



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

THIRD SECTION

**CASE OF BERKMAN v. RUSSIA**

*(Application no. 46712/15)*

JUDGMENT

Art 11 • Art 14 (+11) • Freedom of assembly • Discrimination • Failure to ensure that public LGBTI awareness event proceeded peacefully • Passive police conduct and failure to restrain homophobic verbal attacks and physical pressure by counter-demonstrators • Non-compliance with State's positive obligations, which are to be assessed in light of public hostility towards LGBTI people • Negative obligations breached by preventing applicant's participation in the event through unlawful arrest • No evidence of discriminatory nature of arrests targeting both the event participants and their opponents  
Art 5 § 1 • Lawful arrest or detention • Lack of reasons and legal grounds for applicant's arrest in respect of a suspected administrative offence

STRASBOURG

1 December 2020

**FINAL**

**01/03/2021**

*This judgment has become final under Article 44 § 2 of the Convention. It may be subject to editorial revision.*



**In the case of Berkman v. Russia,**

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

Paul Lemmens, *President*,

Georgios A. Serghides,

Helen Keller,

Dmitry Dedov,

María Elósegui,

Anja Seibert-Fohr,

Peeter Roosma, *judges*,

and Milan Blaško, *Section Registrar*,

Having regard to:

the application against the Russian Federation lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by a Russian national, Ms Yelena Vladimirovna Berkman (“the applicant”), on 9 September 2015;

the decision to give notice to the Russian Government (“the Government”) of the application;

the parties’ observations;

Having deliberated in private on 10 November 2020,

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

## INTRODUCTION

1. The present case concerns the alleged violation of Articles 11 and 14 of the Convention on account of the failure of the Russian authorities to ensure the peaceful conduct of a public meeting in St Petersburg marking Coming Out Day on 12 October 2013. It also concerns the applicant’s complaint that her arrest, removal from the site of the event and subsequent detention at a police station were arbitrary and unlawful in breach of Article 5 of the Convention and that they amounted to discrimination against her on the grounds of her support for lesbian, gay, bisexual, transgender and intersex (LGBTI) people.

## THE FACTS

2. The applicant was born in 1992 and lives in St Petersburg. She was represented by Ms K. Mikhaylova, a lawyer practising in the same city.

3. The Government were represented by Mr M. Galperin, the Representative of the Russian Federation to the European Court of Human Rights.

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

## I. PUBLIC EVENT TO MARK COMING OUT DAY

5. On 27 September 2013 a group of LGBTI rights activists informed the St Petersburg authorities of their intention to hold a meeting to mark Coming Out Day (an annual LGBTI awareness day) from 2 p.m. until 3.30 p.m. on 12 October 2013 at the Field of Mars (*Марсово поле*), a large square in the city centre. About 150 people were expected to attend the event. The organisers mentioned that some participants would arrive at 1.30 p.m. to prepare for the meeting.

6. On 30 September 2013 the authorities forwarded the information about the upcoming event to the police (*ГУ МВД Российской Федерации по г. Санкт-Петербургу и Ленинградской области*) and reminded the organisers of the meeting that they would be held liable under domestic law for inciting hatred and enmity on account of ethnicity, language, origin and religious beliefs or for promoting “non-traditional” sexual relationships to minors.

7. The police deployed around 540 police officers, including officers from special-purpose units, to ensure public order during the meeting. It appears that the enhanced security was ordered in the light of anticipated clashes with counter-demonstrators. There is no information about any other prior arrangements made by the authorities.

## II. THE APPLICANT’S ATTEMPT TO TAKE PART IN THE MEETING AND HER ARREST

8. At 11.30 a.m. on 12 October 2013 the police officers arrived at the Field of Mars in St Petersburg. It does not appear that any crowd barriers were installed at the site or that the police erected any kind of perimeter fence for the demonstrators.

9. At about 1 p.m. the applicant arrived at the site to take part in the preparation of the meeting. According to her, the participants (about twenty or thirty people) were unable to gather, because the place was blocked by more than 100 aggressive counter-demonstrators. Many of them were in national costumes and armed with whips (*нагайка*). They insulted the participants in the meeting, and pushed and punched them. The counter-demonstrators surrounded the Coming Out Day participants, including the applicant, and followed them. The participants asked for help from the police officers, but the latter did not react. They stepped in only later, when counter-demonstrators insulted the police officers personally. The police officers arrested several counter-demonstrators, took them to a police bus parked nearby and then released them. The released counter-demonstrators continued their verbal attacks and physical pressure on the LGBTI activists present at the Field of Mars.

10. At 1.55 p.m. police officers surrounded a group of twelve demonstrators, including the applicant, Mr D.G., Mr. D.M., Ms. N.I., Ms. E.M., Ms S.L. and Ms Y.T., and stated that they had breached public order by using foul language in a public place. Then the officers ordered them to proceed to a police bus and took them to central police station no. 28 in St Petersburg (*28 отдел полиции УМВД России по центральному району г. Санкт-Петербургу*). The police officers referred to the transfer procedure set out in Article 27.2 of the Code of Administrative Offences (“the CAO”).

