

## ***O.G. and others v. Greece: A belated vindication for (some) sex workers living with HIV***

Dr Dimitrios Kagiaros\*

In [\*O.G. and others v. Greece\*](#), the Third Section of the ECtHR delivered a compelling judgment vindicating the rights of sex workers<sup>1</sup> living with HIV in Greece who had been subjected to unprecedented public shaming and vilification by Greek authorities. While the judgment unequivocally denounced the actions of the Greek authorities, some aspects of the case, particularly relating to the applicants' vulnerability, potentially required further consideration.

### **Facts**

The judgment relates to two applications based on similar facts that were brought by eight and three applicants respectively. In 2012, police in central Athens conducted operations that resulted in the arrest of 115 women suspected of engaging in prostitution without the necessary permit. Prostitution is legal and regulated in Greece. Sex workers must register in their local municipality and undergo regular medical screenings. Following their arrest, the applicants were subjected to blood tests. They argued that these tests were carried out without their prior consent. Some of the applicants struggled with substance abuse and noted that they were experiencing withdrawal symptoms at the time and, therefore, could not have given valid consent to the testing.

The blood tests demonstrated that some of the applicants were HIV-positive. They were subsequently prosecuted for, among other offences, attempting to inflict severe bodily injury due to exposing their clients to the risk of contracting HIV. The prosecutor ordered for their details (their names, photographs, and HIV status) to be published. The personal details concerning the applicants were picked up by Greek media and disseminated widely. The following justifications were provided for this measure: firstly, publishing this information was a means to protect the health of any clients that may have had unprotected sex with the applicants. This is because the publication of the applicants' details was perceived to potentially prompt these clients to undergo medical screening for HIV. If the potential exposure had taken place within the previous 72 hours, these clients could receive emergency medication that would make it less likely for them to contract the virus. Identifying the applicants would also ensure that anyone who had had unprotected contact with other sex workers was not unnecessarily 'seized by panic' (para. 10, all quotes are the author's translation of the original text in French) when finding out that HIV-positive sex workers had

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\* Assistant Professor in Public Law and Human Rights, University of Durham, School of Law. My thanks to Dr Marianna Iliadou for commenting on previous drafts. All views and any errors are my own.

<sup>1</sup> The use of this term is contested. As Rigotti [explains](#), "'sex work' is mostly used by scholars, activists, and sex workers' organisations [...]. Instead, the legislators of EU Member States resort to expressions such as 'prostitute', 'prostituted person', or 'individual involved in prostitution'." The term also has a broader meaning, covering a broader range of sexual services, going beyond 'full-service' sex work. While the judgment uses the terms 'prostituées' and 'prostitution', the post will use the term 'sex workers' to refer to the applicants and, where relevant, the term 'prostitution' to reflect the approach of the applicable legal frameworks.

been arrested in Athens. Finally, by identifying any clients that might have contracted HIV, the state could better achieve its goal of convicting the sex workers involved.

The applicants brought claims under Articles 3 and 8 ECHR in relation to the forced blood testing, and under Article 8 ECHR in relation to the publication of their medical and other data without their consent. Additionally, the applicants brought claims under Articles 3 and 5 ECHR challenging the conditions and legality of their detention, as well as Article 13 ECHR due to the lack of an effective remedy for all their grievances.

### **The Judgment**

As to the blood tests, the Court stated that having regard to the nature of the applicants' complaints and the current state of its case law it would examine the claim solely under Article 8 (para. 89). The Court noted that taking a blood or saliva sample constitutes an interference with the right to private life when done forcibly. However, it emphasised that Article 8 does not as such prohibit medical interventions against the will of a suspect with the purpose of obtaining proof of their participation in a criminal offence. In examining whether this interference was prescribed by law, the Court noted that the government had relied on the domestic law regulating prostitution and a Ministerial Decree as bases for the interference. Both instruments require sex workers to undergo frequent medical screenings. The Court found both these provisions to be insufficient. While both established obligations for sex workers to submit to medical testing, neither described the procedure to be followed, nor did they authorise the police or judicial authorities to conduct the screening, with or without the consent of the persons concerned. This led to a finding of an Article 8 violation as the laws in question were not sufficiently foreseeable. Since the interference failed at the 'prescribed by law' stage, the Court did not proceed with the assessment of whether the interference had a legitimate aim and whether it was necessary in a democratic society.

