is concerned about the lack of comprehensive legislation on discrimination. It is also concerned about violence against racial and religious minorities, including by civil servants and high-level representatives of the executive power, and about the failure on the part of the police and judicial authorities to investigate, prosecute and punish hate crimes ...

The State party should ensure that its definition of discrimination covers all forms of discrimination as set out in the Covenant (race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status). Further, the State party should combat violence and incitement to racial and religious hatred, provide proper protection to minorities, and ensure adequate investigation and prosecution of such cases ...

10. The Committee is concerned at the discrimination and violence suffered by lesbian, gay, bisexual and transgender (LGBT) persons and rejects all violations of their human rights on the basis of their sexual orientation or gender identity (arts. 3, 6, 7 and 26).

The State party should state clearly and officially that it does not tolerate any form of social stigmatization of homosexuality, bisexuality or transexuality, or harassment of, or discrimination or violence against persons because of their sexual orientation or gender identity. The State party should prohibit discrimination based on sexual orientation and gender identity and provide effective protection to LGBT persons."

C. Amnesty International

63. In its statement of 18 May 2012, Amnesty International made the following comments:

"... On 8 May, self-described 'fascists' were caught on tape by a security camera as they threw Molotov cocktails through the windows of a gay-friendly bar in downtown Yerevan. Police reportedly arrived at the scene 12 hours later to investigate the arson attack. Two young men were arrested as part of the investigation, but were bailed shortly afterwards by two opposition parliamentarians from the nationalist Armenian Revolutionary Federation – Dashnaktsutyun Party (ARF), who condoned the attack, saying it was in line with 'the context of societal and national ideology'. ARF leaders have distanced themselves from the bailout, saying that the parliamentarians acted in their personal capacity, but they have fallen short of publicly calling on their colleagues

to apologize for supporting the alleged hate crime. [E.S.], spokesperson for Armenia's ruling Republican Party and Parliament Vice Speaker told *Hayots Ashkharh* newspaper Thursday that, 'As an Armenian citizen and member of [the ruling] national-conservative party, I find the rebellion of the two young Armenian people against the homosexuals ... completely right and justified ... Those human rights defenders, who are trying to earn cheap dividends from this incident, I urge them first and foremost to protect the national and universal values.' Amnesty International believes this type of official discourse is dangerous, fuels discrimination and undermines the role of human rights defenders ..."

D. The International Lesbian and Gay Association (ILGA) on the situation of the LGBT community in Armenia

64. In its report on the situation of the LGBT community in Armenia published in 2009, the ILGA made the following comments:

"In principle, LGBT people have the same right to legal protection under the Constitution as all Armenian citizens. However, in practice LGBT people do not for the most part make use of this protection, as there is no guarantee that their rights will be upheld either in courts or in police stations. Numerous human rights reports and testimonies given to ILGA-Europe bear witness to the deeply negative, discriminatory attitudes towards homosexuals in law-enforcement bodies. They show that some LGBT people (mostly gay men and MtF transgender persons) who have been brought to police departments have been subject to torture, arbitrary detention and blackmail.

...

The survey carried out by We For Civil Equality breaks down the types of harassment, violence and human rights abuses directed specifically at lesbian or bisexual women ...: 61% of those surveyed had experienced verbal harassment because of their sexual orientation, 31% were threatened with violence and 1.5% had been assaulted or wounded with a weapon, 37% had personal property damaged or destroyed and 13% had objects thrown at them for this reason. Further, 70% of these women were spat at, while 24% were punched, hit, kicked or beaten because of their sexual orientation, and 12% testified to being excluded or deliberately ignored. As regards sexual assault, 12% recorded that this had happened to them, 20% said they had been sexually harassed and 1.5% had been raped."

THE LAW

I. JOINDER OF THE APPLICATIONS

65. Having regard to the similar subject matter of the applications, the Court finds it appropriate to examine them jointly in a single judgment (Rule 42 § 1 of the Rules of Court).

II. ALLEGED VIOLATION OF ARTICLES 3 AND 8 OF THE CONVENTION TAKEN ALONE AND IN CONJUNCTION WITH ARTICLE 14

66. The applicant complained under Articles 3, 8 and 14 of the Convention about the State authorities' failure to protect her from attacks and abuse by private individuals motivated by prejudice towards homosexuals and to investigate effectively the arson attack of 8 May 2012 and the subsequent events, including the abuse and humiliation to which she had been subjected, by establishing, in particular, the discriminatory motive of the perpetrators. The applicant further complained, under the same provisions, about the lack of an adequate legislative framework to combat hate crimes directed against the LGBT minority. The Articles relied on by the applicant read as follows:

Article 3

“No one shall be subjected to torture or to inhuman or degrading treatment or punishment.”

Article 8

“1. Everyone has the right to respect for his private and family life ...

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.”

Article 14

“The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as ... other status.”

A. Admissibility

67. The Court notes that these complaints are neither manifestly ill-founded nor inadmissible on any other grounds listed in Article 35 of the Convention. They must therefore be declared admissible.

B. Merits

1. The parties' submissions

(a) The applicant

68. The applicant claimed that the homophobic arson attack of 8 May 2012 and the subsequent hate-driven mobbing campaign, including physical attacks, slurs and threats by groups of individuals as well as the public hate

speech by high-ranking officials and the homophobic online abuse, all of which had targeted her for her sexual orientation and LGBT activism, taken separately and together, constituted inhuman treatment in breach of Article 3 of the Convention.