11. The Government submitted that in total, ninety-three people had been arrested during the public event on account of their disorderly conduct. They were taken to three police stations and then released. The applicant argued that the police officers had taken only participants in Coming Out Day to various police stations.

### III. ADMINISTRATIVE PROCEEDINGS AGAINST THE APPLICANT

12. The applicant was detained at the police station under Article 27.3 of the CAO from 2.30 p.m. to around 6.30 p.m.

13. According to her, at around 6 p.m. police officers started drawing up administrative-arrest, administrative-escort and administrative-offence records. The first document stated that she had been detained at 1.55 p.m. on 12 October 2013 on account of her disorderly conduct, an offence proscribed by Article 20.1 of the CAO. She was then taken to the police station to ensure the “prompt and proper examination of her case”. The second document specified that the grounds of her arrest were that the applicant had used foul language during the public meeting and had ignored warnings given by police officers to refrain from doing so. The applicant signed the two records, noting her disagreement with them.

14. The applicant’s case was transmitted to the Dzerzhinskiy District Court of St Petersburg, which terminated the administrative proceedings against her on 8 November 2013 for lack of evidence of her guilt.

### IV. ADMINISTRATIVE PROCEEDINGS AGAINST OTHER PARTICIPANTS OF THE PUBLIC EVENT

15. The police brought similar charges of disorderly misconduct (Use of foul language) against Mr D.G., Mr D.M., Ms N.I., Ms E.M., Ms S.L. and Ms Y.T. The Dzerzhinskiy District Court of St Petersburg terminated the proceedings against Mr D.G., Mr D.M., Ms E.M., Ms S.L. and Ms Y.T. on various dates in November and December 2013 for lack of evidence of their guilt.

16. On 9 January 2014 the same court found Ms N.I. guilty as charged. Following an appeal by her, on 6 March 2014 that decision was quashed by

the St Petersburg City Court, which found that the police had failed to substantiate the charges in question and terminated the proceedings.

## V. CIVIL PROCEEDINGS AGAINST POLICE AUTHORITIES

17. On 12 February 2014 the applicant lodged a civil claim with the Vasileostrovskoiy District Court of St Petersburg against the St Petersburg and Leningrad Region Main Department of the Russian Ministry of the Interior (*Главное управление МВД России по г. Санкт–Петербургу и Ленинградской области*), the Central District of St Petersburg Department of the Russian Ministry of the Interior (*УМВД России по Центральному району г. Санкт–Петербурга*), the chief of central police station no. 28 in St Petersburg, and two police officers involved in her transfer to the police station and her detention there. She challenged the lawfulness of her arrest and detention at the police station. Later, on an unspecified date, she extended her claim, alleging that the authorities had failed to ensure the personal safety of the participants in the public meeting of 12 October 2013.

18. On 17 February 2014 the Vasileostrovskoiy District Court rejected her claim on procedural grounds, without examining it on the merits. Following an appeal by the applicant, that decision was quashed by the St Petersburg City Court on 14 July 2014.

19. On 23 October 2014 the Vasileostrovskoiy District Court examined the merits of the applicant's claim and dismissed it. The court noted that the applicant had failed to comply with the three-month statutory time-limit for appealing against the police's actions. The court furthermore stated that her claim was in any event ill-founded. Relying on a video recording of the event of 12 October 2013, the court established that the police had interfered with the public gathering because of the conflict between the demonstrators and counter-demonstrators. The court found that the applicant had been one of the active participants in that conflict. It therefore concluded that her arrest had been lawful. The court was not convinced by witness evidence stating that the applicant herself had not breached public order because the witnesses belonged to the same group of demonstrators as the applicant. The court furthermore concluded that her arrest had been lawful, as its duration had not exceeded forty-eight hours (the maximum length of administrative detention provided by Article 27.5 of the CAO). Lastly, the court found that the applicant's allegation regarding the authorities' failure to ensure the personal safety of the demonstrators had been unsubstantiated by evidence. It noted that about 550 police officers had been deployed by the authorities and that no harm had been caused to the applicant.

20. On 31 December 2014 the applicant appealed against the above decision to the St Petersburg City Court. She complained that her arrest had not pursued a legitimate aim and had been arbitrary. She also alleged that

the authorities had failed to comply with their positive obligations under the Convention. Instead of ensuring the participants' freedom of expression, the police officers had arrested them. At the same time, no counter-demonstrators had been detained. According to the applicant, that selective approach had been discriminatory.