As to the publication of the applicants' data, the Court held that this was carried out in accordance with domestic law and for the legitimate aim of protecting the rights of others, namely the rights of the clients who had potentially been exposed to HIV. In assessing the (*stricto sensu*) proportionality of the measure, the Court noted that the publication was not accompanied by appropriate and sufficient guarantees, given that the decision to publish the applicants' data had not been notified to them, and they could neither object to the publication before the decision was taken, nor lodge an appeal after the publication. This was particularly problematic given the extreme sensitivity of data relating to HIV status. The Court emphasised that such an interference could only be compatible with Article 8 if it defended an especially important aspect of the public interest, and that such measures taken without the consent of the person concerned called 'for the most rigorous examination' (para. 153). In this respect, the Court concluded that authorities could have adopted less restrictive measures to achieve the legitimate aim pursued. For instance, a general announcement mentioning the arrest of HIV-positive sex workers in the centre of Athens would have sufficed to prompt the clients to get tested. Finally, the Court highlighted that the disclosure of the applicants' HIV status was likely to lead to devastating consequences for their private life and expose them to opprobrium and social exclusion. For these reasons, the Court found a violation of Article 8. Having regard to the 'extreme seriousness'"(para. 165) of the violation

the Court awarded between 15,000 and 20,000 euros to the various applicants for non-pecuniary damages.

The Court held that it was not necessary to rule separately on the other complaints.

### **Commentary**

This judgment serves as a vindication for the applicants on a matter that received enormous publicity and sparked heated debate in Greece. It represents the culmination of the [efforts of activists](#) and [NGOs](#) to bring attention to the facts of this case and to obtain justice for the applicants. The blatantly disproportionate nature of the interference with the applicants' rights meant that the Court did not have to be particularly 'creative' to find Article 8 violations. However, while the judgment is clear and conclusive, certain underlying issues relating to the applicants' vulnerability were left unexplored.

The fact that the Court did not consider these issues does not make the judgment deficient. It might be appropriate for the Court, for reasons of judicial economy, to opt for the most straightforward path to the finding of a violation. The Court also did not have the opportunity to offer a full proportionality assessment since it found that the interference with Article 8 in relation to the forced medical intervention was not prescribed by law. Therefore, the sections below point out some issues that were relevant to the case and were not examined in depth, without suggesting that their absence in the Court's reasoning is necessarily problematic.

### ***Multiple and Intersecting Vulnerabilities***

One concept that was not utilised by the Court in its proportionality reasoning was the applicants' vulnerability, although their 'particularly vulnerable' status was mentioned in the context of awarding damages (para. 165). It is notable that in relation to the forcible blood testing, the Greek authorities explicitly refused to recognise the applicants' vulnerability in detention on the basis that they had been arrested many times before for the same offences and, as a result, could understand the medical procedures to which they were subjected (para. 23). Similarly, the authorities concluded that the applicants were not vulnerable due to their drug use because, purportedly, their withdrawal symptoms were not serious enough to prevent them from 'understanding the procedure or consenting to it' (*ibid.*). Due to the finding of non-compliance with the 'prescribed by law' requirement under Article 8 in relation to the forcible blood testing, these points remained unaddressed.

An assessment of the applicants' vulnerability could have prompted the Court to also examine whether the forcible medical testing amounted to degrading treatment under Article 3. [Vulnerability is a factor](#) that can bring certain treatment within the 'minimum level of severity' required for an Article 3 violation. This case represents an example of multiple and potentially [overlapping axes of vulnerability](#). Some of the applicants were HIV-positive, a group the Court [has identified](#) as vulnerable due to the history of prejudice and stigmatisation people living with HIV have faced. Some of the applicants had also used drugs, [which might increase](#) their vulnerability in the context of detention. The Court has not identified sex workers as a vulnerable group as such, but [has found](#) that, for instance, a woman who was subjected to racist intimidation and violence by police was in a position of 'particular vulnerability' as an

'African woman' involved in prostitution. [CEDAW General Recommendation No. 19](#), on Violence against women also provides that sex workers are 'especially vulnerable to violence' by both state and non-state actors. The fact that the Court only sought to examine this issue under Article 8, did not allow it to provide further clarity on this point. Vulnerability would have also been a crucial element of the Court's reasoning if it had chosen to examine the applicants' Article 3 claim relating to the conditions of their detention.

