



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

FIFTH SECTION

CASE OF KURT v. AUSTRIA

(Application no. 62903/15)

JUDGMENT

STRASBOURG

4 July 2019

Referral to the Grand Chamber

04/11/2019

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Kurt v. Austria,

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

Angelika Nußberger, *President*,

Yonko Grozev,

André Potocki,

Mārtiņš Mits,

Gabriele Kucsko-Stadlmayer,

Lətif Hüseyinov,

Lado Chanturia, *judges*,

and Claudia Westerdiek, *Section Registrar*,

Having deliberated in private on 28 May 2019,

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

PROCEDURE

1. The case originated in an application (no. 62903/15) against the Republic of Austria lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by an Austrian national, Ms Senay Kurt (“the applicant”), on 16 December 2015.

2. The applicant was represented by Mrs C. Kolbitsch, a lawyer practising in Vienna. The Austrian Government (“the Government”) were represented by their Agent, Mr H. Tichy, Head of the International Law Department at the Austrian Ministry for Europe, Integration and Foreign Affairs.

3. The applicant alleged that the Austrian authorities had failed to protect her and her children from her violent husband, which had resulted in him murdering their son.

4. On 30 March 2017 notice of the complaints concerning Articles 2, 3 and 8 of the Convention was given to the Government and the remainder of the application was declared inadmissible pursuant to Rule 54 § 3 of the Rules of Court.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant was born in 1978 and lives in Unterwagram.

6. She married E. in 2003. They had two children, A., born in 2004, and B., born in 2005.

7. On 10 July 2010 the applicant called the police because her husband had beaten her. In her statement to the police she alleged that she had problems with her husband and that he had been beating her for years. Recently the situation had worsened because he had a gambling addiction, was heavily in debt and had lost his job. She stated that she had always supported him financially, but had also lost her job and therefore could no longer pay his debts. The police noted that the applicant showed signs of injuries, namely haematoma on her elbow and upper arm, which she stated she had sustained through beatings by her husband.

8. Pursuant to section 38a of the Security Police Act (*Sicherheitspolizeigesetz*), the police handed the applicant a leaflet informing her, among other things, of the possibility of seeking a temporary restraining order (*einstweilige Verfügung*) against her husband under sections 382b and 382e of the Enforcement Act (see paragraphs 33, 37 and 39 below).

9. When confronted with the allegations by the police, E. stated that he did not have any problems with his wife, but that he had had a fight with his brother the night before and had sustained injuries to his face. There were no indications that E. was in possession of a weapon. A barring order (*Betretungsverbot und Wegweisung zum Schutz vor Gewalt*) in accordance with section 38a of the Security Police Act was issued against E. This order obliged him to stay away from their common apartment as well as from the applicant's parents' apartment and the surrounding areas for fourteen days. It appears that E. complied with the order. The police submitted a report to the public prosecutor's office (*Staatsanwaltschaft*), which brought criminal charges against E. on 20 December 2010.

10. On 10 January 2011 the Graz Regional Criminal Court (*Landesgericht für Strafsachen*) convicted E. of bodily harm and dangerous threatening behaviour and sentenced him to three months' imprisonment, suspended for three years with probation. The applicant refused to testify against E. He was nonetheless found guilty of pushing her against a wall and slapping her, and of threatening his brother and his nephew.

11. On Tuesday 22 May 2012 the applicant, accompanied by her counsellor from the Centre for Protection from Violence (*Gewaltschutzzentrum*) went to the St. Pölten District Court (*Bezirksgericht*) and filed for divorce. In her oral hearing before the judge, which was held at 11.20 a.m., she explained that the reasons for the breakdown of the marriage were her husband's continuous threats and violence against her throughout their marriage. She indicated that on the preceding Saturday the situation had escalated and she had suffered injuries. She added that she was planning to report him to the police and that she hoped a barring order would be issued against him.

12. On the same day at 1.05 p.m., the applicant reported her husband to the police for rape and making dangerous threats. She was interviewed by a female police officer and described the following events in detail.

13. According to the applicant, on Saturday 19 May 2012 at 3 p.m., when the issue of a possible separation came up, the situation escalated. In the course of the ensuing argument E. repeatedly stated that he could not live without her and the children, and that he would take the children to Turkey. In the course of their dispute he choked her and pushed her onto the couch. He told her that he was a man and she was a woman, so she was obliged to have sex with him. The applicant told him to stop, but he removed the clothes from the lower part of her body and raped her. She said he did not hold her tightly, but she did not resist out of fear of being beaten if she did. After the incident she took a shower, put on her clothes and went to the pharmacy to obtain a contraceptive pill because she was afraid of getting pregnant.