21. On 11 March 2015 the St Petersburg City Court upheld the first-instance judgment on appeal. It concluded that the applicant's arrest had been lawful. It was considered as an interim measure taken to facilitate subsequent administrative proceedings for the use of foul language, because at the time of the event, given the tension between the participants of the assembly and counter-demonstrators, the police officers had been unable to identify the people who had used offensive language and to immediately draft the administrative-offence records. Therefore they had had to take the arrested people to the police station. The fact that the administrative proceedings against the applicant had subsequently been terminated had not invalidated the lawfulness of her arrest. Lastly, the court noted that the applicant's claim had been lodged belatedly.

22. On 2 September 2015, the applicant lodged a cassation appeal challenging the judgment of 23 October 2014 and the appeal decision of 11 March 2015; the St Petersburg City Court dismissed her appeal on 25 September 2015, upholding the findings of the lower-instance courts.

23. Later, on an unspecified date, the applicant lodged a cassation appeal with the Supreme Court of Russia. It declined to entertain the appeal on 20 February 2016. It appears that the applicant did not receive a written version of that decision. Subsequently, she requested the court to provide her with a copy. By a letter of 23 May 2019, the Supreme Court of Russia informed her that the case file had been destroyed owing to the expiration of the statutory period for its storage.

## RELEVANT LEGAL FRAMEWORK AND PRACTICE

24. The relevant provisions of the CAO, including Articles 27.2 ("Transfer procedure") and 27.3 ("Administrative detention"), are summarised in *Navalnyy and Yashin v. Russia* (no. 76204/11, § 44, 4 December 2014). For other relevant material see *Lashmankin and Others v. Russia* (nos. 57818/09 and 14 others, §§ 216-17, 218-19 and 231-42, 7 February 2017).

## RELEVANT INTERNATIONAL MATERIAL

25. On 31 March 2010, at the 1081st meeting of Ministers' Deputies, the Committee of Ministers of the Council of Europe adopted Recommendation CM/Rec(2010)5 on measures to combat discrimination on grounds of sexual orientation or gender identity, which in the relevant part reads as follows:

**“III. Freedom of expression and peaceful assembly**

...

14. Member states should take appropriate measures at national, regional and local levels to ensure that the right to freedom of peaceful assembly, as enshrined in Article 11 of the Convention, can be effectively enjoyed, without discrimination on grounds of sexual orientation or gender identity.

15. Member states should ensure that law enforcement authorities take appropriate measures to protect participants in peaceful demonstrations in favour of the human rights of lesbian, gay, bisexual and transgender persons from any attempts to unlawfully disrupt or inhibit the effective enjoyment of their right to freedom of expression and peaceful assembly.”

26. The 2019 Guidelines on Freedom of Peaceful Assembly (CDL-AD(2019)017), prepared by the Office for Democratic Institutions and Human Rights (ODIHR) of the Organization for Security and Co-operation in Europe (OSCE) in consultation with the European Commission for Democracy through Law (the Venice Commission) of the Council of Europe, read in the relevant part as follows:

**“Core State Obligations**

22. **Positive obligation to facilitate and protect.** States have a positive duty to facilitate and protect the exercise of the right to freedom of peaceful assembly. This duty should be reflected in the legislative framework and relevant law enforcement regulations and practices. It includes a duty to facilitate assemblies at the organiser’s preferred location and within ‘sight and sound’ of the intended audience. The duty to protect also involves the protection of assembly organizers and participants from third party individuals or groups who seek to undermine their right to freedom of peaceful assembly...

...

24. **Equality and non-discrimination.** The general principle that human rights shall be enjoyed without discrimination lies at the core of the interpretation of human rights standards. Discrimination based on grounds such as ... sexual orientation, gender, gender identity ... should be prohibited.

...

**Policing Assemblies**

31. **A human rights-based approach.** Law enforcement agencies should adopt a human rights-based approach to all aspects of the planning, preparation and policing of assemblies. This means they take into consideration their duty to facilitate and protect the right to freedom of peaceful assembly. A human rights-based approach to policing assemblies should be based on four key principles which underpin all aspects of police planning, preparation, implementation and debriefing associated with facilitating assemblies. These are (1) knowledge of the groups involved; (2) a commitment to facilitating assemblies; (3) recognition of the value and importance of voluntary communication at all stages of the assembly process; and (4) acknowledgment of the diversity of participants in assemblies and the need to differentiate between them in active policing.



32. **Use of Force.** Law enforcement agencies should not use force at assemblies unless strictly unavoidable. Force should only be applied to the minimum extent necessary, following to the principles of restraint, proportionality, and minimization of damage and the preservation of life. Firearms as potentially lethal weapons are not appropriate tactical tools for policing or dispersing assemblies and should be avoided.

...

#### **Arrest and Detention of Assembly Participants**

35. **Mass arrests or detentions.** Law enforcement should as far as possible avoid the use of containment (a tactic often referred to as “kettling” or “corralling”) or mass arrests of participants at an assembly. Such indiscriminate measures may amount to an arbitrary deprivation of liberty under international human rights law. Clear and accessible protocols for the stop, search and arrest or detention of assembly participants must be established.