69. The applicant submitted that the firebombing of her business had been intended to seriously intimidate her and that she had been psychologically traumatised by it. She had experienced anguish related to the impact the crime had had on her business as a communal project. In addition, she had lost her source of income. The action had been intended, and had succeeded, in harming the LGBT community by violently depriving them of their safe space – a social centre which provided an environment for free and shared self-expression. The impact of that crime had been further exacerbated by the homophobic comments of the police officers, the aggressive homophobic campaign, including online, targeting her and her social enterprise, the attacks carried out on 10, 15, 17 and 21 May 2012 (see paragraphs 29, 34-35 and 40 above) and public hate speech by high-ranking parliamentarians and other politicians who had glorified her aggressors. The rampant public and social-media campaign against her had had a detrimental effect on her social and personal relationships and her community-oriented business, forcing her to self-isolate to the point where she had been forced to leave the country. However, with no opportunity to continue her LGBT activism in exile, she had been deprived of her cause and her social career and therefore of a sense of meaningful pursuit which had seriously affected her mental health.

70. The applicant further submitted that the authorities had failed to put in place an adequate legislative framework allowing the establishment of the hate motive behind the arson attack of 8 May 2012, to investigate or to punish those responsible, or to stop, investigate or prevent the subsequent continuous homophobic attacks on her place of business and the threats and harassment against her person, including online. Moreover, despite the hate motive being overt, the authorities had failed to properly address it. The applicant contended that the credibility of the criminal investigation had been fundamentally undermined from the outset by the assertion of the police that the perpetrators had been justified in their motive.

(b) The Government

71. The Government submitted that the absence of a proper legal framework for providing protection to the members of the LGBT community from hate-driven crime had hindered the investigation process and limited the means for the law-enforcement authorities to conduct a proper investigation into the allegations of a hate crime. At the same time, the investigation authorities had taken all the necessary measures to effectively investigate the arson attack and hold the perpetrators responsible. In that respect the Government pointed out a number of investigative measures that had been undertaken, including questioning witnesses for the purpose of examining the

link between the arson attack and a fascist group, examining the crime scene and ordering forensic examinations. The perpetrators had eventually been charged and convicted. The Government also submitted that operational investigative measures had been undertaken by the investigative authority to investigate the harassment of the applicant online.

72. The Government further submitted that the applicant had not been treated any differently from other victims of similar crimes and submitted several examples of domestic judgments in which conditional sentences had been handed down to persons convicted of arson. The bodies conducting the investigation had not shown any bias towards the applicant based on her sexual orientation and she had failed to demonstrate that the shortcomings in the investigation had been conditioned by her sexual orientation.

73. Lastly, the Government pointed out the fact that in legislative amendments of 15 April 2020, the Criminal Code had been supplemented by Article 226.2, which penalised hate speech (see paragraph 58 above).

(c) The third-party interveners

74. The third-party interveners, represented by ILGA-Europe, submitted that in the context of discrimination based on one's real or imputed sexual orientation or gender identity or expression, acts that in isolation would not have reached the minimum level of severity to fall within the scope of Article 3 of the Convention may qualify as ill-treatment within the meaning of that Article. They pointed out that the Convention organs had already acknowledged that discriminatory treatment could, in certain circumstances, of itself amount to "degrading treatment" within the meaning of Article 3 of the Convention (they referred to *East African Asians v. the United Kingdom*, nos. 4403/70 and 30 others, Commission's report of 14 December 1973, Decisions and Reports 78, pp. 57 and 62, §§ 196 and 207; *Cyprus v. Turkey* [GC], no. 25781/94, §§ 309-10, ECHR 2001-IV; and *Moldovan and Others v. Romania (no. 2)*, nos. 41138/98 and 64320/01, § 111, ECHR 2005-VII (extracts)). The third-party interveners invited the Court to consider those principles when assessing prejudicial ill-treatment perpetrated against LGBT persons.

75. The third-party interveners stressed the importance of effectively prosecuting hate crimes motivated by sexual orientation and/or gender identity by, in particular, examining whether the authorities had taken all the reasonable steps necessary to unmask the role of possible homophobic motives for the acts of violence (see *Identoba and Others v. Georgia*, no. 73235/12, § 77, 12 May 2015, and *M.C. and A.C. v. Romania*, no. 12060/12, § 124, 12 April 2016).

76. Referring mainly to the reports of ECRI in respect of Armenia, the third-party interveners submitted that there was no legislation in Armenia that explicitly prohibited discrimination on the grounds of sexual orientation or gender identity or protected against violence motivated by homophobia

and/or transphobia. In addition to this legislative gap, various reports of leading international human rights organisations had emphasised that the LGBT community in Armenia faced widespread hostile social attitudes and routine discrimination. As a result, access to adequate legal protection for LGBT people continued to be unavailable as a matter of practice.

2. *The Court's assessment*

(a) **Scope of the case**

77. The authorities' duty to prevent hate-motivated violence on the part of private individuals, as well as to investigate the existence of a possible link between a discriminatory motive and the act of violence (whether physical or verbal) can fall under the positive obligations enshrined in Articles 3 and 8 of the Convention, but may also be seen to form part of the authorities' positive responsibilities under Article 14 of the Convention to secure the fundamental values protected by Articles 3 and 8 without discrimination. Owing to the interplay of the above provisions, issues such as those in the present case may indeed fall to be examined under one of these two provisions only – with no separate issue arising under any of the others – or may require simultaneous examination under several of these Articles. This is a question to be decided in each case in the light of its facts and the nature of the allegations made (see *M.C. and A.C. v. Romania*, cited above, § 105, with further references).