14. The applicant stated further that E. had behaved violently towards her from the very beginning of their marriage, and that in 2010 he had been issued with a barring order of two weeks because he had injured her. In relation to another incident at that time, which had concerned his brother and nephew in Graz, E. had been convicted of bodily harm and making dangerous threats. The applicant explained that since 2010 she had been in regular contact with the local Centre for Protection from Violence. Because her husband had subsequently gone to hospital of his own accord to be treated for his gambling addiction and mental problems, she had forgiven him, refused to testify in the criminal proceedings against him and decided to give him another chance. However, the situation had worsened in February 2012, when E.'s gambling resumed. The applicant stated that since the beginning of March 2012 he had been threatening her on a daily basis, always with the same phrases: "I will kill you", "I will kill our children in front of you", "I will hurt you so badly that you will beg me to kill you", "I will hurt your brother's children if I am expelled to Turkey" (the applicant's brother lives in Turkey), and "I will hang myself in front of your parents' door". She said that she had not reported these threats until now, because she feared that he would act upon them if she did.

15. The applicant stated that her husband had been beating her regularly, and sometimes slapped the children as well. The applicant repeated that she was in great fear of her husband and that she was reporting all this to the police now because she wanted to protect herself and her children. She added that he always took her mobile phone away from her and sometimes locked her in their apartment so that she could not leave.

16. The police took pictures of the injuries the applicant had sustained (haematoma on her neck and scratches on her chin). A medical examination did not however detect any injuries typically caused by rape. The public prosecutor ordered E.'s immediate questioning.

17. After the applicant's report to the police, at 5 p.m. a female police officer accompanied her to the marital home. The officer questioned E., who contested the allegations of violence. She then interviewed the children, who confirmed that their father beat their mother and for some time had also been regularly slapping them. Based on those facts and section 38a of the Security Police Act, the police officer issued a barring order against E. This order obliged him to leave the marital home and prohibited him from returning to it or the surrounding areas, as well as barring him from the applicant's parents' apartment and its surrounding areas. His keys to the marital home were taken from him. The applicant was handed a "leaflet for victims of violence", informing her, among other things, of the possibility of extending the scope of the barring order in time and place by seeking a temporary restraining order (*einstweilige Verfügung*) against her husband under sections 382b and 382e of the Enforcement Act (see paragraphs 33, 37 and 39 below). The police report described the applicant as "tearful and very scared".

18. In the same police report E. was described as "mildly agitated" and "cooperative". He accompanied the police officer voluntarily, at 6.10 p.m., to the police station. While there, the content of the barring order was explained to him. Subsequently, he was questioned by a prosecutor who confronted him with the allegations against him. E. denied the allegations of violence, rape and threatening behaviour. He admitted that he had had sexual intercourse with his wife on 19 May 2012. However, he contended that sexual contact with his wife had always taken place in such a way that his wife had first refused, but then allowed herself to be convinced.

19. On the same day, after E.'s questioning, still on 22 May 2012, the public prosecutor's office instituted criminal proceedings against E on the basis of the suspicion of rape, bodily harm and dangerous threat. It ordered, as a further step of investigation, that the children be interviewed. The interview of the children also took place on the same day, by a specially trained female police officer. The children said that their father had beaten their mother, as well as them, including blows to the face.

20. On 23 May 2012 the St. Pölten Federal Police Department (*Bundespolizeidirektion*) assessed the lawfulness of the issuance of the barring order against E. (under section 38a(6) of the Security Police Act, see paragraph 33 below). It found that the evidence coherently and conclusively showed that E. had used violence against his family, and that the barring order was therefore lawful.

21. On 24 May 2012 at 9 a.m. E. went to the police station on his own initiative to inquire whether it would be possible for him to contact his children. The police took the opportunity to question him and to confront him with his children's statements that he had beaten them. E. confessed that he beat them "every now and then", but "only as an educational measure", "not about the face" and "never aggressively". His wife also

slapped them from time to time. He added that his children were his everything, and that he did not have anyone else but his children. He stated that the day before he had had a telephone conversation with his daughter and she wanted to see him. He admitted that he had problems with his wife and that he no longer shared the marital bed, but slept on a couch in the living room, because she was “such a cold woman”. He stated that he had not beaten her in the past three years.

