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**CONFERENCE ON
THE CONSTITUTIONAL PROTECTION OF
VULNERABLE GROUPS :
A JUDICIAL DIALOGUE**

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**The case law of the European Court of Human Rights
on vulnerable children and the elderly**

REPORT BY

Ms Herdis THORGEIRSDOTTIR

**Professor, Faculty of Law, Bifrost University
President European Women Lawyers' Association
Member (Iceland)**

Opening remarks

Honorable participants, ladies and gentlemen,

It makes sense to address the issue of the protection of vulnerable groups - here in Santiago, Chile – only 5 kilometers away from Pablo Neruda's house, *La Chascona*, in the slopes of the San Christobal hill. The spirit of the great poet and Nobel laureate whose art was placed at the service of the struggle for social justice – is also the spirit of the Council of Europe that has guided European Convention jurisprudence in cases regarding the most vulnerable of the vulnerable – innocent children who have been bereft of opportunities, dreams and hopes, even of their lives – especially in these times of economic crisis and increasing inequality where poverty is affecting a growing number of children – and the elderly.

The Venice Commission adopted a study on the protection of children's rights in March 2014. The starting point of this study was the UN Convention on the Rights of the child – which signaled international recognition of children as legal right holders and the new threats to the well being of children, which constituted the base line of the analysis.

The study concludes that the provisions of the UN Convention on the Rights of the Child are not self-executing and that the treaty can be seen as weakened by the number of reservations.

The Venice Commission recommended to Member States that in devising and implementing legislation, policies and measures concerning children, the best interest of the child shall be a primary consideration in line with Article 3 of the Convention on the Rights of the Child.

Although there is no explicit provision in the European Convention on Human Rights (ECHR) protecting children's rights as the one in the American Convention on Human Rights (ACHR) – the European Court of Human Rights (ECtHR) has interpreted the ECHR with regard to vulnerable children as placing positive obligations on states.

The Venice Commission finally also recalled in its 2014 study that positive obligations to ensure effective human rights protection, consistent with the case law of the ECtHR, are of particular importance for children.

Vulnerability and poverty

One of the most threatening situations facing the vulnerable, children as well as the elderly is poverty.

The famous Russian author Leo Tolstoy said that “all happy families are alike; each unhappy family is unhappy in its own way” – one can paraphrase this and say that all the children in the 47 member states of the CoE who are well off are alike – while each poor child is miserable and vulnerable in his/her own way – depending on whether he/she is living in a Nordic welfare society or somewhere in the former Soviet bloc.

Vulnerability and poverty go hand in hand. An Icelandic Judge dissenting in the landmark case of *Airey v. Ireland* in 1979 (*Airey v. Ireland*) stated:

“The war on poverty cannot be won through broad interpretation of the European Convention for the Protection of Human Rights and Fundamental Freedoms”,

While the majority in this case stresses that there is no watertight division separating economic and social rights from political and civil rights.

Bulgaria responsible for death of 15 children

The economic crisis has deeply affected children.

Absolute poverty can be life threatening as evident from a recent judgment in 2013 in the case of *Nencheve and Others against Bulgaria*. The ECtHR found Bulgaria responsible for the death of 15 disabled children at a state-run care home in the winter of 1998 because of a lack of food, heating and basic care during a time of serious economic crisis in Bulgaria. The manager of this home had requested government officials for assistance, she had even made desperate pleas over the radio – yet no help came from the authorities and the children died one after the other during a period of three months. The youngest was four and half years and the oldest 22 years. One of the victims was five years when he was placed in the institution in 1995. At the beginning of 1996 he weighed 12 kilos and lost half of his body weight by the end of the year, dying of unknown causes days after his sixth birthday.

The European Court Of Human Rights held that when government officials, who had noticed that a problem existed, did not take necessary measures within the scope of their powers to provide assistance to the facility, the State was in violation of Article 2 of the [European Convention on Human Rights](#), which protects the right to life. The Court found that the conditions at the facility were not due to any sudden *force majeure* event to which the State would have been unable to respond, but rather was part of a national crisis of which high level government officials had been informed. Not only did the government fail to take action to protect the children’s lives, the European Court also found that they subsequently failed to

provide an adequate remedy and properly investigate the incident. The government's criminal investigation was only initiated two years after the deaths, the authorities were inactive for several years, and the criminal proceedings lasted eight years, thereby failing to meet the Article 2 standard.¹

Degrading treatment in conditions of extreme poverty

In a recent judgment in the case of *V.M. and Others against Belgium* from 7 July 2015 the ECtHR held that that conditions of extreme poverty faced by a family of Serbian Nationals, asylum seekers, following their eviction from an accommodation center constituted degrading treatment and hence a violation of Article 3 of (prohibition of inhuman or degrading treatment) of the European Convention on Human Rights.