78. Having regard to the particular circumstances of the present case, notably the arson attack of 8 May 2012 seen in the context of the subsequent hate-driven campaign directed against the applicant which led the police to put in place protection measures (see, in particular, paragraph 45 above), and the applicant's allegations that the homophobic motive of the perpetrators of those attacks was not addressed at all by the authorities, the Court considers that the most appropriate way to proceed would be to subject the applicant's complaints to a simultaneous dual examination under Article 3 of the Convention taken in conjunction with Article 14 (see *Identoba and Others*, cited above, § 64, and *Women's Initiatives Supporting Group and Others v. Georgia*, nos. 73204/13 and 74959/13, § 57, 16 December 2021) and, if need be, also under Article 8 of the Convention taken in conjunction with Article 14 (see, *mutatis mutandis*, *M.C. and A.C. v. Romania*, cited above, § 106).

(b) **General principles**

79. The Court reiterates that ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3. The assessment of this minimum is relative: it depends on all the circumstances of the case, such as the nature and context of the treatment, its duration, its physical and mental effects and, in some instances, the sex, age and state of health of the victim (see, for example, *Bouyid v. Belgium* [GC], no. 23380/09, § 86, ECHR 2015,

and *Costello-Roberts v. the United Kingdom*, 25 March 1993, § 30, Series A no. 247-C).

80. In general, ill-treatment that attains the minimum level of severity to fall within the scope of Article 3 usually involves actual bodily injury or intense physical or mental suffering. However, even in the absence of these aspects, where treatment humiliates or debases an individual, either in the eyes of others or in those of the victim, showing a lack of respect for or diminishing his or her human dignity, or arouses feelings of fear, anguish or inferiority capable of breaking an individual's moral and physical resistance, it may be characterised as degrading and also fall within the prohibition set forth in Article 3 (see *Women's Initiatives Supporting Group and Others*, cited above, § 59, with further references).

81. Furthermore, discriminatory treatment can in principle amount to degrading treatment within the meaning of Article 3 where it attains a level of severity such as to constitute an affront to human dignity. More specifically, treatment which is grounded upon a predisposed bias on the part of a heterosexual majority against a homosexual minority may, in principle, fall within the scope of Article 3. Discriminatory remarks and insults must in any event be considered as an aggravating factor when considering a given instance of ill-treatment in the light of Article 3 (see *Identoba and Others*, cited above, § 65, with further references). This is particularly true for violent hate crime. In this connection it should be remembered that not only acts based solely on a victim's characteristics can be classified as hate crimes. For the Court, perpetrators may have mixed motives, being influenced by situational factors equally or more than by their biased attitude towards the group the victim belongs to (see, as a recent authority, *Sabalić v. Croatia*, no. 50231/13, §§ 65-66, 14 January 2021, with further references).

82. The obligation of the High Contracting Parties under Article 1 of the Convention to secure to everyone within their jurisdiction the rights and freedoms defined in the Convention, taken together with Article 3, requires States to take measures designed to ensure that individuals within their jurisdiction are not subjected to ill-treatment, including ill-treatment administered by private individuals (see *M.C. v. Bulgaria*, no. 39272/98, § 149, ECHR 2003-XII, and *O'Keeffe v. Ireland [GC]*, no. 35810/09, § 144, ECHR 2014 (extracts)).

83. The Court reiterates that, as with Article 2 of the Convention, Article 3 may, in certain circumstances, require a State to take operational measures to protect victims, or potential victims, of ill-treatment. This positive obligation is to be interpreted in such a way as not to impose an impossible or disproportionate burden on the authorities, bearing in mind the unpredictability of human conduct and the operational choices which must be made in terms of priorities and resources. Accordingly, not every risk of ill-treatment can entail for the authorities a Convention requirement to take measures to prevent that risk from materialising. However, the required

measures should, at least, provide effective protection in particular of children and other vulnerable persons and should include reasonable steps to prevent ill-treatment of which the authorities had or ought to have had knowledge. Therefore, for a positive obligation to arise it must be established that the authorities knew or ought to have known at the time of the existence of a real and immediate risk of ill-treatment of an identified individual from the criminal acts of a third party and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk (see *X and Others v. Bulgaria* [GC], no. 22457/16, §§ 181-83, 2 February 2021).

Furthermore, the absence of any direct State responsibility for acts of violence of such severity as to engage Article 3 of the Convention does not absolve the State from all obligations under this provision. In such cases, Article 3 requires that the authorities conduct an effective official investigation into the alleged ill-treatment, even if such treatment has been inflicted by private individuals (see *M.C. and A.C. v. Romania*, cited above, § 110).

84. Even though the scope of the State's positive obligations might differ between cases where treatment contrary to Article 3 has been inflicted through the involvement of State agents and cases where violence has been inflicted by private individuals, the requirements regarding an official investigation are similar. For the investigation to be regarded as "effective", it should in principle be capable of leading to the establishment of the facts of the case and to the identification and punishment of those responsible. This is not an obligation as to the results to be achieved but as to the means to be employed. The authorities must have taken the steps reasonably available to them to secure the evidence concerning the incident, including, *inter alia*, eyewitness testimony, forensic evidence, and so on. Any deficiency in the investigation which undermines its ability to establish the cause of injuries or the identity of the persons responsible will risk falling foul of this standard, and a requirement of promptness and reasonable expedition is implicit in this context. A prompt response by the authorities in investigating allegations of ill-treatment may generally be regarded as essential in maintaining public confidence in their maintenance of the rule of law and in preventing any appearance of collusion in or tolerance of unlawful acts. Tolerance by the authorities towards such acts cannot but undermine public confidence in the principle of lawfulness and the State's maintenance of the rule of law (*ibid.*, § 111, with further references).