22. On 25 May 2012 E. went to A. and B.’s school. He asked A.’s teacher if he could speak briefly to his son in private, because he wanted to give him money. The teacher, who later stated that she had been aware that money had to be paid for some school events but that she had not been informed of the problems in the family, agreed. When A. did not return to class, she started looking for him. She found him in the school’s basement, having been shot in the head. His sister B., who had witnessed her brother being shot, was not injured. E. had gone. An arrest warrant was issued against him immediately. A. was taken to the intensive care unit of the city hospital.

23. The police questioned several witnesses including the applicant and her daughter. The applicant stated that E. had always presented “extremely different faces” – towards strangers he had always appeared friendly, but only she had known his “true face”. After the barring order had been issued he had been calling her several times each day. He had wanted to see her and the children together. She had answered that he could, of course, see the children in the presence of her father. She had also told her children that they could see their father whenever they wanted. She had only preferred to avoid meeting her husband alone with the children, because she was afraid that he would kill the children in front of her. The applicant stated that she had seen her husband in front of the school with his car in the morning, before the shooting. She had planned to inform the teacher of her family problems, but on the following day, 26 May.

24. The applicant’s counsellor from the Centre for Protection from Violence stated that she had never thought that E. would commit such a crime. A.’s teacher said that she had never noticed any injuries on the boy or any other indications that he could have been a victim of domestic violence. She had never heard of any threats made against the children. The mother of one of A.’s schoolmates, a nurse, described E. as a “friendly and courteous person”. She had met him an hour before the event in front of the school, and he had greeted her and shaken her hand. A father of another schoolmate also met E. that morning and described him as “calm and polite”.

25. On the same day, at 10.15 a.m., E. was found dead in his car. He had committed suicide by shooting himself. From his suicide note dated 24 May 2012, which was found in the car, it became apparent that E. had actually planned to kill both of the children as well as himself. He wrote that he loved his wife and children and could not live without them.

26. On 27 May 2012 A. succumbed to his injuries and died.

27. On 11 February 2014 the applicant instituted official liability proceedings. She claimed that the public prosecutor's office should have requested that E. be held in pre-trial detention on 22 May 2012, after she had reported him to the police. There had been a real and immediate risk that he would reoffend against his family. It should have been clear to the authorities that the barring order had not offered sufficient protection, particularly as the police had known that it could not be extended to cover the children's school. The applicant claimed 37,000 euros (EUR) in compensation for non-pecuniary damage. She also applied to the court for a declaratory judgment (*Feststellungsbegehren*) that the Republic of Austria was liable for any possible future damage (such as mental and physical problems experienced by the applicant) caused by the murder of her son, which she assessed at EUR 5,000.

28. On 14 November 2014 the St. Pölten Regional Court (*Landesgericht*) dismissed the applicant's claim. It held that, taking into account the information the authorities had had to hand at the relevant time, there had not been an immediate risk to A.'s life. A barring order had been issued against E., which had required him to stay away from the marital home and the applicant's parents' apartment, as well as the surrounding areas. E. had never acted aggressively in public before. Even though he had allegedly been issuing threats against his family for years, he had never acted upon them. He had complied with the barring order issued in 2010, and no further misconduct had been reported to the authorities after the incident in 2010 until the applicant had reported him to the police on 22 May 2012. There had not been any indications that E. had had a gun in his possession, or that he had tried to get one. Moreover, after the issuance of the barring order, E. had cooperated with the police and had not demonstrated any aggressive behaviour, so the authorities had been able to assume that there would be a reduction in tension. The court weighed the applicant's and her children's right to be protected against the rights of E. under Article 5 of the Convention, and held that pre-trial detention should only be the *ultima ratio*. A less intrusive measure had been issued instead, namely the barring order with respect to both the residential premises. The court concluded that the public prosecutor's office had therefore not acted unlawfully or culpably by not taking E. into pre-trial detention.

29. The applicant appealed, repeating that the public prosecutor's office should have been aware that there had been an increased threat of further violent acts by E. since she had filed for divorce. She presented statistics showing that the number of homicides committed between partners was significantly raised during the separation phase of a couple, the phase in which the applicant and E. had found themselves. The applicant asserted that the authorities had been aware that E.'s violence against her had increased since February 2012. In fact, he had specifically threatened that he

would kill the children in front of the applicant, and that he would kill her or himself. The applicant also argued that the domestic authorities were under a positive obligation under Article 2 of the Convention to protect her and her children's lives by making use of criminal law provisions and the respective measures therein, which, in her specific situation, could only have meant detention. The temporary restraining order as a "less intrusive measure" had not been sufficient as the police could not extend it to cover the children's school.