Although this case falls into the category of case law on the protection of asylum seekers – I mention it here because the ECtHR recalled the recent judgment in *Tarakhel v. Switzerland* to underscore that asylum seekers' vulnerability is amplified in the case of families with children, thus the requirement of special protection is even more important due to the presence of small children, including, in the case at issue, even a disabled child who died.

The ECtHR found in particular that the Belgian authorities had not given due consideration to the vulnerability of the applicants, who had remained for 4 weeks in conditions of extreme poverty, leaving them living on the street, without money, with no access to sanitary facilities and no means of meeting their basic needs. The ECtHR found that these living conditions, combined with the lack of any prospect of an improvement in the applicants' situation, had attained the level of severity required under Article 3 of the ECHR. The applicants had therefore been subjected to degrading treatment, in breach of that provision.

On the other hand, the ECtHR did not find a violation of Article 2 as to the death of the seriously disabled child, as the applicants could not adequately prove that this was the consequence of the living conditions in Belgium or Belgian authorities' failure to protect the life of the disabled child.

¹ Among other claims, the applicants also contended that Bulgaria had violated Article 3 (inhuman or degrading treatment) due to the conditions in the home and Article 6 (fair trial) with regard to the applicants' ability to participate in the criminal proceedings, but the European Court found these claims time barred by the 'six-month rule.' ECtHR, *Nencheva and Others v. Bulgaria*, no. 48609/06, Judgment of 18 June 2013, para. 154. The six-month rule is a condition of admissibility requiring that applicants file a petition with the European Court within six months of receiving notice of the final determination by a domestic tribunal that exhausts the domestic remedies available to the applicant. See European Convention on Human Rights, art. 35(1).

Failure of State to protect property rights of minors

In another recent judgment in the case of S.L. and J.L. v Croatia,² the ECtHR tackled the principle of the best interests of children. The applicants, two sisters complained to the European Court of Human Rights (ECtHR) in relation to a property deal conducted on their behalf by their parents while they were children.

Their mother a drug addict and her husband, the father of one the sisters and the legal guardian of the other, had been sentenced to six years in prison. The father's criminal defense lawyer requested authorization from the Social Welfare Centre for a real estate swap agreement under which the villa owned by the sisters would be transferred to the lawyer's mother-in-law in exchange for a flat worth much less than their property and a small amount of money. The social welfare centre granted the authorisation - which was required because the applicants, who owned the villa, were still minors - after interviewing the mother – the drug addict.

The Croatian civil courts had ruled against the children because they had not objected to the administrative decision of the local Social Welfare Centre to permit the real estate sale transaction. However, the children were unable to do so at the time due to their legal incapacity and the absence of a special guardian.

The ECtHR found the Croatian authorities had failed to evaluate whether the real estate transaction complied with the principle of the best interests of the child, and had thus failed to take the necessary measures to safeguard their proprietary interests as children and afford them a reasonable opportunity to effectively challenge the measures interfering with their rights guaranteed by Article 1 of Protocol 1, based on a number of facts.

Sexual crimes against children

Combating sexual abuses and sexual exploitation of children is a very important but challenging task. The problem is far too often under-estimated, and sometimes even overlooked.

According to the Council of Europe Children's Rights homepage recent research estimates that in 70 to 85% of cases, the perpetrator is a person known to the child. In 90% of cases, abuse is not reported to the police.

² Judgment 7.5.2015 [Section I] See: [\[2015\] ECHR 468](#)

On 28 January 2014, the Grand Chamber of the ECtHR handed down a landmark judgment in the case of [Louise O'Keefe and Ireland](#). The ruling brought to an end a 15 yearlong legal struggle of a woman seeking vindication of her rights against Irish authorities as she had been sexually abused by her teacher when attending **primary school** in Ireland in the 1970s. The groundbreaking judgment in this case established beyond doubt that the State has a positive obligation to protect children from abuse under the ECHR.

The applicant's core complaint was that the State had failed, in violation of its positive obligation under Article 3, to put in place an adequate legal framework of protection of children from sexual abuse, the risk of which the State knew or ought to have known and which framework would have countered the non-State management of National Schools.

The ECtHR acknowledged that, when examining this case and assessing whether there had been a violation of Article 3 (ill-treatment) it had to assess any State responsibility from the point of view of facts and standards of 1973 and --- notably, disregarding the awareness in society today of the risk of sexual abuse of minors in an educational context. That awareness is the result of recent public controversies on the subject, including in Ireland.

