

IN THE EUROPEAN COURT OF HUMAN RIGHTS

Application No. 39954/09

ALEKSEYEV AND OTHERS

Applicants

- v -

RUSSIA

Respondent

Application No. 3465//17

KRIKKERIK

Applicants

- v -

RUSSIA

Respondent

**WRITTEN COMMENTS BY THE EUROPEAN REGION OF THE
INTERNATIONAL LESBIAN, GAY, BISEXUAL, TRANS AND INTERSEX
ASSOCIATION (ILGA-EUROPE)**

11 April 2018
By Mail and Fax

A. INTRODUCTION

1. These written comments are submitted by the European Region of the International Lesbian, Gay, Bisexual, Trans and Intersex Association (ILGA-Europe), hereinafter “the intervener”¹.
2. As set out in the application to intervene dated 5 February 2018, these comments focus on
 - a. the humiliating and stigmatising effect of homophobic and transphobic statements on the members of LGBTI community under Articles 8 and 14 of the Convention; and
 - b. the positive obligations under Article 8 in protecting members of LGBTI community from homophobic and transphobic expression, particularly made by politicians and public figures to include the obligation to prevent, investigate, prosecute, punish and remedy such crimes.
3. The comments draw upon the Court’s case-law and authoritative interpretation of other applicable sources of international law and relevant soft law.
4. For the purpose of these comments, homophobic and transphobic statements are understood to be any expression - explicit or implicit - of prejudice against, hatred towards, or fear of respectively
 - homosexuality or of people who are identified or perceived as being bisexual, gay or lesbian; and
 - transgender people, whose gender identity and/or gender expression differ from the sex/gender they were assigned at birth.
5. In these comments, the intervener: notes the widespread recognition that homophobic and transphobic statements are hate speech (paras 6-15); identifies the humiliating and stigmatising effect of such statements under Articles 8 and 14 of the Convention (paras. 16-30); and sets out the requirements by European and international bodies regarding the need to take effective action against hate speech, including homophobic and transphobic statements, and the consistency with such requirements of

¹ The intervener’s letter to the President of the Court, dated 5 February 2018, provides a detailed description of the intervener.

recognising positive obligations under Article 8 of the Convention in this regard ((paras 31-45).

B. HOMOPHOBIC AND TRANSPHOBIC STATEMENTS ARE HATE SPEECH

6. There has been widespread recognition within Europe and beyond that homophobic and transphobic statements amount to hate speech.

7. Thus, the European Parliament has noted “a proliferation of hate speech targeting the lesbian, gay, bisexual and transgender (LGBT) community in a number of European countries” and highlighted the use by public figures of “inflammatory or threatening language or hate speech.”²

8. Similarly, the Committee of Ministers of the Council of Europe in the Appendix to its Recommendation CM/Rec(2010)5 to member states on measures to combat discrimination on grounds of sexual orientation or gender identity³ stated that such measures should be taken:

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.⁴

9. The United Nations High Commissioner for Human Rights has also drawn attention to concern within the United Nations system about this form of hate speech, noting that:

Treaty bodies and special procedures continue to express concern at rhetoric used to incite homophobic and transphobic hatred and related violence. Such language is used by some political and community leaders to promote negative stereotypes, stir up prejudice and harass particular individuals, especially during electoral periods.⁵

10. Furthermore, the Court in *Vejdeland and Others v. Sweden* agreed with the domestic courts’ finding that certain homophobic messages were “unwarrantably offensive to others, constituting an assault on their rights”.⁶ In addition, in *Identoba and Others v. Georgia*, the Court drew attention to the “clearly homophobic hate speech” that

² European Parliament resolution of 26 April 2007 on homophobia in Europe.

³ Adopted by the Committee of Ministers on 31 March 2010 at the 1081st meeting of the Ministers’ Deputies.

⁴ Para. 6.

⁵ *Discrimination and violence against individuals based on their sexual orientation and gender identity*, A/HRC/29/23, 4 May 2015, para. 33 (footnotes omitted).