Vulnerability was also relevant to the publication of the applicants' data. In balancing the competing considerations (the rights and interests of the, one would presume, mostly male clients and the rights of the applicants), the domestic authorities gave automatic priority to the interests of the clients involved, with no consideration of the various overlapping forms of vulnerability present with regard to the applicants, or the fact that they might be rendered vulnerable to further harm by the publication of their data. While the Court rightfully placed its emphasis on the harm caused by the publication of the applicants' HIV status, it did not comment on the fact that the publication of the applicants' real names<sup>2</sup> also identified them as sex workers without their consent. This, on its own, could expose them to harm due to the [stigmatisation and social exclusion](#) that is sometimes linked to sex work. The effects of this measure could have been explored more holistically to acknowledge the multiple vulnerabilities present in this case and the various forms of stigma associated with the applicants' identity. Additionally, in [Armonienė v. Lithuania](#) (2008) the Court held that the publication of sensitive data relating to HIV status 'could have a negative impact on the willingness of others to take voluntary tests for HIV'. Although that judgment related to voluntary testing, it is likely that the events in the present case would discourage other sex workers from submitting to medical screening out of concern that their details would be published.

This argument should not be taken to endorse the designation of all sex workers as vulnerable. The Court's case law on 'vulnerable groups' is [not without criticism for reinforcing stereotypes](#) against the groups it aims to defend. Sometimes, the Court might be faulted for labelling a group 'vulnerable' without [being sensitive to the individual circumstances](#) of the members of the group, thus essentialising the group in question. Particularly in the context of sex work, reference to vulnerability may further stigmatise and promote harmful stereotypes equating all sex work with victimisation and exploitation. However, in the specific context of the interaction between sex workers and law enforcement, an interaction [with a fraught history](#), there could be scope to recognise some forms of individual vulnerability in order to address the obvious asymmetry of power, especially when other factors pointing towards vulnerability are present (for instance, irregular migration status, or, like in the present case, drug use and HIV-positive status). Recognising some of the vulnerabilities associated with sex work might also be useful in future cases, such as the pending case of [M.A. and others v. France](#) in which applicants engaging in prostitution are challenging the compatibility with the ECHR of the 'Nordic model' of sex work regulation that criminalises the purchase of sex services. In this case, recognising certain vulnerabilities linked to sex work in relation to some of the claims

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<sup>2</sup> It should be noted that the name of the eighth applicant in the first application was published in error, and she was not involved in the arrests.

can narrow the margin of appreciation (which is likely to be wide due to the lack of a uniform approach across Europe to the regulation of sex work) and invite the Court to adopt a clearer stance in relation to the applicants' claims. The Court [has previously relied on vulnerability](#) as a justification to assign less persuasive weight to European consensus that 'disfavours' a marginalised or stigmatised group. While this is an issue outside the scope of the present case, vulnerability reasoning could have served as a building block to developing more concrete standards on state duties in relation to the interaction between sex workers, their clients, and law enforcement.

### ***Providing meaningful and timely justice to the applicants***

By the time the Court heard this case, five of the original eleven applicants had died. Their claims were struck out, apart from one whose children were found to have a legitimate interest in maintaining the application. From the remaining applications, some failed at the admissibility stage for non-compliance with the six-month rule (on this there was disagreement between the majority and partly dissenting judges for one applicant) and non-exhaustion of domestic remedies. Some applicants relied on their vulnerable status as a justification for not *prima facie* fulfilling certain admissibility criteria, but they failed to sway the Court. Ultimately, a violation was found for only two of the original applicants in relation to the blood testing and for five applicants in relation to the publication of their data. The application numbers indicate that both applications were submitted at least eleven years before the judgment was published. The manner in which the Court manages its docket through its [priority policy](#), and how strictly admissibility criteria should apply to vulnerable people are distinct issues, both of which require careful analysis and debate which is beyond the scope of this short post. However, it is regrettable that this belated condemnation of Greece's actions will only serve as a moral victory for many of the original applicants and their surviving relatives.

### **Conclusion**

The unanimous findings of violations in *O.G. v. Greece* serve as a well-reasoned condemnation of a cruel policy that caused considerable distress and suffering to the applicants and their families. However, the judgment does leave some lingering questions. While this was not an apposite case for the Court to comment on matters that are entirely peripheral to the applicants' claims (for instance, the compatibility with the ECHR of various models of regulating sex work, or the criminalisation of HIV transmission), there was scope for the Court to consider the intersecting vulnerabilities of the applicants in more depth. Hopefully, this is an issue on which the Court will comment more boldly in future cases.



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