

ANNOTATIE

Cînta v. Romania (EHRM, nr. 3891/19) – Maintaining Family Ties: Disability- Based Discrimination at the Strasbourg Court

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1. Disability-based discrimination in matters related to family and parenthood is pervasive, and is often based on entrenched stereotypes concerning the perceived inability of parents with disabilities to care for their children. Article 23 of the United Nations Convention on the Rights of Persons with Disabilities (CRPD or UN Convention) requires States Parties to take effective and appropriate measures to eliminate such discrimination. On the whole, the CRPD endorses the ‘paradigm shift’ from the outdated medical model of disability – which perceives of the inability of people with disabilities to participate in society as the ‘inevitable result of their own impairment rather than as a consequence of any disabling and discriminatory barriers in society’[1] – to the ‘social-contextual model’[2] of disability. This version of the social model views disability as an *interaction* between persons with impairments and widespread barriers in society (physical barriers, as well as legal and attitudinal barriers, among others).

2. The European Court of Human Rights (ECtHR or Strasbourg Court) has consistently ruled that the European Convention on Human Rights (ECHR) is a living instrument that ‘must be interpreted in the light of present-day conditions’.[3] In that regard, the Strasbourg Court pays attention to the ‘consensus and common values emerging from the practices of European States and specialised international instruments’, as well as ‘the evolution of norms and

principles in international law’.[4] Since the entry into force of the CRPD, there have been ‘growing synergies’[5] between the Strasbourg Court’s jurisprudence and the norms in the UN Convention, particularly with regard to the right to non-discrimination. The ECtHR has affirmed that it views the CRPD as embracing ‘a European and worldwide consensus on the need to protect people with disabilities from discriminatory treatment’.[6] Following *Glor v. Switzerland*,[7] in which the ECtHR stated that national authorities have a considerably reduced margin of appreciation with regard to disability discrimination,[8] in *Alajos Kiss v. Hungary*[9] the Strasbourg Court outlined its standard of ‘strict scrutiny’ in the context of disability, linking it to the ‘considerable discrimination’ which individuals with (certain types of) disabilities – psychosocial (mental) disabilities – have encountered in the past.[10]

3. In the recent Chamber judgment of *Cînta v. Romania*,[11] the ECtHR put into practice its standard of strict scrutiny, when it addressed the sensitive issue of the withdrawal of parental rights from a biological parent with a psychosocial disability (‘mental illness’) during divorce and custody proceedings. In that case, the Court held that there had been a violation of Articles 8 and 14 ECHR (on the rights to respect for private and family life, and non-discrimination, respectively) in the context of court-ordered restrictions related to the contact that the applicant, Marcel Dan Ciînta, was allowed to have with his four-year old daughter.

4. The case before the ECtHR originated in a domestic court decision, and a subsequent appeal by the applicant of that decision, which restricted contact between the applicant and his daughter, only allowing him to see her two evenings per week in a public place and in the presence of his wife. The relevant domestic courts’ decisions were based partly on medical evidence demonstrating that the applicant had a psychosocial disability, as well as on statements from the applicant’s wife alleging his inability to take care of their child. The domestic courts also based their decisions on the testimony of the mother of the applicant’s wife, who complained that he had been physically and psychologically aggressive towards his wife on account of his condition, and on his daughter’s allegations of certain ‘negative behaviour’ on the part of her father.[12]

5. With regard to the breach of Article 8 ECHR, the Strasbourg Court accepted that it was common ground between the parties that there was an interference with the applicant’s right to respect for his family life pursuant to Article 8(1) ECHR. The Court also accepted that the domestic courts’ decisions were taken in accordance with the law and pursued a legitimate aim, namely the protection of the rights of others, which called for the protection of the child’s best interests. The essential question for the Court to determine was whether the interference was ‘necessary in a democratic society’ under Article 8(2) ECHR. In its examination of the complaint raised under Article 8, the Strasbourg Court ruled that there was nothing in the domestic courts’ decisions that indicated the risk that the applicant supposedly posed for his

child; nor was there a genuine assessment of the allegations that he had exhibited negative behaviour towards his daughter.[13] Moreover, the Court ruled that it could not find any elements in the domestic courts' decisions that would explain how those courts had established or assessed the child's best interests, including in setting the contact schedule, in light of the fact that the relationship between the applicant and his wife remained tense.[14] The Court also observed that no alternative means of maintaining family ties had been explored by the domestic authorities, such as supervised contact sessions involving the child-protection authority.[15] This demonstrates the importance placed by the ECtHR on the adoption of positive measures on the part of Contracting States, as also emphasised in the previous case of *S.S. v. Slovenia*. [16]