85. In addition, when investigating violent incidents, such as ill-treatment, State authorities have a duty to take all reasonable steps to unmask possible discriminatory motives. The respondent State's obligation to investigate possible discriminatory motives for a violent act is an obligation to use best endeavours and is therefore not absolute. The authorities must do whatever is reasonable in the circumstances to collect and secure evidence, explore all

practical means of discovering the truth and deliver fully reasoned, impartial and objective decisions, without omitting suspicious facts that may be indicative of violence fuelled by, for instance, racial or religious intolerance, or violence motivated by gender-based discrimination. Accordingly, where there is a suspicion that discriminatory attitudes led to a violent act, it is particularly important that the official investigation be pursued with vigour and impartiality, having regard to the need to continuously reassert society's condemnation of such acts and maintain the confidence of minority groups in the ability of the authorities to protect them from the discriminatory violence. Compliance with the State's positive obligations requires that the domestic legal system demonstrate its capacity to enforce the criminal law against the perpetrators of such violent acts (see *Sabalić*, § 95, and *Women's Initiatives Supporting Group and Others*, § 63, both cited above).

86. Lastly, the Court emphasises that treating violence and brutality with discriminatory intent, irrespective of whether they are perpetrated by State agents or private individuals, on an equal footing with cases that have no such overtones would be to turn a blind eye to the specific nature of acts that are particularly destructive of fundamental rights. A failure to make a distinction in the way situations that are essentially different are handled may constitute unjustified treatment irreconcilable with Article 14 of the Convention (see *Begheluri and Others v. Georgia*, no. 28490/02, §§ 173 and 179, 7 October 2014, and *Aghdgomelashvili and Japaridze v. Georgia*, no. 7224/11, § 44, 8 October 2020).

(c) Application of those principles to the present case

87. The Court observes that the applicant's complaint (see paragraph 70 above) is twofold: on the one hand, she argued that the authorities had failed to conduct an effective investigation into the arson attack which would have taken into account its homophobic motive; on the other hand, she argued that the authorities had failed to protect her from and investigate the subsequent homophobic attacks on the club and the threats and harassment against her person, including online. As a first step, the Court will assess whether the threshold of severity of the alleged ill-treatment has been met and then, as a second step, it will proceed to the examination of those aspects separately.

(i) Threshold of severity

88. The Court notes at the outset that the applicant did not suffer actual physical injury at the hands of the perpetrators of the arson attack of 8 May 2012 or any other individual engaged in the subsequent events. Although the applicant briefly mentioned in her submissions that she had also been the subject of physical attacks (see paragraph 68 above), there is nothing in the material before the Court to indicate that she sustained any physical injury during the events in question.

89. The Court reiterates, however, that treatment which humiliates or debases an individual, either in the eyes of others or in those of the victim, showing a lack of respect for or diminishing his or her human dignity, or arouses feelings of fear, anguish or inferiority capable of breaking an individual's moral and physical resistance, may be characterised as degrading and also fall within the prohibition set forth in Article 3 of the Convention (see the case-law cited in paragraph 80 above).

90. The Court has already found in several other cases concerning allegations of ill-treatment motivated by homophobia where the applicants had not suffered actual physical injuries that the threshold of Article 3 of the Convention had been attained (see, for example, *Aghdgomelashvili and Japaridze*, cited above, §§ 47-49, concerning abusive police conduct, including, *inter alia*, threats to use physical force, hate speech and insults, during the search of the premises of an LGBT NGO, including unjustified strip-searches of the applicants, motivated by homophobic hatred, and *Women's Initiatives Supporting Group and Others*, cited above, §§ 60-61, concerning rallies to promote LGBT rights in which the individual applicants had become the target of vicious hate speech and aggressive behaviour during clashes with counter-demonstrators).

91. Indeed, the applicant in the present case became the target of a sustained and aggressive homophobic campaign, including the arson attack on the club, as well as the subsequent death threats, physical mobbing and hate speech, including online, which eventually led to the applicant permanently leaving Armenia, the country where she had lived her entire life and had her family and social ties (see paragraphs 12, 29, 31-32, 34-35, 40, 42 and 46 above), facts which were not disputed by the Government.

92. Bearing in mind the various reports on the overall sentiment towards the LGBT community in Armenia (see paragraphs 60, 62 and 64 above), the Court acknowledges that the community finds itself in a precarious position. It is when assessed against that background that the discriminatory nature of the events which are the subject of the present application and the level of vulnerability of the applicant, who publicly positioned herself with the target group of sexual prejudice (see paragraphs 61 and 63 above), are particularly apparent (see, *mutatis mutandis*, *Identoba and Others*, cited above, § 68).

93. In the light of the evidence before the Court, including the reports on the events in question (see paragraphs 61 and 63 above), it is clear that the behaviour of the perpetrators of the arson attack and the persons involved in the applicant's subsequent harassment was premeditated and motivated by homophobic bias. Furthermore, that harassment was aimed at deterring the applicant from reopening the club, which was a place where members of the LGBT community could socialise openly (see paragraphs 29 and 36 above).

94. The Court notes that the club in general and the applicant in particular became the target of continued aggression lasting more than two weeks at the very least, including attacks almost every day after the arson attack, verbal

abuse and threats, which were openly discriminatory and performed in the context of actions that had intolerant overtones (see, for example, paragraph 30 above). Furthermore, at one point the applicant had to physically confront unknown men who directly threatened and seriously humiliated her (see, in particular, paragraph 35 above). In the context of the overall negative sentiment towards the LGBT community (see paragraph 92 above) and the club having been the subject of a violent hate crime only several days before (see paragraph 12 above), it is clear that the applicant could have perceived the threats of violence very seriously. The Court observes in this connection that the police themselves acknowledged that there existed a real risk to the applicant's physical safety at that point (see paragraph 45 above). The Court reiterates in this connection that a threat of conduct prohibited by Article 3, provided it is sufficiently real and immediate, may fall foul of that provision (see, for instance, *Abu Zubaydah v. Lithuania*, no. 46454/11, § 631, 31 May 2018).