...

#### **Section B: Guiding Principles: Interpretive Notes**

81. **Duty to protect and facilitate controversial but peaceful assemblies:** State authorities must protect the organizers and participants of peaceful assemblies that espouse views that are controversial or unpopular, and which may generate hostile opposition, and shall protect peaceful assemblies from any person or group that intentionally seeks to limit or destroy the rights of others to assemble. In cases where assemblies annoy or give offence to persons opposing the message, the obligations of the state go beyond a mere duty not to interfere – rather, there may be a need for active police measures to protect assembly organizers and participants from attacks by third parties. Potential disorder arising from hostility directed against those participating in a peaceful assembly must not be used to justify disproportionate restrictions on the assembly. However, an assembly may be prohibited as a last resort measure when the risk of violent counter-demonstrations may not otherwise be prevented or mitigated. The principle of proportionality must always be respected. The State has the duty to ensure that counter-demonstrators do not constitute an undue and serious interference with the main event’s ability to convey its message.

...

84. **Duty to take special measures to adequately facilitate assemblies associated with individuals or groups most at risk.** The State should take positive measures to facilitate assemblies associated with individuals and groups that have historically faced discrimination, or are otherwise marginalized or at risk. In doing so, the State should address specific needs and challenges confronting those persons or groups before, during and after assemblies. This includes integrating a gender and diversity perspective into States’ efforts to create a safe and enabling environment for the exercise of the right to freedom of peaceful assembly; special protection measures developed in consultation with persons at risk, such as early warning systems to trigger the launch of protective measures; and public statements in advance of assemblies to advocate, without ambiguity, a tolerant, conciliatory stance.

...

87. **Duty to distinguish between peaceful and non-peaceful participants.** Law enforcement officials must differentiate between peaceful and non-peaceful participants since only those who themselves take part in violence forfeit the legal guarantee of their right to assemble. State intervention should target individual

wrongdoers, rather than all participants more generally ... unless that is impossible due to the massive nature of the violence committed.

88. **Duty to de-escalate tensions.** If a dispute arises during the course of an assembly, communication between the organizer and the competent state authorities may be an appropriate means by which to reach an acceptable resolution. A number of countries have units within police forces specifically set up to deal with de-escalation through dialogue. At the same time, such dialogue will only be possible if both parties – law enforcement and organizers/participants – agree to it. If organizers or participants are unwilling to engage, then this should be accepted and should not, of itself, impact detrimentally on the performance of the State’s human rights obligations in relation to the assembly. Where voluntary dialogue is not possible, the relevant law enforcement bodies must still ensure that their actions are aimed at deescalating tensions. Public statements by State authorities and law enforcement in advance of demonstrations should clearly advocate for a tolerant, conciliatory stance and warn potential law-breakers about possible sanctions...”

27. In a report entitled “License to Harm: Violence and Harassment against LGBT People and Activists in Russia” published in December 2014, the NGO Human Rights Watch stated that since at least the mid-2000s, Russian authorities had refused to tolerate most public events in support of LGBT rights and equality, and that homophobic counter-demonstrators had violently disrupted many of them. The vast majority of people that Human Rights Watch interviewed who had been involved in such events had said that, in their experience, the frequency of attacks had risen over the previous two years. They had said that in 2013 anti-gay activists had attacked virtually every LGBT equality event of which Human Rights Watch were aware. Human Rights Watch and others had also described how anti-gay counter-protesters routinely harassed LGBT activists and their supporters during public events, used offensive homophobic slurs, or threatened them with physical violence. In five out of seven cases documented in the report, police had not taken adequate measures to prevent and stop the harassment and attacks. One of those cases concerned the public meeting of 12 October 2013 in St Petersburg. The relevant part of the report reads as follows:

“A Human Rights Watch researcher observed a rally organized by LGBT activists on October 12, 2013 in St. Petersburg to commemorate International Coming Out Day. After about a dozen LGBT activists arrived at the Mars Field in central St. Petersburg for the rally, a crowd of at least five times as many anti-gay counter-protesters harassed and attacked them. Some of the counter-protesters were dressed as priests with religious accessories; others were in military uniforms and camouflage outfits. The counter-protesters yelled that gays were “abnormal” and that there was no place for them in St. Petersburg and blocked access for LGBT activists to the protest venue. After several attempts to reach the venue, LGBT activists were unable to start the event.

The LGBT activists told the police at Mars Field that they were effectively barred from reaching the event venue. However, the police, who numbered several dozen ordinary police officers and many riot police, did not take adequate measures to ensure access to the venue and prevent harassment and attacks by anti-gay counter-protesters. The police began detaining counter-protesters only when several of

them started insulting police officers for not stopping the LGBT rally. A few activists were also detained but were released after several hours. Their initial charges of organizing and participating in an unsanctioned public event were eventually dropped.”