30. On 30 January 2015 the Vienna Court of Appeal (*Oberlandesgericht*) dismissed the applicant's appeal. It held that the public prosecutor's office had some discretion when deciding on whether to take a person into pre-trial detention. Official civil liability could only be established if the decision had not been justified under the particular circumstances. The starting point for the evaluation of such a decision was the specific information the authorities had to hand at the time the decision was taken. The public prosecutor's office had to decide on the basis of the specific information available and the facts of the case before it. In the absence of such information, any general knowledge concerning increased levels of homicides during divorce proceedings was not decisive. What mattered was the question whether at the pertinent time there had been serious reasons to suggest that there was a real and individual risk that E. would commit further serious offences against the applicant and her children. According to the information available to the public prosecutor's office at the time, and considering that a barring order had already been issued, there had not been sufficiently specific grounds to assume the existence of such a risk, in particular in the public area, for the reasons already set out by the St. Pölten Regional Court.

31. On 23 April 2015 the Supreme Court rejected an extraordinary appeal by the applicant on points of law. The decision was served on the applicant's counsel on 16 June 2015.

II. RELEVANT LAW AND PRACTICE

A. Domestic law and practice

32. Section 22(2) of the Security Police Act (entitled "Preventive protection of legally protected interests") as in force at the relevant time, read as follows:

"The security authorities have to prevent dangerous attacks on life, health, freedom, morality, property or environment, if such attacks are likely."

33. The relevant parts of section 38a of the Security Police Act (titled "Barring order for protection against violence" (*Betretungsverbot und*

Wegweisung zum Schutz vor Gewalt)) as in force at the relevant time read as follows:

“(1) If, on the basis of specific facts, in particular because of a previous dangerous attack, it must be assumed that a dangerous attack on life, health or freedom is imminent, the members of the police force are authorised to ban a person who poses a threat from the home in which an endangered person lives, as well as its immediate surroundings. [The police] have to inform [the person who poses a threat] of the premises to which the ban applies; this area shall be determined in accordance with the requirements of effective preventive protection.

(2) Under the conditions laid down in paragraph 1, the public security authorities are authorised to issue a barring order, which is to be defined in accordance with paragraph 1; however, the exercise of force to enforce this prohibition is not permitted. In the case of a ban from returning to one’s own home, particular attention must be paid to the question whether this interference with that person’s private life is proportionate. The members of the police force ... are obliged to give [the person posing a threat] the opportunity ... to inform him/herself where he/she can find shelter ...

(4) The members of the police force are ... obliged to inform the endangered person of the opportunity to seek a temporary restraining order under sections 382b and 382e of the Enforcement Act and of suitable victim protection institutions ...

(6) The security authorities must be notified immediately of the issuance of a barring order and must review it [as to its legality] within 48 hours ...

(7) The observance of a barring order must be verified by the public security authorities at least once within the first three days of its entry into force. The barring order ends two weeks after its issuance, unless a request for a temporary restraining order pursuant to sections 382b and 382e of the Enforcement Act (*Exekutionsordnung*) is submitted within [these two weeks] to the competent court ...”

34. According to statistics published by the Austrian Ministry of the Interior (*Innenministerium*), in 2012 the police issued 7,647 barring orders under section 38a of the Security Police Act.

35. The relevant parts of section 38a of the Security Police Act, as amended as a result of the events in question with effect from 1 September 2013, read as follows:

“(1) If there is evidence, in particular because of a previous dangerous attack, leading to the necessary assumption that a dangerous attack on life, health or freedom is imminent, the members of the police force are authorised to prohibit a person who poses a threat from entering

1. the home where an endangered person lives, as well as its immediate surroundings;

2. and, if the endangered person is under the age of 14, furthermore from entering

a) a school that the endangered minor attends to fulfil the requirements of compulsory education ... or

b) an institutional childcare facility he or she attends, or

c) a day nursery he or she attends

including an area within a radius of fifty metres.

(2) ... In the event of a barring order prohibiting a return to one's own home, it must be ensured particularly that this interference with the private life of the person affected is proportionate. ...