95. The Court further notes that the aim of the attacks, as noted above (see paragraph 93), was evidently to frighten the applicant so that she would desist from her public expression of support for the LGBT community, including her community-oriented activism by running the club as a communal project. At the same time, those attacks resulted in the applicant being deprived of her livelihood as a result of the loss of her source of income from her destroyed business. The applicant's emotional distress must have been further exacerbated by the fact that the police, being aware of the ongoing homophobic abuse against her, including serious damage to her business property and of the existence of a real threat to her and her associates' physical safety (see paragraphs 45 and 94 above), failed to react properly and in a timely manner and only put in place protection measures in respect of her and her closest relations more than a week after she had requested protection for the first time and those measures were discontinued only five days later without there being any indication that the applicant and her close relations were no longer at risk of ill-treatment (see paragraphs 36 and 44 above and paragraphs 110-113 below).

96. Against this background, the Court considers that the question whether the applicant sustained physical injury or not is not decisive (see *Women's Initiatives Supporting Group and Others*, cited above, § 60).

97. On the whole, considering the background of the continuous harassment of the applicant described above and the prevailing negative attitude towards the members of the LGBT community in general, the Court finds that the situation in which the applicant found herself as a result of the arson attack and the subsequent attacks on her person motivated by homophobic hatred must necessarily have aroused in her feelings of fear, anguish and insecurity which were not compatible with respect for her human dignity and, therefore, reached the threshold of severity within the meaning of Article 3 of the Convention taken in conjunction with Article 14.

(ii) *As regards the alleged ineffective investigation into the arson attack*

98. The Court observes that the complaint concerning the arson attack was lodged on 9 May 2012 (see paragraph 18 above) and the police instituted criminal proceedings on 11 May 2012 (see paragraph 22 above). The investigation was completed in one year and the overall trial lasted about seven months (see paragraphs 47 and 54 above). Thus, the authorities can be said to have carried out a prompt and reasonably expeditious investigation into the arson attack at the relevant time.

99. That being said, the Court observes that upon arrival at the scene in the afternoon of 8 May 2012, the police did not carry out any investigative measures. That is, they did not question any witnesses or examine the scene (see paragraph 14 above). According to the Government, the police examined the scene of the arson attack on 10 May 2012. However, they failed to submit any documentary evidence in that respect.

100. The Court further observes that it was due to the efforts of the employees of a nearby business and of the applicant and her associates that one of the perpetrators was identified on the security camera footage (see paragraph 15 above), which the police officers took with them, again without questioning anyone or undertaking any other investigative measures (see paragraph 16 above). Furthermore, it was once more due to the efforts of the applicant and her associates that a meeting was set up with A.K. and H.K., during which the police apprehended them, having been alerted about the place of the meeting by the applicant and N.D. (see paragraph 17 above).

101. Hence, by the time the applicant lodged a formal complaint concerning the arson attack and the police instituted criminal proceedings (see paragraphs 18 and 22 above), A.K. and H.K. had already been identified by the applicant's associates and had taken full responsibility for the arson attack, also confessing to its homophobic motivation (see paragraph 17 above). Hence, the authorities did not have any difficulty in resolving the case (contrast *M.C. and A.C. v. Romania*, cited above, § 121). At the same time, it remains unclear why G.K. was referred to as an "unidentified person" in the bill of indictment (see paragraph 47 above), given that he had been clearly identified by A.K. and H.K. in their statements as the third participant of the attack (see paragraphs 19-20 above).

102. Indeed, as opposed to similar cases where the Court has emphasised the necessity of conducting a meaningful inquiry into the possibility that discriminatory motives lay behind the abuse (see, for example, *Identoba and Others*, cited above, § 77, with further references; *Association ACCEPT and Others v. Romania*, no. 19237/16, § 123, 1 June 2021; and *Women's Initiatives Supporting Group and Others*, cited above, § 63), in the present case the hate motive was overt from the very outset, even before the police launched an investigation. Nonetheless, the authorities described the crime merely as "intentional property damage" and brought charges against the perpetrators under Article 185 § 3 of the Criminal Code (see paragraphs 27

and 57 above), despite having at their disposal unequivocal and direct evidence that setting the club on fire had been motivated by the applicant's sexual orientation and the bias towards the LGBT community in general, facts which were moreover expressly acknowledged in the bill of indictment (see paragraph 47 above).

103. According to the Court's case-law, the existence of such evidence mandated for an effective application of domestic criminal-law mechanisms capable of elucidating the hate motive with homophobic overtones behind the violent incident and of identifying and, if appropriate, adequately punishing those responsible (see paragraph 85 above). The Court observes, however, that, as accepted by the Government, no such mechanisms existed in domestic criminal law (see paragraph 71 above). In particular, the domestic criminal legislation does not provide that discrimination on the grounds of sexual orientation and gender identity should be treated as a bias motive and an aggravating circumstance in the commission of an offence (see Article 63 of the Criminal Code, cited in paragraph 57 above; points 2 and 25 of the ECRI report, cited in paragraph 60 above; and contrast *Identoba and Others*, cited above, § 77). Furthermore, Article 226 of the Criminal Code, which criminalises incitement to hatred (see paragraph 57 above), does not refer to sexual orientation and gender identity. As a result, the attack on the club, which had been committed with a clearly established homophobic hate motive, was addressed by the investigative authorities and subsequently the courts as an ordinary crime of arson (see paragraphs 47, 50 and 52 above), effectively ignoring the hate-based nature of the offence in terms of legal consequences. That is, while the arson attack was formally investigated and the perpetrators convicted, the legal assessment of the crime took no account of the hate motive of the arson attack, effectively rendering this fundamental aspect of the crime invisible and of no criminal significance.