## THE LAW

### I. ALLEGED VIOLATION OF ARTICLE 5 § 1 OF THE CONVENTION

28. The applicant claimed that her administrative arrest and subsequent detention at the police station had been arbitrary and unlawful. She relied on Article 5 § 1 of the Convention, which reads in its relevant part as follows:

#### **Article 5**

“1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

...

(c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so; ...”

#### **A. Admissibility**

29. The Government stated that the applicant’s complaint was manifestly ill-founded because she had been lawfully arrested, transferred to the police station and detained there. Her detention had not exceeded the statutory time-limit of forty-eight hours. The Government’s arguments essentially repeated those used by the domestic courts (see paragraphs 19 and 21 above).

30. The applicant stated that her complaint was admissible.

31. The Court finds that the complaint is neither manifestly ill-founded nor inadmissible on any other grounds listed in Article 35 of the Convention. It must therefore be declared admissible.

#### **B. Merits**

##### *1. The parties’ submissions*

32. The applicant, relying on the domestic court’s finding in the administrative proceedings against her (see paragraph 13 above), submitted that she had not breached public order and that, accordingly, her arrest had been arbitrary. There had been no reason for her transfer to the police station because the administrative-offence record could have been drawn up on the spot. Her arrest, as well as the arrest of other participants, had been aimed at preventing the public event from being held.

33. The Government submitted that the interference with the applicant's rights had satisfied the requirements of Article 5 of the Convention. The police officers had arrested her for the use of foul language in a public place – that is to say for committing an act of disorderly conduct proscribed by the CAO. Then the applicant had been transported to a police station to give police officers an opportunity to prepare documents related to her administrative offence. Her detention there had not exceeded the statutory time-limit of forty-eight hours. The subsequent termination of the administrative proceedings against the applicant had not rendered her arrest or detention unlawful.

2. *The Court's assessment*

(a) **General principles**

34. For a summary of the relevant general principles, see *S., V. and A. v. Denmark* ([GC], nos. 35553/12 and 2 others, §§ 89-92, 22 October 2018).

(b) **Application of those principles to the present case**

35. The applicant was deprived of her liberty within the meaning of Article 5 § 1 of the Convention from about 1.55 p.m. until 6 p.m. on 12 October 2013. Police officers took her to the police station, in accordance with the procedure set out by Article 27.2 of the CAO. Once at the police station she was placed under administrative arrest under Article 27.3 of the CAO.

36. It appears that her arrest and detention had the purpose of bringing her before the relevant legal authority on suspicion of having committed an administrative offence and thus fell within the ambit of Article 5 § 1 (c) of the Convention (see *Tsvetkova and Others v. Russia*, nos. 54381/08 and 5 others, §§ 109-16 and 119-24, 10 April 2018 in respect of the administrative arrest and detention of the applicant within the context of administrative proceedings on account of the use of foul language in public; also contrast *Kapustin v. Russia* [Committee], no. 36801/09, 8 October 2019, §§ 29-31, where the applicant was not suspected of or charged with any offence and no administrative proceedings were instituted against him).

37. According to the applicant's arrest record, she was taken to the police station for the purpose of drawing up an administrative-offence report. The Court observes that Article 27.2 of the CAO provides that a suspected offender may be brought to a police station for the purpose of drawing up an administrative-offence report only if such a report could not be drawn up at the place where the offence was detected. The Government, however, have not argued that in the applicant's case drawing up such a report at the site of the protest was impossible. Moreover, the domestic authorities have never assessed in a meaningful manner the necessity of the applicant's transfer to the police station (compare *Butkevich v. Russia*,

no. 5865/07, §§ 61-65, 13 February 2018; *Korneyeva v. Russia*, no. 72051/17, § 34, 8 October 2019; and *Tsukanov and Torchinskiy v. Russia* [Committee], nos. 35000/13 and 35010/13, §§ 24-28, 17 April 2018).

38. In view of the foregoing, the Court finds a breach of the applicant's right to liberty on account of a lack of reasons and legal grounds for her arrest. Accordingly, there has been a violation of Article 5 § 1 of the Convention. Having reached this conclusion, in the circumstances of this case the Court does not consider necessary to examine the merits of the applicant's complaint under Article 5 § 1 of the Convention concerning her delayed release from the police station (see *Zavyalova and Others v Russia* [Committee], 74814/14 and 12 others, § 24, 8 September 2020).

## II. ALLEGED VIOLATION OF ARTICLE 11 OF THE CONVENTION, TAKEN ALONE AND IN CONJUNCTION WITH ARTICLE 14

39. The applicant complained that the domestic authorities had failed to enable the public meeting marking Coming Out Day to proceed peacefully. The police officers had not restrained counter-demonstrators in order to give the applicant and other participants in the event an opportunity to exercise their freedom of assembly. Instead, the police officers arrested the participants and removed them from the venue of the event just when it was about to start. She relied on Articles 11 and 14 of the Convention, which read as follows:

### Article 11

"1. Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests.