(4) The members of the police force are further obliged to inform

1. the endangered person about the possibility of obtaining a temporary restraining order under sections 382b and 382e of the Enforcement Act and of appropriate victim protection facilities ... and

2. if persons under the age of 14 are endangered, immediately

a) the locally responsible child and youth welfare office pursuant to section ... and

b) the head of an institution pursuant to § 1 (2) for which the ban has been imposed. ...”

36. The relevant parts of section 84 of the Security Police Act as in force at the relevant time read as follows:

“(1) A person who ...

2. disregards a barring order pursuant to section 38a paragraph 2 ...

commits an administrative offence and shall be punished with a fine of up to 500 euros, or up to two weeks' imprisonment in case of default of payment.”

37. The relevant parts of section 382b of the Enforcement Act (titled “protection from violence in the home”) read as follows:

“(1) The court shall, in respect of a person who makes continued cohabitation intolerable for another person through physical attack, threats of such an attack, or behaviour seriously affecting their mental health, upon an application by [the endangered person],

1. order such person to leave the home and its immediate vicinity, and

2. prohibit him or her from returning to the home and its immediate vicinity if the home is the principal and essential residence of the applicant ...”

38. The relevant parts of section 382c of the Enforcement Act (titled “procedure and issuance”) as in force at the relevant time read as follows:

“(1) If there is an imminent threat of further endangerment by the person posing a threat, [he or she] shall not be heard before the temporary restraining order is issued, in accordance with section 382b paragraph 1. This can become apparent especially from the security authorities' report, which the court has to acquire of its own motion; the security authorities are obliged to send such reports to the courts immediately. However, [the application] has to be served on the respondent immediately, if the application is submitted without undue delay after a barring order has been issued (section 38a paragraph 7 Security Police Act) ...

(3) The following have to be notified immediately about the content of the court order deciding on an application for a temporary restraining order in accordance with section 382b and about a court order lifting the temporary restraining order ...

2. in the event that one of the parties is a minor, the local child and youth welfare authority ...”

39. The relevant parts of section 382e of the Enforcement Act (titled “general protection from violence”) read as follows:

“(1) The court shall order a person who makes continued cohabitation intolerable for another person through physical attack, threats of such an attack, or behaviour seriously affecting their mental health, upon application by [the endangered person],

1. to stay away from certain designated locations and
2. to avoid meeting or contacting the applicant,

unless this runs counter to the essential interests of [the person posing the threat] ...”

40. A request for a temporary restraining order under the Enforcement Act, by which a police barring order can be issued or extended in time (section 382b) or by which a police barring order can be extended in area (section 382e), can be lodged within two weeks of the applicable police order. Even though not specifically stated in the law, the civil court needs to determine a request under section 382e within four weeks at the latest.

41. Article 170 of the Code of Criminal Procedure (listed in the chapter on “arrest”) reads as follows:

“(1) Arresting a person suspected of having committed an offence is permitted

1. if the person has been caught in the act of committing an offence or is plausibly suspected of committing the offence, or is caught with items indicating the person’s involvement in the offence,

2. if the person has fled or is in hiding or if there is evidence of a risk that the person will flee or go into hiding,

3. if the person tries to influence witnesses, expert witnesses or co-suspects, remove evidence of the offence, or hinder the establishment of the truth in any other way or if there is specific factual evidence that there is a risk that the person will try to do so,

4. if the person is suspected of having committed an offence which is punishable by imprisonment exceeding six months or if there is specific factual evidence leading to an assumption that he or she will commit such an offence, which is directed against the same legally protected interest, or that he or she will carry out the attempted or threatened act (Article 74 § 1 (5) of the Criminal Code).

(2) If the offence is punishable by imprisonment of at least ten years, arrest must be ordered, unless it can be assumed, on the basis of factual evidence, that all the grounds for arrest laid down in paragraph 1 (2) to (4) can be excluded.

(3) Arrest and detention may not be ordered if they are disproportionate to the significance of the case (Article 5).”

42. The relevant parts of Article 171 of the Code of Criminal Procedure as in force at the relevant time read as follows:

“(1) The arrest has to be carried out by the police on the basis of a warrant issued by the public prosecutor’s office which has been approved by a court.

(2) The police may arrest a suspect of their own motion

1. in the cases referred to in Article 170 paragraph 1 (1) and

2. in the cases referred to in Article 170 paragraph 1 (2) to (4), if, owing to imminent danger, an order from the public prosecutor's office cannot be obtained in time.