⁶ No. 1813/07, 9 February 2012, at para. 57.

constituted an element in its finding that the domestic authorities had failed to conduct a proper investigation into allegations of ill-treatment.⁷

11. Moreover, the European Commission against Racism and Intolerance (“ECRI”) in its General Policy Recommendation No. 15 on combating Hate Speech (“GPR No. 15”) – in defining this concept as covering “the advocacy, promotion or incitement of a person or group of persons, as well as any harassment, insult negative stereotyping, stigmatization or threat in respect of such a person or group of persons” based on their personal characteristics or status - specifically included gender identity and sexual orientation in the list of such characteristics.
12. As a form of hate speech, it is now well-established that homophobic and transphobic statements can be made subject to restrictions – whether administrative, civil or criminal – without entailing a violation of the right to freedom of expression under Article 10 of the Convention.
13. The permissibility of such restrictions is evident in the case law of the Court concerning hate speech in general, which has been summarised by the Grand Chamber’s judgment in *Perinçek v. Switzerland*.⁸
14. Their permissibility in the present context was particularly underlined by the Court when it indicated in the *Vejdeland* case that criminal responsibility for “statements that threatened or expressed contempt for a group of people with reference to their sexual orientation” had the legitimate aim of protecting the reputation and rights of others.
15. The appreciation that criminal liability and sanctions, as much as administrative and civil law and self-regulation, can – consistently with the right to freedom of expression - be an appropriate means of combating the use of hate speech also underpins the various recommendations made in ECRI’s GPR No. 15.
16. The Court and other human rights bodies have highlighted the particular responsibility of politicians to avoid disseminating words likely to foster intolerance.⁹ This is

⁷ No. 73235/12, 12 May 2015, at para. 77.

⁸ [GC], no. 27510/08, 15 October 2015, at paras. 204-207.

⁹ See, e.g., *Erbakan v. Turkey*, no. 59405/00, 6 July 2006, para. 6 and *Feret v. Belgium*, no. 15615/07, 16 July 2009, para 75. See also *General Recommendation No. 35 Combating racist hate speech*, CERD/C/GC/35, 26 September 2013, para. 15.

because their authority means that the use by them of hate speech “has an impact on potential offenders who feel encouraged in their intolerance and bias.”¹⁰

C. THE HUMILIATING AND STIGMATISING EFFECT OF HOMOPHOBIC AND TRANSPHOBIC STATEMENTS

17. Action motivated by homophobic and transphobic attitudes has been found by the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance on the implementation of General Assembly resolution 69/160 and the Office of the United Nations High Commissioner for Human Rights to lead to violations of the right to life, the right to liberty and security of the person and the prohibition of ill-treatment.¹¹

18. Similarly, the Court has considered that violence perpetrated with homophobic and transphobic overtones was capable of meeting the threshold required for a violation of Article 3.¹²

19. Many instances of hate crimes committed against LGBTI people are linked to the prior use of “degrading words”¹³ or occur in a context of “heightened dehumanisation and discrimination”.¹⁴

20. However, even when not acted upon, homophobic and transphobic statements can have extremely serious repercussions for the enjoyment of other rights and freedoms, notably, the right to respect for private and family life and the prohibition of discrimination under Articles 8 and 14 of the Convention.

21. As was noted in the Explanatory Memorandum to GPR No. 15:

¹⁰ Report of the Council of Europe Conference: “The hate factor in political speech – Where do responsibilities lie?”, para 16; accessed online on 10 April 2018 at: <https://rm.coe.int/16800c170e>.

¹¹ See, e.g., their respective reports in A/HRC/29, 47, 13 April 2015, at para, 13 and in *Discrimination and violence against individuals based on their sexual orientation and gender identity*, A/HRC/29/23, 4 May 2015, para. 21.

¹² See, e.g., *Identoba v. Georgia*, no. 73235/12, 12 May 2015, at para. 64 and *M.C and A.C. v. Romania*, no. 12060/12, 12 April 2016, at para. 119

¹³ *Supra*, note 10, para. 16.

¹⁴ Joint report by the IACHR Office of the Rapporteur on the Rights of Lesbian, Gay, Bisexual, Trans and Intersex Persons and the IACHR Office of the Special Rapporteur for Freedom of Expression. Chapter IV, para 1.

Available at: http://www.oas.org/en/iachr/expression/docs/reports/hate/hate_speech_incitement_violence_against_lgbti.pdf

The use of hate speech can lead to those targeted by it feeling not only afraid and insecure but also – without any justification - guilty or ashamed and humiliated, leading to a loss of self-confidence and self-esteem. Moreover, these feelings can also result in physical symptoms such as loss of sleep and headaches, as well as mental and physical health problems of a more serious nature. As a result, such feelings can have consequences for every aspect of the life of those concerned, whether at work, school, or home, but their impact on family relations and the willingness to participate in society is especially serious.