104. The Court notes that it has been emphasised by ECRI that the inclusion of sexual orientation or gender identity in Article 226 of the Criminal Code along with the addition of a provision in the Criminal Code stipulating that homo/transphobic motivation constitutes an aggravating circumstance for any ordinary offence are essential to ensure an appropriate level of protection for LGBT persons. This recommendation, however, has not been followed. The Court further notes that the authorities' attention has also been drawn to the lack of comprehensive legislation on discrimination in general, including the lack of a legal definition of discrimination or an adequate mechanism for investigating discrimination complaints (see points 25 and 91 of the ECRI report, cited in paragraph 60 above; see also point 6 of the Concluding Observations of the UN Human Rights Committee, cited in paragraph 62 above).

105. The Court is of the view that, given the clear hate motive behind the arson attack on the club and the precariousness of the situation of the LGBT community in the respondent State (see paragraphs 64 and 62 above; point 90

of the ECRI report, cited in paragraph 60 above; and point 10 of the Concluding Observations of the UN Human Rights Committee, cited in paragraph 62 above), it was essential for the relevant domestic authorities to adequately address the issue of discrimination motivating the arson attack on the club – a safe space where LGBT persons had the opportunity to socialise openly (see *M.C. and A.C. v. Romania*, cited above, § 124).

106. The Court considers that without such a rigorous approach on the part of the law-enforcement authorities, prejudice-motivated crimes will inevitably be treated on an equal footing with cases involving no such overtones, and the resultant indifference can be tantamount to official acquiescence in, or even connivance with, hate crimes (see *Identoba and Others*, § 77, and *Association ACCEPT and Others*, § 124, both cited above). Moreover, a failure to make a distinction in the way situations that are essentially different are handled may constitute unjustified treatment irreconcilable with Article 14 of the Convention (see paragraph 85 above, and, *mutatis mutandis*, *Begheluri and Others*, cited above, § 173).

107. Lastly, the applicant contended that the credibility of the criminal investigation was fundamentally undermined from the outset as the police had openly asserted that the perpetrators had been justified in their motive (see paragraph 70 above). The Court notes that in her application the applicant submitted in rather vague terms that the police officers “had made it clear to her” that they supported A.K. and H.K. in their actions while in her observations she claimed that the police officers had “condemned her activities” and “commented that as if it wasn’t enough that [she] was a homosexual, [she had also gone] to Turkey and performed music there” (see paragraph 18 above). The Government contested the applicant’s submissions in this respect. While it is not possible for the Court to determine whether the police officers who registered the applicant’s criminal complaint did indeed make the comments subsequently asserted by the applicant, it notes that the arson attack on the club was publicly condoned by leading political figures at the relevant time, including by a high-ranking official representing the then ruling political party (see paragraphs 33, 37, 39, 61 and 63 above). Nevertheless, considering the previously-identified absence of legal possibilities for the law-enforcement authorities to properly evaluate the homophobic motive of the arson attack under the domestic law (see paragraphs 102-104 above), there is no basis for the Court to find that it was a discriminatory state of mind that was at the core of the failure on the part of the relevant public authorities to discharge their positive obligation to investigate the arson attack on the club in an effective manner (compare *Beizaras and Levickas v. Lithuania*, no. 41288/15, § 129, 14 January 2020).

108. The foregoing considerations are sufficient to enable the Court to conclude that the authorities failed to discharge their positive obligation to investigate in an effective manner whether the arson attack on the club which was motivated by the applicant’s sexual orientation constituted a criminal

offence committed with a homophobic motive (see, *mutatis mutandis*, *Association ACCEPT and Others*, cited above, § 126).

(iii) *As regards the authorities' reaction and the follow-up given to the applicant's complaints concerning the post-arson attacks and hate speech*

(α) Post-arson attacks

109. The Court observes that in the days following the arson attack, the club in general and the applicant personally became the target of continued aggression by a number of individuals. Their actions, including verbal abuse and threats, were mostly directed specifically against the applicant. In particular, on 10 May 2012 several individuals, who had visited the club and acted aggressively, threatened the applicant with a further attack should she try to reopen the club. The Court notes that the Government did not dispute the applicant's account that the police arrived following a considerable delay and took no investigative action (see paragraph 29 above). Subsequently, on 17 May 2012 three men visited the club and broke furnishings. They also shouted abuse, threatened the applicant and spat at her (see paragraphs 35 above). A further attack took place on 21 May 2012 when a group of around fifty people entered the club and vandalised it by, in particular, breaking furniture and leaving threatening messages and swastika symbols. In the applicant's submission, the police officers, who arrived in response to her telephone call, looked around the club and left without undertaking any measures (see paragraphs 40-41 above). The Government did not dispute this.

110. The Court further observes that following the incident of 17 May 2012, the applicant lodged a complaint with the chief of police on the same date asking that the assailants be identified. She provided a detailed account of the incident and relevant personal details of the assailants. She also requested protection measures in view of the continuing nature of the assaults against her and the club. The applicant submitted a similar request the next day (see paragraphs 36 and 38 above).

111. The Court also observes that other violent acts took place in relation to which the applicant did not specifically seek the assistance of the police or lodge separate complaints. In particular, groups of people attacked the club in the aftermath of the arson attack, causing material damage and threatening the applicant (see paragraph 30 above). Furthermore, on 15 May 2012 a group of men attacked the club. They broke fixtures and left threatening messages on the walls containing swastika symbols and homophobic comments (see paragraph 34 above).