(3) In case of an arrest pursuant to paragraph 1 the suspect must be served with the court approval of the arrest immediately or within twenty-four hours after the arrest; in case of an arrest pursuant to paragraph 2 a written police statement disclosing the strong suspicion of the offence and the ground for the arrest [must be issued to the suspect]. Furthermore the suspect has to be informed at once, or immediately after his or her arrest, that he or she has the right

1. to notify a relative or any other trusted person and defence counsel of his or her arrest, or have them so notified ...
2. to request the appointment of legal-aid defence counsel where applicable,
3. to lodge a complaint or an appeal against his or her arrest and to request his or her release at any time."

43. The relevant parts of Article 173 of the Code of Criminal Procedure (listed in the chapter on "pre-trial detention") as in force at the relevant time read as follows:

"(1) Pre-trial detention may only be ordered and continued upon request by the public prosecutor's office, and if the suspect is strongly suspected of having committed a specific offence, if he or she has been heard by the competent court concerning the subject of the accusation, and if the grounds for pre-trial detention and one of the grounds for detention laid down in paragraph 2 are met. [Pre-trial detention] may not be ordered or continued if it is disproportionate to the significance of the case or if more lenient measures (*gelindere Mittel*) (paragraph 5) would achieve the same result [as pre-trial detention].

(2) A ground for detention is given if, on the basis of certain facts, there is a risk that at liberty the suspect would

1. flee or go into hiding due to the nature and extent of the expected punishment or for other reasons
2. influence witnesses, expert witnesses or co-suspected persons, remove evidence of the offence, or hinder the establishment of the truth in any other way
3. despite the fact that proceedings concerning an offence punishable by imprisonment exceeding six months have been instituted against [the suspect]
 - a. commit a criminal offence ensuing serious consequences, which is directed against the same legally protected interest as the criminal offence ensuing serious consequences that he or she is suspected of
 - b. commit a criminal offence ensuing not only minor consequences, directed against the same legally protected interest as the offence that he or she is suspected of, if he or she has previously been convicted or is presently suspected of having repeatedly or continually committed such offences
 - c. commit a criminal offence punishable by imprisonment exceeding six months, which is directed against the same legally protected interest as the criminal offence that he or she is suspected of and in which respect he or she has been convicted of twice previously, or

d. carry out the attempted or threatened act (Article 74 paragraph 1 (5) of the Austrian Criminal Code) that he or she is suspected of.

(3) Risk of flight shall in any case not be assumed if the suspect is suspected of a criminal offence that is not punishable by imprisonment exceeding five years, is in a stable living environment and has a permanent residence in Austria, unless he or she has already made arrangements to flee. When assessing whether the suspect will commit an offence pursuant to paragraph 2 (3) it shall be of particular weight if the suspect poses a threat to life and limb of a person or if a risk of committing crimes in a criminal organisation or terrorist association emanates from the suspect. Apart from this, the assessment of this ground for detention shall take into consideration to what extent such risk has been reduced by the fact that the circumstances have changed under which the offence that he or she is suspected of has been committed. ...

(5) More lenient measures include, in particular:

1. the pledge to neither flee nor go into hiding nor leave their place of residence without permission from the public prosecution office until the final conclusion of the criminal proceedings

2. the pledge that he or she will not attempt to hinder the investigations

3. in cases of domestic violence (section 38a Security Police Act), the pledge to refrain from any contact with the victim and to comply with the instruction not to enter a specific home or its immediate surroundings or to comply with an existing barring order pursuant to section 38a paragraph 2 of the Security Police Act or an existing temporary restraining order pursuant to section 382b Enforcement Act; including taking away all keys to the home [from the suspect]

4. the instruction to live at a certain place, with a certain family, to stay away from certain homes, certain places or certain people, to refrain from consuming alcohol or other addictive substances, or to have a steady job

5. the instruction to report every change of residence or to report to the police or another authority at certain intervals ...”

44. According to the Austrian Ministry of Justice (*Justizministerium*), pre-trial detention was ordered 8,640 times in 2012. Some 470 cases thereof concerned offences against personal freedom, and 389 concerned offences against life and limb.

B. International law and practice

45. The relevant international law has partly been summarised in *Opuz v. Turkey* (no. 33401/02, § 72-90, ECHR 2009).

46. The United Nations Convention on the Elimination of All Forms of Discrimination against Women (“the CEDAW”) was adopted in 1979 by the United Nations General Assembly. Austria ratified the CEDAW on 31 March 1982 and the Optional Protocol to that Convention on 6 September 2000.