6. In *Cința*, the ECtHR ruled that reliance on the applicant's mental illness as a relevant factor in the decision-making process 'was not accompanied by a genuine domestic assessment of his current situation'. [17] Thus, the ECtHR held that it could not but conclude that 'the applicant was perceived as a threat because of his mental illness without further consideration to the concrete circumstances of the case and the family situation'. [18] On this point, the Court distinguished the circumstances of the case from those in *S.S. v. Slovenia*, where the Court had previously found that the withdrawal of the applicant's parental rights had not been based on her psychiatric diagnosis, but on her consequent inability to take care of her child. By contrast, in *Cința*, the ECtHR took into account the fact that the domestic courts had been presented with evidence that the applicant had not suffered 'any episode of psychiatric decompensation caused by his mental illness in the recent past'. [19] The ECtHR also ruled that the lack of expert reports concerning the applicant's 'mental condition' at the time that the domestic courts examined his action substantially 'limited the factual assessment of his caring skills, vulnerability and mental state at the material time'. [20]

7. In finding a violation of Article 8 ECHR and in reflecting on the balancing of interests in the case, the Strasbourg Court focused on the absence of safeguards in the decision-making processes at the domestic level. The Court ruled that the domestic decisions did not 'ensure that the applicant's current state of health was properly assessed and that all views and interests were duly taken into account'. [21] In that light, it is not surprising that a breach of Article 8 was established, particularly given findings of a breach of Article 8 in previous case law that touched upon similar issues. [22]

8. What is novel in this judgment is the finding of a breach of Article 14 ECHR, in conjunction with Article 8 – given the Court's dismissal of Article 14 claims in its previous case law on similar matters [23] – and the attendant reversal of the burden of proof. As is well established, Article 14 affords protection against differential treatment, without an objective and reasonable justification – that is, if it does not pursue a legitimate aim or if a 'reasonable

relationship of proportionality' cannot be established between the means employed and the aim sought to be realised. In spite of the Government's argument that the domestic courts had not treated the applicant differently from any other person, including his wife (who also had a psychosocial disability in the past, although not at the time of the relevant proceedings),^[24] the Court agreed with the applicant. The latter had argued that he had been placed in a less favourable situation than a person without a mental illness on account of his condition and was considered to represent an inherent danger to his child, without any assessment of the evolution of his illness or its symptoms.

9. Having established that the applicant had made out a *prima facie* case of discrimination, the Court went on to reverse the burden of proof,^[25] and to determine whether the differential treatment was justified. In that regard, the Strasbourg Court noted that although the applicant's mental illness was not the only element taken into account by the domestic courts, it was present at all stages of the decision-making process.^[26] The ECtHR therefore concluded that the applicant's mental illness was a 'decisive factor' leading to the decision to limit his contact with his daughter^[27] – a threshold used in other case law.^[28] The Court reiterated its finding that the domestic courts had not properly assessed the applicant's mental health in restricting his contact with his daughter, and therefore held that the respondent State had not put forward convincing reasons such as to rebut the presumption of discrimination against the applicant on the ground of his disability.^[29]

10. Notably, the finding of discrimination within the Strasbourg Court was not unanimous, and was subject to a statement of dissent by Judges Mourou-Vikström and Ravarani, who deemed that there were insufficient elements present in the case to conclude that there had been discrimination.^[30] In this light, one must at least question whether the ECtHR may have merged consideration of whether a *prima facie* case of discrimination had been established with application of the objective justification test, a trend identified in the Strasbourg Court's jurisprudence by Arnardo|ttir.^[31]

11. It is furthermore apt to reflect on the influence that the CRPD played in the Strasbourg Court's finding of discrimination in *Cința*. The Court noted that the CRPD, to which the respondent State is a Party, 'recognises all individuals with disabilities as full subjects of rights and as rights holders'.^[32] In finding a violation of the ECtHR's non-discrimination norm, the Strasbourg Court noted that 'the international community has consistently strived for better and more coherent protection for the rights of persons with mental illness and mental disabilities'.^[33] Moreover, the Court expressly took into account the international standards and recommendations cited earlier in its judgment, and gave consideration to important human rights norms underlying the principles of equality and non-discrimination, including respect for dignity and equal opportunities for persons with psychosocial disabilities. The