2. No restrictions shall be placed on the exercise of these rights other than such as are prescribed by law and are necessary in a democratic society in the interests of national security or public safety, 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. This Article shall not prevent the imposition of lawful restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State."

### Article 14

"The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

#### A. Admissibility

40. The Government claimed that the applicant's complaints were manifestly ill-founded.

41. The applicant argued that her complaints were admissible.

42. The Court considers that the 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*

43. The applicant maintained her complaints. She claimed that her arrest as well as the arrest of other participants in the public meeting had been arbitrary and unjustified. According to her, it amounted to discrimination against her and the other participants on the grounds of their opinions and perceived sexual orientation. Instead of arresting the participants and removing them from the venue, the police should have provided them with an opportunity to hold the meeting peacefully without fear of being subjected to physical violence. To support her allegation the applicant submitted video material.

44. The Government submitted that the authorities had taken all necessary measures to ensure peaceful conduct of the event. They had deployed 540 police officers, which was sufficient to ensure the safety of the 150 expected participants in the public meeting. As soon as the clashes between demonstrators and counter-demonstrators had started, police officers had arrested ninety-three people involved in the breach of public order – including the applicant, who had used foul language – and had taken them to police stations. The police had not distinguished demonstrators from counter-demonstrators and had treated them equally. The police intervention had saved both sets of parties to the conflict from physical injuries that they could have inflicted on each other.

### *2. The Court's assessment*

#### **(a) General principles**

45. Within the context of Article 11 of the Convention, the Court has often emphasised that pluralism and democracy are built on genuine recognition of, and respect for, diversity. The harmonious interaction of persons and groups with varied identities is essential for achieving social cohesion (see *Gorzelik and Others v. Poland* [GC], no. 44158/98, § 92, 17 February 2004; *Identoba and Others v. Georgia*, no. 73235/12, § 93, 12 May 2015; and *Beizaras and Levickas v. Lithuania*, no. 41288/15, § 107, 14 January 2020). Referring to the hallmarks of a “democratic society”, the Court has attached particular importance to pluralism, tolerance and broadmindedness. In that context, it has held that although individual interests must on occasion be subordinated to those of a group, democracy does not simply mean that the views of the majority must always prevail: a

balance must be achieved which ensures the fair and proper treatment of minorities and avoids any abuse of a dominant position (see *Young, James and Webster v. the United Kingdom*, 13 August 1981, Series A no. 44, p. 25, § 63; *Sørensen and Rasmussen v. Denmark* [GC], nos. 52562/99 and 52620/99, § 58, ECHR 2006-I; *Fáber v. Hungary*, no. 40721/08, §§ 37-41, 24 July 2012; and *Identoba*, cited above, § 93).

46. The State must act as the ultimate guarantor of the principles of pluralism, tolerance and broadmindedness (see *Informationsverein Lentia and Others v. Austria*, judgment of 24 November 1993, Series A no. 276, p. 16, § 38, and *Identoba*, cited above, § 94). Genuine, effective freedom of peaceful assembly cannot, therefore, be reduced to a mere duty on the part of the State not to interfere: a purely negative conception would not be compatible with the object and purpose of Article 11 of the Convention. This provision sometimes requires positive measures to be taken, even in the sphere of relations between individuals, if need be (see *Plattform "Ärzte für das Leben" v. Austria*, 21 June 1988, § 32, Series A no. 139; *Wilson and the National Union of Journalists and Others v. the United Kingdom*, nos. 30668/96, 30671/96 and 30678/96, § 41, ECHR 2002-V; *Ouranio Toxo v. Greece*, no. 74989/01, 20 October 2005, § 37; *Promo Lex and Others v. the Republic of Moldova*, no. 42757/09, § 22, 24 February 2015; and *Identoba*, cited above, § 94). That positive obligation is of particular importance for persons holding unpopular views or belonging to minorities, because they are more vulnerable to victimisation (see *Bączkowski and Others v. Poland*, no. 1543/06, § 64, 3 May 2007).

47. A peaceful demonstration may annoy or give offence to persons opposed to the ideas or claims that it seeks to promote. The participants must, however, be able, with the State's assistance, to hold the demonstration without having to fear that they will be subjected to physical violence by their opponents; such a fear would be liable to deter associations or other groups supporting common ideas or interests from openly expressing their opinions on highly controversial issues affecting the community. In a democracy the right to counter-demonstrate cannot extend to inhibiting the exercise of the right to demonstrate (see *Plattform "Ärzte für das Leben"*, cited above § 32, and *Identoba*, cited above, § 95).