22. Furthermore, in the specific context of homophobic and transphobic statements, a report prepared by the European Union Agency for Fundamental Rights found,

The current social situation for lesbians, gay men, bisexuals, transsexuals and transgender (LGBT) persons represents a problem for the European Union. Lesbians, gay men, bisexuals, transsexual and transgender persons experience discrimination, bullying and harassment across the EU. This often takes the form of demeaning statements, name calling and insults or the use of abusive language ... As the results of the July 2008 Eurobarometer Discrimination Survey showed, on average over half of EU citizens consider that discrimination on grounds of sexual orientation is widespread in their country ... Discrimination, homophobia and transphobia affect the lives and choices of LGBT persons in all areas of social life. From their early years the derogative words used for gays and lesbians at schools teach them to remain invisible; they often experience harassment and discrimination at the workplace; in many countries they cannot secure their relationships to one another as legal partners; they rarely see positive LGBT representation in the media; when seeking treatment for themselves or their partner they hesitate to reveal themselves in settings that take heterosexuality for granted; at retirement homes, understanding and awareness of their needs is rare.¹⁵

23. Moreover, the adverse impact of homophobic and transphobic statements has also been recognised by the Committee on the Rights of the Child in its expression of concern about:

past statements and declarations made by the Holy See on homosexuality, which contribute to the social stigmatization of and violence against lesbian, gay, bisexual, and transgender adolescents and children raised by same sex couples¹⁶

and about:

incidents of hate speech [in Switzerland] against lesbian, gay, bisexual, transgender and intersex persons and their impact on children belonging to these groups¹⁷.

24. Similarly, the UN International Criminal Tribunal for Rwanda has affirmed that:

Hate speech is a discriminatory form of aggression that destroys the dignity of those in the group under attack. It creates a lesser status not only in the eyes of the group members themselves but also in the eyes of others who perceive and treat them as less than human. The denigration of a person on the basis of his or her ethnic identity or other group membership in and of itself, as well as in its other consequences, can be an irreversible harm.¹⁸

¹⁵ *Homophobia and Discrimination on Grounds of Sexual Orientation and Gender Identity in the EU Member States Part II – The Social Situation*, (2009), p. 8.

¹⁶ CRC/C/VAT/CO/2 (25 February 2014), para. 25.

¹⁷ CRC/C/CHE/CO/2-4 (26 February 2015), para. 24.

¹⁸ UN, International Criminal Tribunal for Rwanda, *Prosecutor v. Ferdinand Nahimana, Jean-Bosco Barayagwiza and Hassan Ngeze, Case No. ICTR-99-52-T*.

25. The Court itself has recognised that:

any negative stereotyping of a group, when it reaches a certain level, is capable of impacting on the group's sense of identity and the feelings of self-worth and self-confidence of members of the group. It is in this sense that it can be seen as affecting the private life of members of the group.¹⁹

26. In particular, it has noted that this may be the consequence of a homophobic statement when it observed of remarks by a parliamentarian that

In order to reinforce his point, he imitated a homosexual man through the use of specific gestures which, according to the domestic courts, were reminiscent of gestures used by actors to portray homosexuals. The Court, however, considers that S.P.'s imitation may be regarded as ridicule promoting negative stereotypes.²⁰

27. In addition, the Court has found that laws that ban public statements concerning the identity, rights and social status of sexual minorities were not only discriminatory but also reinforced stigma and prejudice and encourage homophobia, which is incompatible with the notions of equality, pluralism and tolerance inherent in a democratic society.²¹

28. Moreover, the Court has also recognised that a sustained focus on the sexual orientation of individuals can be distressing and humiliating for them, amounting both to an unjustified interference with the right to respect for private life and to discriminatory treatment, albeit that it was considered sufficient to find only a violation of Article 8 in the particular circumstances of the cases.²²

29. This approach is consistent with the view of the Court, in various contexts, that the concept of private life under Article 8 includes a person's psychological integrity.²³

30. There is, therefore, every reason to consider that the humiliating and stigmatising effect of homophobic and transphobic statements necessarily entail interferences with the enjoyment by those targeted by them of their rights under Articles 8 and 14 of the Convention.

31. Furthermore, this impact will not be restricted to situations where such statements make some specific reference to one or more individuals.

¹⁹ *Aksu v. Turkey* [GC], nos. 4149/04 and 41029/04, 15 March 2012, at para. 58.