ECtHR also cited the CRPD extensively in the context of relevant international law, and mentioned the recent General Comment No. 6 (on equality and non-discrimination) of the UN Committee on the Rights of Persons with Disabilities (CRPD Committee).[34] Moreover, for the first time, the ECtHR referred[35] explicitly to the CRPD's human rights model of disability – which recognises that disability is a social construct and that impairments must not be taken as a legitimate ground for the denial or restriction of human rights[36] – and to its model of inclusive equality, which embraces (among others) a recognition dimension, to combat stereotyping of people with disabilities.[37]

12. The CRPD therefore arguably played a key role in the Court's finding of discrimination in the case. Furthermore, certain elements of the *Cînta* judgment reflect the UN Convention's tenets, including Article 23(4) CRPD, which was mentioned by the ECtHR. That Article provides that 'in no case shall a child be separated from parents on the basis of a disability of either the child or one or both of the parents'. In that connection, the ECtHR ruled that the fact that the applicant's mental health featured in the courts' assessment did not, in itself, raise an issue under Article 14 ECHR. However, it held that relying on mental illness as the decisive element – *or even as one element among others* – may amount to discrimination when, in the specific circumstances of the case, the mental illness does not have a bearing on the individual's ability to take care of their child.[38] The Court's decision in this regard differs from its previous pronouncement in *S.S. v. Slovenia*, where the claim under Article 14 ECHR was rejected as manifestly ill-founded on the basis that there was a 'lack of any indication in the present case that the applicant was divested of her parental rights on the *sole* basis of her mental health diagnosis'.[39]

13. In *Cînta*, the Strasbourg Court also laid emphasis on the adoption by Contracting States of positive steps in assisting applicants with disabilities to maintain personal and family ties with their children. In that connection, the ECtHR stated that it was 'of particular relevance' that 'mentally-ill persons must receive appropriate assistance from the State in the performance of their child-rearing responsibilities'.[40] This finding is in line with Article 23(2) CRPD, which requires States Parties to render 'appropriate assistance' to persons with disabilities in the performance of their child-rearing responsibilities. Moreover, it reflects the approach adopted by the Court in previous cases, such as *S.H. v. Italy*[41] and *S.S. v. Slovenia*. As pointed out in the Concurring Opinion of Ad Hoc Judge Zalar (joined by Judge Motoc) in *S.S. v. Slovenia*, this approach by the ECtHR 'is a well-established standard in the case-law regarding cases of serious interference in the family life of vulnerable parents'.[42]

14. Furthermore, the Strasbourg Court's assessment in *Cînta* was, as in all child-related cases, guided by the child's best interests, which is in accordance with Article 23(4) CRPD, pursuant to which States Parties must ensure that a child shall not be separated from his or her parents

against their will, except when competent authorities subject to judicial review determine, in accordance with applicable law and procedures, that such separation is necessary for the best interests of the child.

15. Notably, in contrast to the CRPD, which adopts an empowering approach to disability,[43] the Strasbourg Court once again[44] invoked the language of vulnerability to justify ‘special consideration’ for the rights of ‘mentally-ill persons’.[45] Peroni and Timmer rightly argue that the ECtHR’s use of the concept of ‘group vulnerability’ addresses and redresses different aspects of inequality in a more substantive manner.[46] Other authors even argue that ‘vulnerability reasoning provides an avenue for engaging with the susceptibility of disabled persons to discrimination and stigmatization’,[47] and that such ‘engagement makes plain that, to avoid stereotyped reasoning, parental adequacy must be judged not by the fact that a parent belongs to the class of persons with a mental disability, but by the actual performance of individual disabled parents on a case-by-case basis’.[48] While it is certainly true that vulnerability analysis has increased protection in individual disability cases under the ECHR, and the Court has even invoked the idea of group vulnerability to read positive obligations into ECHR rights,[49] the use of language based on the perceived inherent vulnerability of individuals with disabilities themselves is arguably not compliant with the CRPD’s social-contextual model of disability and runs the risk of further stigmatisation of those individuals.[50]

16. On the whole, however, the judgment in *Cînta v. Romania* is positive in its outcome. The withdrawal of parental rights has been described as ‘an extreme measure, running counter to the right of biological parents and children to enjoy a family life together’.[51] In the case of individuals with disabilities, parental rights are all too often denied or limited. Thus, although the Strasbourg Court’s construction of the finding of discrimination has been called into question by the dissenting judges in the case itself, the ruling sends out a strong signal towards domestic authorities that disability-based discrimination in the sphere of family and private life is contrary to the ECHR.