48. The right to freedom of assembly is a fundamental right in a democratic society and, like the right to freedom of expression, is one of the foundations of such a society. Accordingly, States must not only safeguard the right to assemble peacefully but must also refrain from applying unreasonable indirect restrictions upon that right. In view of the essential nature of freedom of assembly and its close relationship with democracy, there must be convincing and compelling reasons to justify an interference with this right (see *Adalı v. Turkey*, no. 38187/97, § 267, 31 March 2005; *Ouranio Toxo*, cited above, § 36; and *Emin Huseynov v. Azerbaijan*, no. 59135/09, § 97, 7 May 2015).

49. The Court reiterates that in the enjoyment of the rights and freedoms guaranteed by the Convention, Article 14 affords protection against different treatment, without an objective and reasonable justification, of persons in relevantly similar situations (see, among many other authorities, *Burden v. the United Kingdom* [GC], no. 13378/05, § 60, ECHR 2008). However, this is not the only facet of the prohibition of discrimination in Article 14. The right not to be discriminated against in the enjoyment of the rights guaranteed under the Convention is also violated when States, without an objective and reasonable justification, fail to treat differently persons whose situations are significantly different (see *Thlimmenos v. Greece* [GC], no. 34369/97, § 44, ECHR 2000-IV; *D.H. and Others v. the Czech Republic* [GC], no. 57325/00, § 175, ECHR 2007-IV; *Kurić and Others v. Slovenia* [GC], no. 26828/06, § 288, ECHR 2012; *Runkee and White v. the United Kingdom*, nos. 42949/98 and 53134/99, § 35, 10 May 2007; *Eweida and Others v. the United Kingdom*, no. 48420/10, 15 January 2013; and *J.D. and A v. the United Kingdom*, nos. 32949/17 and 34614/17, § 84, 24 October 2019). The prohibition deriving from Article 14 will therefore also give rise to positive obligations for the Contracting States to make necessary distinctions between persons or groups whose circumstances are relevantly and significantly different. In the case of *Identoba* (cited above, §§ 81 and 100) the Court considered that the State had violated its obligations under the principle of non-discrimination due to the failure to protect demonstrators from homophobic violence and to launch an effective investigation.

**(b) Application of the above principles to the present case**

*(i) Alleged failure of the authorities to facilitate the conduct of the event*

50. The Court is satisfied that the St Petersburg authorities did not ban the public meeting in support of the LGBTI community, where the applicant intended to participate (see, by contrast, *Alekseyev v. Russia*, nos. 4916/07 and 2 others, § 12, 21 October 2010, and *Alekseyev and Others v. Russia*, nos. 14988/09 and 50 others, § 6, 27 November 2018) and that being aware of the risks associated with the event they dispatched considerable number of police officers to the scene of the demonstration (see, by contrast, *Identoba*, cited above §§ 73 and 99).

51. Those police officers arrived at the Field of Mars several hours before the envisaged event (see paragraph 8 above). At some point counter-demonstrators equipped with whips appeared at the venue. They were ostensibly hostile to the planned event (see paragraphs 9 and 27 above). Nothing suggests that any reaction from the police followed. The officers, who outnumbered counter-demonstrators several times, neither warned the latter against obstructing the meeting nor attempted to secure a safe perimeter for the participants in Coming Out Day. As a result of police



inaction, the applicant and other participants were unable to find a place for the event at the square which was occupied by counter-demonstrators.

52. As submitted by the applicant and not disputed by the Government, the police did not interfere immediately when the counter-demonstrators started bullying the participants in Coming Out Day by verbally attacking and pushing them. The officers did not take any steps to de-escalate the tension between the two groups. They stepped in belatedly, only when a real risk of inflicting bodily injuries appeared.

53. The passive conduct of the police officers at the initial stage, the apparent lack of any preliminary measures (such as official public statements promoting tolerance, monitoring of the activity of homophobic groups, or arrangement a channel of communication with the organisers of the event) and subsequent arrests on account of the alleged administrative offences demonstrate that the police officers were concerned only with the protection of public order during the event and that they did not consider it necessary to facilitate the meeting. The domestic courts which examined the applicant's case shared the same narrow view on the State's positive obligations under the Convention (see paragraphs 19 and 21 above).

54. The Court is unsatisfied with such approach. It reiterates that a demonstration may annoy or give offence to persons opposed to the ideas or claims that it is seeking to promote. The participants must, however, be able to hold the demonstration without having to fear that they will be subjected to physical violence by their opponents (see paragraph 47 above). Genuine, effective freedom of peaceful assembly cannot, therefore, be reduced to a mere duty on the part of the State not to interfere (see paragraph 46 above).