²⁰ *Mladina d.d. Ljubljana v. Slovenia*, no. 20981/10, 17 April 2014, at para. 44.

²¹ *Bayev and Others v. Russia*, nos. 67667/09, 44092/12 and 56717/12, 20 June 2017, at paras. 84 and 91.

²² See *Lustig-Prean and Beckett v. United Kingdom*, nos. 31417/96 and 32377/96, 27 September 1999 and *Smith and Grady v. United Kingdom*, nos. 33985/96 and 33986/96, 27 September 1999.

²³ See, e.g., *Dorđević v. Croatia*, no. 41526/10, 24 July 2012, at paras. 151-152.

32. As the Court has recognised, the use of hate speech relating to just a group of persons in general can result in a member of that group feeling offended²⁴ - or indeed suffer the other consequences outlined above – and thus be a victim of a violation of these two rights. Although the justification for the Court’s adoption of such a flexible approach to victim status may well be reinforced in some instances by the ability of such a person to bring proceedings in national courts, it should also be noted that GPR No. 15 underlines the importance of those targeted by hate speech being able to seek recourse for its use and, in particular, to participate in criminal proceedings connected with this.²⁵
33. A similar approach to that adopted by the Court in connection with victim status has been taken both by the Committee on the Elimination of Racial Discrimination in respect of an organisation providing counselling and support against discrimination²⁶ and by the United Nations Human Rights Committee in respect of members of a group against whom the impugned statements could be regarded as creating discriminatory attitudes.²⁷

D. THE POSITIVE OBLIGATIONS TO PROTECT MEMBERS OF LGBTI COMMUNITY FROM HOMOPHOBIC AND TRANSPHOBIC EXPRESSION

34. There has been widespread recognition at the European and international level of the need for an effective response to the use of hate speech and, in particular, homophobic and transphobic statements.
35. Some aspects of the response seen as necessary relate to the taking of steps to increase public awareness of the importance of respecting pluralism and of the dangers posed by the use of hate speech, to demonstrate the falsity of the foundations on which such speech is based and to provide support for self-regulation of expression by public and private institutions.²⁸

²⁴ *Aksu v. Turkey* [GC], nos. 4149/04 and 41029/04, 15 March 2012, para. 53.

²⁵ Notably in recommendations 5 and 10.

²⁶ See *TBB-Turkish Union in Berlin/Brandenburg v. Germany*, Communication No. 48/2010, Opinion of 26 February 2013.

²⁷ See *Rabbae, A.B.S. and N.A. v. Netherlands*, Communication No. 2124/2011, Views of 14 July 2016.

²⁸ See, e.g., GPR No. 15, recommendations 4 and 6.

36. However, there is also seen to be a need, in certain circumstances, for action to be taken against particular uses of hate speech – including its dissemination – through the application of administrative, civil and criminal law, while nonetheless respecting the right to freedom of expression.
37. This can be seen in a wide range of measures and instruments. These include the requirements in Article 20(2) of the International Covenant on Civil and Political Rights requires that any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law²⁹ and in Article 4(a) of the International Convention on the Elimination of All Forms of Racial Discrimination that States Parties criminalise, inter alia, all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination and incitement to such acts against any race or group of persons of another colour or ethnic origin.
38. The need for criminal and other measures has also been recognised in the Rabat Plan of Action (for advocacy of national, racial or religious hatred constituting incitement to discrimination, hostility or violence),³⁰ by the European Commission for Democracy through Law (for incitement to hatred, including religious hatred)³¹, the European Union (for racism and xenophobia)³² and the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression (for hate speech in general).³³
39. Furthermore, the need for administrative, civil and criminal measures to be taken with respect to hate speech based a person's sexual orientation, i.e., homophobic and transphobic statements, was specifically recognised in ECRI's GPR No. 15.
40. However, the adoption of such measures would be pointless if effective steps for their implementation are not also taken.

²⁹ Such prohibition may, according to the United Nations Human Rights Committee, take the form of civil and administrative, as well as criminal *penalties*; *Rabbae, A.B.S. and N.A. v. Netherlands*, Communication No. 2124/2011, Views of 14 July 2016, at para. 10.4.

³⁰ *Report of the United Nations High Commissioner for Human Rights on the expert workshops on the prohibition of incitement to national, racial or religious hatred*, A/HRC/22/17/Add.4, 11 January 2013.