47. The Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (“the Istanbul Convention”) was signed by Austria on 11 May 2011, ratified on

14 November 2013 (hence after the events in question in the instant case) and entered into force on 1 August 2014.

THE LAW

ALLEGED VIOLATION OF ARTICLE 2 OF THE CONVENTION

48. Relying on Articles 2, 3 and 8 of the Convention, the applicant complained that the Austrian authorities had failed to fulfil their positive obligations to protect her and her children from her violent husband. She alleged that the State had failed to protect her son's physical integrity against E.'s lethal attack by not taking E. into pre-trial detention. She had suffered severe psychological problems because of her son's death, which were a direct result of the State providing her family with insufficient protection. Furthermore, the applicant complained that the legislative framework which had been in force in 2012 had not allowed the police to extend barring orders to places outside residential premises, such as the children's school. This was a negligent omission and, as such, a breach of Article 2. In the aftermath of the events, by the amendment made to Article 38a of the Security Police Act, the Austrian state had recognised its failure and nevertheless "evaded" its responsibility in her case.

49. The Court, being master of the characterisation to be given in law to the facts of the case, considers that these complaints essentially cover the same ground and thus finds it appropriate to examine them under the substantive aspect of Article 2 of the Convention (see *Fernandes de Oliveira v. Portugal* [GC], no. 78103/14, § 81, 31 January 2019).

50. The relevant parts of Article 2 of the Convention read as follows:

"1. Everyone's right to life shall be protected by law ..."

A. Admissibility

51. The Government submitted that the complaint concerning the allegedly incomplete legislative framework was inadmissible for non-exhaustion. While it was true that the barring order issued by the police could not, at the relevant time, be extended to the children's school, it had been open to the applicant to request temporary restraining orders under sections 382b and 382e of the Enforcement Act before the competent district court (see paragraphs 37 and 39 above). This was the same district court where she had filed for divorce on the morning of 22 May 2012, even before contacting the police. A temporary restraining order under section 382e of the Act could be issued in relation to any place the court deemed appropriate. The police, based on a legal obligation to do so, had

informed the applicant of this possibility on two occasions: following the first barring order against her husband in July 2010 and on 22 May 2012 (see paragraphs 8 and 16 above).

52. The applicant replied that she was aware that district courts were the competent authorities both for divorce proceedings and for temporary restraining orders. However, they had only one dedicated morning per week for applicants who were not represented by lawyers, namely the public court consultation day every Tuesday (*Amtstag*). After the escalation of violence on Saturday 19 May 2012, she had seized the first opportunity to file for divorce on Tuesday, 22 May 2012. On the same day, she had also reported E. to the police and obtained a barring order with respect to the residential premises. The applicant submitted that she had already made an appointment with her counsellor from the Centre for the Protection from Violence for 25 May 2012 in order to make arrangements to apply for a temporary restraining order at the District Court, but had to wait until the following Tuesday to file such an application, which would have been 29 May 2012. Even if she had applied for a temporary restraining order earlier, that is on the same day she had filed for divorce, the court, in the applicant's view, probably would not have decided on the application within three days, and it was only three days later that her son was killed. In addition, the judge at the court where she had filed for divorce on 22 May 2012 had not informed her that she had that opportunity, despite the allegations she had made about her husband's violent and threatening behaviour.

53. The Court notes that the part of the applicant's complaint that concerns the alleged deficiencies of the legal framework addresses the fact that at the relevant time the police had not had the possibility, under section 38a of the Security Police Act, of extending the barring order beyond the residential premises, in particular to cover the children's school, where the murder was committed. In this context the applicant submitted that on 22 May 2012 she and her children had been in need of immediate protection from further violence by her husband. The Court agrees with the Government that the applicant could have requested a temporary restraining order under section 382e of the Enforcement Act with respect to premises beyond the residences even as early as on 22 May 2012. She was informed of this possibility and had, according to her own submissions, planned an appointment with her counsellor in order to request such a measure. The Court is however not convinced that, even if the applicant had made the request on 22 May 2012, it would have provided her family with immediate protection. It had to be lodged separately with the District Court, and that court had up to four weeks to issue a temporary restraining order. Although it is not impossible, it is also far from certain that the court would have delivered a decision immediately. The Court is not convinced that such an

application would have been an effective remedy against the alleged risk in the instant case. It therefore rejects the Government's argument.

54. The Court notes that the complaints under Article 2 of the Convention are not otherwise manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that they are not inadmissible on any other grounds. They must therefore be declared admissible.