112. The Court notes that the police put in place protection measures in respect of the applicant and her closest relations as late as on 25 May 2012, whereas the applicant had requested protection already on 17 May 2012 and reiterated her request on 18 May 2012 (see paragraphs 36, 38 and 44 above)

in view of the numerous acts of violence during the preceding days (see paragraphs 29-30 and 34 above).

113. The Court further notes that the protection measures in respect of the applicant and her relations were discontinued after five days (see paragraph 44 above). However, the grounds for lifting the measures remain unclear. In the Court's view, considering that the police had decided to put in place protection measures because, according to its assessment, there existed "a real danger threatening the applicant's life, health and property" (see paragraph 45 above), the decision to lift them necessitated a careful reassessment of the persistence of the very same risks. However, the Government did not explain the reasons behind the authorities' decision to discontinue the measures.

114. For these reasons, the Court concludes that the authorities failed to provide adequate protection to the applicant from the bias-motivated attacks by private individuals following the arson attack of 8 May 2012 (see, *mutatis mutandis*, *Identoba and Others*, cited above, § 74).

115. Lastly, there is nothing in the material before the Court to indicate that there was any follow-up to the applicant's complaints of 17 and 21 May 2012 (see paragraphs 36, 41 and 110 above). According to the police, the incidents of 15, 17 and 21 May 2012 were to be investigated within the framework of the criminal proceedings instituted into the arson attack of 8 May 2012 (see paragraph 45 above). However, neither the indictment nor the subsequent judicial decisions (see paragraphs 47, 50 and 52 above) contained any mention of those incidents, let alone of the investigative measures, if any, undertaken in relation to them. In addition, the Court notes that in any event the law-enforcement authorities would not have had any legal possibility to properly address the violent incidents in question by, in particular, subjecting their homophobic motivation to a proper evaluation under domestic law (see paragraphs 102-104 above), in line with the requirements of the Convention.

116. Accordingly, the Court finds that the authorities failed to conduct a proper investigation of the applicant's allegations of abuse motivated by homophobia (see, *mutatis mutandis*, *Association ACCEPT and Others*, cited above, §§ 123-26).

(β) Hate speech

117. The Court observes that throughout the period following the arson attack on the club on 8 May 2012, the applicant was targeted on social-media platforms (mainly Facebook and YouTube) in highly abusive online speech (see paragraphs 31-32 and 42 above). It notes that the abuse directed against the applicant on social media included numerous direct calls for violence, including that she "should be burnt" or "put in an electric chair", that "[the perpetrators of the arson] should have put [the applicant] inside and then set the [club on] fire" and so on (see, in particular, paragraph 32 above).

118. The Court further observes that the applicant submitted the evidence in her possession, including screenshots from the relevant web pages which contained homophobic comments, to the police (see paragraph 43 above). However, there is nothing in the material before the Court to suggest that there was any meaningful follow-up on the matter. The Government submitted that “operational investigative measures” were undertaken to investigate the harassment of the applicant online (see paragraph 71 above). However, they failed to provide any details or documents to support that submission.

119. While being careful not to hold that each and every utterance of hate speech must, as such, attract criminal prosecution and criminal sanctions, the Court reiterates its finding that comments that amount to hate speech and incitement to violence, and are thus clearly unlawful on their face, may in principle require the States to take certain positive measures. It has likewise held that inciting hatred does not necessarily entail a call for an act of violence or other criminal acts. Attacks on persons committed by insulting, holding up to ridicule or slandering specific groups of the population can be sufficient for the authorities to favour combating racist speech in the face of freedom of expression exercised in an irresponsible manner (see *Association ACCEPT and Others*, cited above, § 119).

120. The Court has already pointed out that criminal sanctions, including against the individuals responsible for the most serious expressions of hatred, inciting others to violence, could be invoked only as an *ultima ratio* measure. That being so, it has also held that where acts that constitute serious offences are directed against a person’s physical or mental integrity, only efficient criminal-law mechanisms can ensure adequate protection and serve as a deterrent factor. The Court has likewise accepted that criminal-law measures were required with respect to direct verbal assaults and physical threats motivated by discriminatory attitudes (see *Beizaras and Levickas*, cited above, §§ 110-11, with further references). Furthermore, the Court considered that this applied equally to hate speech against persons’ sexual orientation and sexual life. It found in that case that the “undisguised calls [for attacks] on the applicants’ physical and mental integrity ... require[d] protection by the criminal law” (ibid., § 128). In the Court’s view, the hateful comments in the present case contained similarly undisguised calls for violence against the applicant which required protection by criminal law. However, as noted above, no such possibility existed under domestic criminal law (see paragraphs 102-104 above). In addition, having regard to the actual acts of violence, including the arson attack on the club and the subsequent homophobic attacks against the applicant, which had preceded the online verbal abuse, the authorities should have taken the hateful comments posted on social-media platforms all the more seriously. Instead, as noted above, parliamentarians and high-ranking politicians themselves made intolerant statements by publicly endorsing the actions of the perpetrators of the arson

attack (see paragraphs 33, 37 and 39 above; see also paragraphs 61 and 63 above citing the relevant reports of the international bodies).

121. Lastly, the Court takes note of the evolution of domestic law, as pointed out by the Government, which now prohibits hate speech (see paragraph 73 above, and the recently adopted Article 226.2 of the Criminal Code, cited in paragraph 58 above). It observes, however, that sexual orientation and gender identity are still not included in the characteristics of victims of the offence of hate speech despite the recommendations of the relevant international bodies in that respect (see paragraph 104 above).

122. In view of the above, the Court finds that the authorities failed to respond adequately to the homophobic hate speech of which the applicant was a direct target because of her sexual orientation.