³¹ *Report on the Relationship between Freedom of Expression and Freedom of Religion: the Issue of Regulation and Prosecution of Blasphemy, Religious Insult and Incitement to Religious Hatred*, CDL-AD(2008)026, 23 October 2008.

³² Council Framework Decision 2008/913/JHA of 28 November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law.

³³ A/67/357, 7 September 2012.

41. The existence of a specific obligation in this regard has, for example, been recognised by the Committee on the Elimination of Racial Discrimination.

42. Thus, it has underlined not only the need to carry out an effective investigation into whether or not particular statements fall within the expression that must be proscribed³⁴ but also that the domestic legislation concerned should not undermine the proscription by introducing any mitigating factors not specified in Article 4(a) of the International Convention on the Elimination of All Forms of Racial Discrimination.³⁵

43. Similarly, the Special Rapporteur on contemporary forms of racism, racial discrimination, xenophobia and related intolerance on the implementation of General Assembly resolution 69/160 has reiterated that

States have the obligation to prosecute the perpetrators of crimes with racist, xenophobic, anti-Semitic or homophobic motivations and to fight against impunity. States should ensure prompt, thorough and impartial investigation into those crimes, and that those responsible are adequately sanctioned.³⁶

44. Furthermore, the existence of a possibility of interested persons being able to take proceedings to secure an order directing the public prosecutor to prosecute the author of alleged hate speech, to join those proceedings as a civil party and then to introduce arguments into them has also been considered by the United Nations Human Rights Committee to entail the taking of the necessary and proportionate measures required to “prohibit” statements made in violation of Article 20(2) of the International Covenant on Civil and Political Rights and to guarantee them an effective remedy in order to protect them against the consequences of such statements.³⁷

45. In addition, ECRI in its GPR No. 15 has not only recommended that standing be provided for those targeted by hate speech – as well as equality bodies, national human rights institutions and interested non-governmental organisations - to bring

³⁴ See, e.g., *Adan v. Denmark*, Communication No. 43/2008, Opinion of 13 August 2010 and *TBB-Turkish Union in Berlin/Brandenburg v. Germany*, Communication No. 48/2010, Opinion adopted on 26 February 2013. See also its *General Recommendation No. 35 Combating racist hate speech*, CERD/C/GC/35, 26 September 2013, para. 17.

³⁵ See *TBB-Turkish Union in Berlin/Brandenburg v. Germany*, Communication No. 48/2010, Opinion adopted on 26 February 2013.

³⁶ A/HRC/29/47, 13 April 2015, at para, 46

³⁷ See *Rabbae, A.B.S. and N.A. v. Netherlands*, Communication No. 2124/2011, Views of 14 July 2016, at para. 10.7

various administrative or civil proceedings in respect of hate speech³⁸ but also that appropriate and effective action involving criminal proceedings be taken against the use, in a public context, of hate speech which is intended or can reasonably be expected to incite acts of violence, intimidation, hostility or discrimination against those targeted by it³⁹. As part of the latter recommendation, there was seen a particular need to ensure the effective participation of those targeted by hate speech in the relevant proceedings and to monitor the effectiveness of the investigation of complaints and the prosecution of offenders with a view to enhancing both of these.

46. In the context of a failure to conduct an effective investigation into allegations of violence that had been perpetrated with homophobic overtones, the Court has already recognised that positive obligations on the part of a State are inherent in the right to effective respect for private life under Article 8.⁴⁰ In particular, the Court has underlined the need for

effective deterrence against serious acts, where fundamental values and essential aspects of private life are at stake, requires efficient criminal-law provisions

and it was not prepared to exclude

the possibility that the State's positive obligation under Article 8 to safeguard an individual's physical integrity may extend to questions relating to the effectiveness of a criminal investigation.

47. Such an approach, if adopted, would be entirely consistent with the requirements seen as necessary under other international and regional standards concerned with taking effective action against not only violence and threats that have homophobic and transphobic motivations but also against the use of hate speech in general and the making of homophobic and transphobic statements in particular.

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³⁸ Namely to seek to delete it, to require an acknowledgement that it was published or to enjoin its dissemination and to compel the disclosure of the identity of those using it; Recommendation 8e.

³⁹ Recommendation 10.

⁴⁰ See, e.g., *M.C. and A.C. v. Romania*, no. 12060/12, 12 April 2016, at para. 114 and *Alković v. Montenegro*, no. 66895/10, 5 December 2017, at para. 65.