The ECtHR recalled its earlier case law, emphasizing that the State cannot absolve itself from its obligations to minors in primary schools by delegating those duties to private bodies or individuals³ - yet underscoring that this was not the challenge in the case of Louise O'Keefe as the question raised in this particular case was whether the primary school system in Ireland contained sufficient mechanisms of child protection against the risk of sexual abuse. The facts of the case of Louise O'Keefe showed that the authorities ought to have had the relevant knowledge when Louise, then 9 years old, was sexually abused twenty times by her teacher.

Adequate action ought to have been taken on the grounds of previous complaints in 1971 to avoid abuses like those experienced by 9-year-old Louise two years later by the same teacher in the same school. As a result, the ECtHR found that the State had failed in its positive obligation to protect Louise from sexual abuse to which she was subjected in 1973, in violation of her rights under Article 3.

Elderly people and European Convention case law

As mentioned by Judge Alberto Perez Perez speaking before me there is no case law at the

³ Costello-Roberts v. the United Kingdom, cited above, § 27. See also, mutatis mutandis, Storck v. Germany, no. 61603/00, § 103, ECHR 2005-V

Inter-American Court concerning the right of the elderly as a vulnerable group. Issues as the pensioners' rights and the protection of elderlies' right to property and access to justice have been tackled, but not the protection of the elderly from the standpoint of vulnerability. Although the ECtHR has more case law regarding the elderly as a vulnerable group it is far from as progressive as the case law on children – except maybe in terms of property and pensions.

The ECtHR has had to face very difficult cases and situations in which the protection of the elderly has been raised, and its case law has sometimes been the subject of strong criticism. The ECtHR has tried to find a balance based on the exceptional circumstances in times of crisis and the limits in public resources.

The recent case of *Senchishak v. Finland*, judgment of 18 November 2014, concerned the threatened removal from Finland of a 72-year-old Russian national. The woman used to live in Russia, where she had a husband who died in 2007 and a daughter who went missing in 2003 and is probably dead. In 2006, the woman suffered a stroke with the result that her right side got apparently paralyzed. In 2008, she arrived in Finland with a 30-day tourist visa. Ten days after her arrival, she applied without success for a residence permit on the basis of family ties to her other daughter, who has resided in Finland permanently since 1988 and is a Finish citizen.

She complained that she risked being subjected to treatment contrary to Article 3 of the Convention if removed to Russia and this was also a violation of her right to family life under Article 8 of the Convention.

The ECtHR held unanimously that there would be no Article 3 violation if the elderly woman were to be expelled to Russia. The conclusion was that her need for health care did not show substantial grounds to believe that she would be exposed to a real risk of treatment contrary to Article 3. By a majority, the ECtHR also declared the Article 8 right to family life complaint inadmissible. The majority reasoned that the family life between the elderly woman and her adult daughter had been interrupted for at least twenty years. Moreover, it noted that the five years they had lived together in Finland could not amount to family life given the applicant's unlawful residence and awareness of her insecure situation. The ECtHR also considered that the applicant had failed to prove any dependency on her daughter other than normal ties of affection, as both private and public institutions are available in Russia to care for her needs.

The dissenters in *Senchishak*, the Albanian Judge Bianku and the Bulgarian Judge Kalaydjieva, were struck by the irrelevance in the majority reasoning of an elderly parent's dependence on the loving care of her adult child. The dissenters' approach makes room at

least for relationships between adult children and elderly parents. These judges stressed that the time comes elderly parents need the loving care of their adult children – and to deny that there existed emotional ties between children and elderly parents by saying that the children have no legal duty to provide care – was both legally and morally incorrect.

The dissent in *Senchishak* is more sensitive to the **diversity of family lives** across Europe. The dissenting judges stated:

The notion of “core family” and the level of preserved emotional ties between parents and separated adult children vary across the cultures and traditions of Europe as well as among individuals living in various countries (emphasis added) –

And proving Leo Tolstoy’s point that unhappy families are all unhappy in their own way:

Equal treatment of “family life” across cultures may thus lead to an unequal outcome – the notion of indirect discrimination lies in the focus on the effect of a measure rather than appearance or law – which may call for a positive action.

To close on a frivolous note the *Senchishak* judgment ranks as one of the three worst ECtHR judgments in 2014 in the Strasbourg Observer’s poll on best and worst judgments⁴ - where the best judgment (*Matúz v. Hungary*) arguably won because as stated “it clearly confirms the ECtHR’s strong commitment to providing much needed protection to whistleblowers’ freedom of expression in times when this is – politically speaking – a far from obvious, and therefore quite courageous, judicial position to take”.

Judicial issues regarding vulnerable and poor children and the elderly – taking into account political, economic and budgetary considerations depend at the end of the day on judicial independence and judicial courage– traits that may never have been more important than in today’s world.

⁴ <http://strasbourgeoiservers.com/2015/02/12/the-results-are-in-poll-on-best-and-worst-ecthr-judgment-of-2014/>