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[1] A. Broderick, *The Long and Winding Road to Equality and Inclusion for Persons with Disabilities: The United Nations Convention on the Rights of Persons with Disabilities* (Intersentia, 2015), p. 1.

[2] A. Broderick, cited above, p. 77.

[3] See, for example, *Tyrer v. United Kingdom*, ECtHR 25 April 1978, no. 5856/72, ECLI:CE:ECHR:1978:0425JUD00585672, par. 31. See A. Mowbray, 'The Creativity of the European Court of Human Rights', *Human Rights Law Review*, 2010, p. 57–79.

[4] *Opuz v. Turkey*, ECtHR 9 June 2009, no. 33401/02, ECLI:CE:ECHR:2009:0609JUD003340102, «EHRC» 2009/97 case comment Westendorp, par. 164.

[5] D. Ferri and A. Broderick, 'The European Court of Human Rights and the "Human Rights Model of Disability": Convergence, Fragmentation and Future Perspectives' *European Yearbook on Human Rights*, 2019, p. 261-294, p. 264.

[6] *Glor v. Switzerland*, ECtHR 30 April 2009, no. 13444/04, ECLI:CE:ECHR:2009:0430JUD001344404, «EHRC» 2009/79, par. 53.

[7] *Glor v. Switzerland*, cited above.

[8] *Glor v. Switzerland*, cited above, par. 84.

[9] *Alajos Kiss v. Hungary*, ECtHR 20 May 2010, no. 38832/06, ECLI:CE:ECHR:2010:0520JUD003883206, «EHRC» 2010/83 case comment Timmer.

[10] *Alajos Kiss v. Hungary*, cited above, par. 44.

[11] *Cînța v. Romania*, ECtHR 18 February 2020, no. 3891/19, ECLI:CE:ECHR:2020:0218JUD000389119.

[12] *Cînța v. Romania*, cited above, par. 53.

[13] *Cînța v. Romania*, cited above, par. 74.

[14] *Cînța v. Romania*, cited above, par. 52.

[15] *Cînța v. Romania*, cited above, par. 55.

[16] *S.S. v. Slovenia*, ECtHR 20 October 2018, no. 40938/16, ECLI:CE:ECHR:2018:1030JUD004093816.

[17] *Cînța v. Romania*, cited above, par. 74.

[18] *Cînța v. Romania*, cited above, par. 74.

[19] *Cînța v. Romania*, cited above, par. 48.

[20] *Cînța v. Romania*, cited above, par. 51.

[21] *Cînța v. Romania*, cited above, par. 57.

[22] See, for instance, *Kacper Nowakowski v. Poland Kocherov*, ECtHR 10 January 2017, no. 32407/13, ECLI:CE:ECHR:2017:0110JUD003240713, «EHRC» 2017/67; *A.K. and L. v. Croatia*, ECtHR 08 January 2013, no. 37956/11, ECLI:CE:ECHR:2013:0108JUD003795611, «EHRC» 2013/162 case comment De Graaf. For an analysis of a finding of discrimination in the disability field, outside of the context of family and private life, see A. Broderick, 'Enver Sahin v Turkey: Verbod op discriminatie op grond van handicap, recht op onderwijs, VN-Gehandicaptenverdrag, doeltreffende aanpassingen' *European Human Rights Cases*, 2018, p. 106-127.

[23] See, for instance, *Kocherov and Sergeyeva v. Russia*, ECtHR (GC) 29 March 2016, no. 16899/13, ECLI:CE:ECHR:2016:0329JUD001689913, «EHRC» 2016/161 case comment Bruning. For a commentary on the Article 14 aspects of that claim, see C. Heri, 'Silence as Acquiescence: On the Need to Address Disability Stereotyping in Kocherov and Sergeyeva v. Russia', May 12 2016, Strasbourg Observers, <https://strasbourgobservers.com/2016/05/12/silence-as-acquiescence-on-the-need-to-address-disability-stereotyping-in-kocherov-and-sergeyeva-v-russia/#_ftnref3>.

[24] *Cînța v. Romania*, cited above, par. 64.