55. The Court notes that the State's compliance with their positive obligations under the Convention in the present case should be assessed in the light of the subject matter of the assembly. Those obligations were of paramount importance in the present case, because the applicant as well as other participants in Coming Out Day belonged to a minority. They held views that were unpopular in Russia and therefore were vulnerable to victimisation (see *Identoba*, cited above, §§ 63-64, and *Bączkowski and Others*, cited above, § 64), particularly given the history of public hostility towards the LGBTI people in Russia (see paragraph 27 above, compare *Identoba*, cited above, § 68). It is when assessed against that background that the discriminatory overtones of the incident of 12 October 2013 and the level of vulnerability of the applicant, who publicly positioned herself with the target group of the sexual prejudice, are particularly apparent.

56. Indeed, during the conflict between the participants of the event and counter-demonstrators the latter were insulting in the language, spitefully using offensive homophobic slurs (see paragraph 27 above). The homophobic connotation of the counter-demonstrators' speech and their conduct was evident to the authorities. However, it was not duly addressed.

57. Accordingly, the authorities failed to duly facilitate the conduct of the planned event by restraining homophobic verbal attacks and physical pressure by counter-demonstrators. As a result of the passive attitude of the police authorities, the participants of the event fighting against discrimination on the grounds of sexual orientation became themselves the victims of homophobic attacks which the authorities did not prevent or adequately manage.

58. The Court therefore considers that the domestic authorities failed to comply with their positive obligations under Article 11 of the Convention, taken alone and in conjunction with Article 14 (compare *Identoba*, cited above, §§ 92 and 100).

*(ii) Alleged interference with the applicant's freedom of assembly*

59. The Court observes that police officers arrested the applicant and other participants of the meeting on the grounds of the alleged use of foul language. The applicant's arrest prevented her from participating in the public event. Therefore, this action of the police amounted to an interference with her rights enshrined by Articles 11 of the Convention.

60. The Court has already found that the applicant's arrest fell short of the lawfulness requirement (see paragraph 38 above), accordingly, the interference in question was unlawful (compare *Kasparov v. Russia*, no. 53659/07, § 69, 11 October 2016 and *Hakim Aydın v. Turkey*, no. 4048/09, § 51, 26 May 2020).

61. Moreover, given that the applicant's conduct was clearly of non-violent nature, the Court considers that the reasons relied upon by the domestic authorities for the arrest were insufficient to justify that the applicant was prevented from continuing to participate in the event (compare to *Christian Democratic People's Party v. Moldova (no. 2)*, no. 25196/04, § 27, 2 February 2010).

62. The Court therefore considers that there has been a violation of the State's negative obligations Article 11 of the Convention taken alone.

63. In the circumstances of the present case, regard being had to the case file material and the parties' submissions (including video material and the allegations about the number of the participants and the arrested people (see paragraphs 9, 11 and 43 above)), the Court cannot find it established that the police officers arrested only the participants of the public event and disregarded the breaches of public order by their opponents. Accordingly, it cannot conclude that the interference in question affected the applicant's rights guaranteed by Article 14 of the Convention. There has been no violation of Article 14 taken in conjunction with negative obligations under Article 11 of the Convention.

### III. OTHER ALLEGED VIOLATIONS

64. Under Article 14 taken in conjunction with Article 5 § 1 of the Convention the applicant complained that she had been arrested on the grounds of her views in support of LGBTI people.

65. The Government argued that the complaint was manifestly ill-founded.

66. The Court finds that the complaint is neither manifestly ill-founded nor inadmissible on any other grounds listed in Article 35 of the Convention. It must therefore be declared admissible. In the light of its findings in paragraphs 38 and 62 above the Court considers that there is no need to examine separately the merits of the complaint at hand.

### IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

67. 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**

68. The applicant claimed 10,000 euros (EUR) in respect of non-pecuniary damage.

69. The Government stated that the applicant’s claim was excessive.

70. The Court grants the amount claimed and awards the applicant EUR 10,000 in respect of non-pecuniary damage.

#### **B. Costs and expenses**

71. The applicant did not claim costs and expenses. Accordingly, there is no call to make an award under this head.

#### **C. Default interest**

72. 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. *Declares* the application admissible;

2. *Holds* that there has been a violation of Article 5 § 1 of the Convention on account of the applicant's arrest;
3. *Holds* that there has been a violation of the respondent State's positive obligations under Article 11 of the Convention taken alone and in conjunction with Article 14;
4. *Holds* that there has been a violation of the respondent State's negative obligations under Article 11 of the Convention;
5. *Holds* that there has been no violation of Article 14 taken in conjunction with negative obligations under Article 11 of the Convention;
6. *Holds* that there is no need to examine separately the merits of the applicant's complaint under Article 5 § 1 of the Convention concerning her detention at the police station or to examine separately the merits of the complaint under Article 14 taken in conjunction with Article 5 § 1 of the Convention;
7. *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, EUR 10,000 (ten 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;
  - (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period, plus three percentage points.

Done in English, and notified in writing on 1 December 2020, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Milan Blaško  
Registrar

Paul Lemmens  
President