(iv) Conclusion

123. Having regard to the findings contained in paragraphs 108, 114, 116 and 122 above, the Court considers it established that the authorities failed to offer adequate protection to the applicant from homophobic attacks and hate speech and to conduct a proper investigation into the hate-motivated ill-treatment against her including the arson attack on the club and the subsequent homophobic attacks.

124. There has accordingly been a violation of Article 3 of the Convention taken in conjunction with Article 14.

125. This conclusion means that the Court need not examine the allegations made under Article 8 of the Convention taken in conjunction with Article 14 (see, *mutatis mutandis*, *M.C. and A.C. v. Romania*, cited above, § 126).

III. ALLEGED VIOLATION OF ARTICLE 13 OF THE CONVENTION

126. The applicant complained that she had had no effective remedy by means of which to raise her complaints before the domestic authorities concerning the alleged violation of her Convention rights, in breach of Article 13 of the Convention taken in conjunction with Articles 3, 8 and 14. Article 13 reads as follows:

“Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity.”

127. The parties presented observations in this respect.

128. Having regard to the facts of the case, the submissions of the parties and its findings relating to Articles 3 and 14 of the Convention (see paragraph 123 above), the Court finds that this complaint is likewise admissible but considers that it has examined the main legal questions raised in the present application and that there is thus no need to give a separate ruling on the

merits of this complaint (see *Centre for Legal Resources on behalf of Valentin Câmpeanu v. Romania* [GC], no. 47848/08, § 156, ECHR 2014, with further references, and, *mutatis mutandis*, *M.C. and A.C. v. Romania*, § 129, cited above).

IV. APPLICATION OF ARTICLE 46 OF THE CONVENTION

129. With reference to Article 46 of the Convention, the applicant requested that general measures be applied which would ensure structural redress. In particular, she requested that the Court order the Government to introduce comprehensive enhanced sentencing provisions under specific offences, as relevant; to amend Article 63 of the Criminal Code to include homophobic motives as an explicit aggravating factor; and to amend Article 226 of the Criminal Code (see paragraph 57 above) to include sexual orientation as a protected ground.

130. The Government did not make any submissions on the matter.

131. The Court reiterates that its judgments are essentially declaratory in nature and, in general, it is primarily for the State concerned to choose the means to be used in its domestic legal order in order to discharge its legal obligation under Article 46 of the Convention, provided that such means are compatible with the conclusions set out in the Court's judgment (see, among other authorities, *Akdivar and Others v. Turkey* (Article 50), 1 April 1998, § 47, *Reports of Judgments and Decisions* 1998-II; *Scozzari and Giunta v. Italy* [GC], nos. 39221/98 and 41963/98, § 249, ECHR 2000-VIII; and *Brumărescu v. Romania* (just satisfaction) [GC], no. 28342/95, § 20, ECHR 2001-I). This discretion as to the manner of execution of a judgment reflects the freedom of choice attached to the primary obligation of the Contracting States under the Convention to secure the rights and freedoms guaranteed (Article 1) (see, *mutatis mutandis*, *Papamichalopoulos and Others v. Greece* (Article 50), 31 October 1995, § 34, Series A no. 330-B).

132. Having regard to the established principles cited above and to the particular circumstances of the case, the Court finds it appropriate to leave it to the Government to choose the means to be used in the domestic legal order in order to discharge their legal obligation under Article 46 of the Convention.

V. APPLICATION OF ARTICLE 41 OF THE CONVENTION

133. Article 41 of the Convention provides:

“If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party.”

A. Damage

134. The applicant claimed 20,000 euros (EUR) in respect of non-pecuniary damage.

135. The Government objected to the applicant's claim, arguing that it was excessive.

136. The Court considers that the applicant has undoubtedly sustained non-pecuniary damage that cannot be compensated for solely by the finding of a violation. Having regard to the nature of the violations found, and making its assessment on an equitable basis, the Court awards the applicant EUR 12,000 in respect of non-pecuniary damage, plus any tax that may be chargeable.

B. Costs and expenses

137. The applicant also claimed EUR 2,000 and 10,725 pounds sterling (GBP) in respect of the legal costs incurred before the Court, and a further GBP 1,086.39, EUR 479 and 84,252 Armenian drams (AMD) for translation and other administrative expenses. Relevant invoices were attached to the claim.

138. The Government argued that the claim was exorbitant. In their view the applicant had employed an excessive number of lawyers and the translation costs were unnecessary considering that the applicant had not been requested by the Court to provide translations of the documents which had already been submitted along with the application.

139. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these were actually and necessarily incurred and are reasonable as to quantum. In the present case, the Court considers that the applicant failed to show that all the costs claimed were necessarily and reasonably incurred. Regard being had to the documents in its possession and the above criteria, the Court awards the sum of EUR 4,500 in respect of costs and expenses in the proceedings before the Court, plus any tax that may be chargeable to the applicant, to be paid into her representatives' bank account in the United Kingdom.

C. Default interest

140. The Court considers it appropriate that the default interest rate should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Decides* to join the applications;
2. *Declares* the applications admissible;
3. *Holds* that there has been a violation of Article 3 of the Convention taken in conjunction with Article 14;
4. *Holds* that it is not necessary to examine the remaining complaints;
5. *Holds*
 - (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts:
 - (i) EUR 12,000 (twelve thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage, to be converted into the currency of the respondent State at the rate applicable at the date of settlement;
 - (ii) EUR 4,500 (four thousand five hundred euros), plus any tax that may be chargeable to the applicant, in respect of costs and expenses, to be paid into the applicant's representatives' bank account in the United Kingdom;
 - (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;
6. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 17 May 2022, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Ilse Freiwirth
Deputy Registrar

Yonko Grozev
President