[25] The reversal of the burden of proof has featured in other cases, such as *D.H. and Others v. the Czech Republic*, ECtHR (GC) 13 November 2007, no. 57325/00, ECLI:CE:ECHR:2007:1113JUD005732500, «EHRC» 2008/5 case comment Hendriks.

[26] *Cînța v. Romania*, cited above, par. 67.

[27] *Cînța v. Romania*, cited above, par. 69.

[28] See, *mutatis mutandis*, related to the ambit of alleged discrimination on the basis of sexual orientation, *E.B. v. France*, ECtHR (GC) 22 January 2008, no. 43546/02, ECLI:CE:ECHR:2008:0122JUD004354602, «EHRC» 2008/44 case comment Gerards.

[29] *Cînța v. Romania*, cited above, par. 78-80.

[30] *Cînța v. Romania*, cited above, Statement of dissent by Judges Mourou-Vikström and Ravarani.

[31] Oddnyl Mjoll Arnardottir, 'Non-discrimination Under Article 14 ECHR: The Burden of Proof' *Scandinavian Studies in Law*, 2007, p. 13-39, p. 17.

[32] *Cînța v. Romania*, cited above, par. 75.

[33] *Cînța v. Romania*, cited above, par. 76.

[34] CRPD Committee, General Comment 6, UN Doc. CRPD/C/GC/6 (2018).

[35] *Cînța v. Romania*, cited above, par. 31.

[36] CRPD Committee, General Comment 6, cited above, para. 9. See generally T. Degener, 'A New Human Rights Model of Disability', in V. Della Fina, R. Cera and G. Palmisano, (eds.), *The United Nations Convention on the Rights of Persons with Disabilities: A Commentary* (2017), p. 41.

[37] CRPD Committee, General Comment 6, cited above, para. 11.

[38] *Cînța v. Romania*, cited above, par. 68. Emphasis added.

[39] *S.S. v. Slovenia*, cited above, par. 108. Emphasis added.

[40] *Cînța v. Romania*, cited above, par. 76.

[41] *S.H. v. Italy*, ECtHR 13 October 2015, no. 52557/14, ECLI:CE:ECHR:2015:1013JUD005255714, «EHRC» 2015/244.

[42] *S.S. v. Slovenia*, ECtHR 20 October 2018, no. 40938/16, ECLI:CE:ECHR:2018:1030JUD004093816, Concurring Separate Opinion of Ad Hoc Judge Zalar, joined by Judge Motoc.

[43] A. Broderick, *The Long and Winding Road to Equality and Inclusion for Persons with Disabilities: The United Nations Convention on the Rights of Persons with Disabilities* (Intersentia, 2015), p. 320. On the vulnerable subject, see, M.A. Fineman, 'The Vulnerable Subject: Anchoring Equality in the Human Condition', *Yale Journal of Law and Feminism*, 2008, p. 1-23; see also L. Peroni and A. Timmer, 'Vulnerable Groups: The Promise of an Emerging Concept in European Human Rights Convention Law', *International Journal of Constitutional Law*, 2013, p.1056-1085.

[44] On the use of group vulnerability analysis, see *Alajos Kiss v. Hungary*, cited above, par. 42.

[45] *Cînța v. Romania*, cited above, 77.

[46] L. Peroni and A. Timmer, cited above, p. 1056. Emphasis in original.

[47] C. Heri, cited above.

[48] C. Heri, cited above.

[49] See *ZH v. Hungary*, ECtHR 08 November 2012, no. 28973/11, ECLI:CE:ECHR:2012:1108JUD002897311, par. 31. See also par. 138 of *Dordević v. Croatia*, ECtHR 24 July 2012, nr. 41526/10, ECLI:CE:ECHR:2012:0724JUD004152610, where the Court used similar language.

[50] See the arguments of the European Disability Forum in *Dordević v. Croatia*, cited above, par. 133. Maria Roche, 'Failure to Stop Disability Harassment' October 9 2012 <<https://www.localgovernmentlawyer.co.uk/adult-social-care/307-adult-care-features/11934-failure-to-stop-disability-harassment>>.

[51] *S.S. v. Slovenia*, ECtHR 20 October 2018, nr. 40938/16, ECLI:CE:ECHR:2018:1030JUD004093816, Concurring Separate Opinion of Ad Hoc Judge Zalar, joined by Judge Motoc, par. 24.