B. Merits

1. The applicant's arguments

55. The applicant stated that after she had reported E. to the police on 22 May 2012 it should have been obvious to the authorities that a significant risk of new acts of violence by E. existed. She had referred to several risk factors in the course of filing the report, namely his previous criminal convictions for dangerous threatening behaviour and bodily harm, the latter as a result of domestic violence against her; E.'s long history of violence against the applicant and her children; the evidence of the injuries she had sustained during previous attacks; his relapse into gambling in February 2012 and his resulting increased aggression and financial problems; the continuous and very specific threats he had been issuing since March 2012; his non-acceptance of her wish to get a divorce and her resulting fear that he would act upon his threats; his gross trivialisation and denial of the use of violence; and the predictable escalation of the situation because of the divorce proceedings. E.'s sense of ownership over his family had been threatened by the applicant's wish for a separation, which she had manifested by filing for divorce and reporting him to the police. In addition, his own children had testified against him. E. had had nothing to lose, and had taken action.

56. The applicant submitted that the authorities' evaluation of E.'s statements before the police was bewildering. Contradicting the unanimous statements of all three victims, E. told the police that he had not beaten his wife in the three previous years, and had never beaten his children. However, the authorities had E.'s criminal record before them, which showed that he had been convicted on 10 January 2011 for an act of violence committed on 10 July 2010, hence less than two years before the applicant approached the police on 22 May 2012. In addition, there were obvious contradictions in E.'s different statements. In the light of these inconsistencies, seen in conjunction with the choke marks on the applicant's neck, the authorities should not have assumed that the intercourse had been consensual.

57. The applicant emphasised that she had explicitly mentioned in her report to the police that she feared for her children's lives. Nonetheless, they

were not mentioned as endangered persons in the police report. The authorities had all the relevant information at hand to make them aware of the increased risk of further criminal offences by E. against his family, but failed to take effective preventive measures. The applicant maintained that E. should have been taken into pre-trial detention, as the legal grounds for such detention had been satisfied (Article 170 § 1 of the Code of Criminal Procedure, see paragraph 38 above), particularly taking into consideration the risk that E. would reoffend or carry out an offence (Article 170 § 1 (4)). In the alternative, as a more lenient measure, it would have been possible under Article 173 § 5 (4) of the Code of Criminal Procedure for the public prosecutor to order E. to stay away from the children's school. This was all the more the case as the police barring order could not be extended to cover such premises. However, neither of these measures was employed. This demonstrated the lack of knowledge by the authorities of the dynamics of violence in cases of intimate partner violence and the profiling of perpetrators. Furthermore, the fact that section 38a of the Security Police Act did not allow the extension of barring orders to childcare facilities, indicated a deficiency in the legislation. The applicant concluded that in the light of the above, the authorities had unlawfully and culpably failed to protect A.'s life, in violation of Article 2 of the Convention.

2. *The Government's submissions*

58. The Government stated that they understood that the applicant had been under serious pressure from her violent husband, that she herself had been very much intimidated and injured and that she was deeply affected by her son's tragic death. They stressed however that the extent of the State's positive obligations under Article 2 must be construed in such a way that no impossible or unreasonable burden is imposed on them. Hence, not each and every risk obliged the State to take criminal law measures such as pre-trial detention. It had to be "established that the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual" (see *Osman v. the United Kingdom*, 28 October 1998, § 116, *Reports of Judgments and Decisions* 1998-VIII; *Opuz v. Turkey*, no. 33401/02, §§ 128-30, ECHR 2009; *Talpis v. Italy*, no. 41237/14, § 101, 2 March 2017).

59. The Government argued that in the circumstances of the instant case, the authorities could not have known that the applicant's children's lives were at real and immediate risk after the barring order had been issued and criminal proceedings had been instigated. Prior to the report filed on 22 May 2012, E. had only come to the attention of law-enforcement officials once, namely two years before, in 2010, on account of ill-treatment reported by the applicant. E. had thereafter complied with the barring order which had been issued against him, had undergone medical treatment, and the authorities had been made aware of no further misconduct. Furthermore,

the applicant had only reported the alleged rape and choking by E. three days after the events, even though the police could be reached twenty-four hours a day, seven days a week. When law-enforcement officials had interviewed her husband on 22 May 2012 he had presented himself as calm and cooperative. A medical examination of the applicant had been conducted, but no physical evidence of rape had been found. Given that E. had not appeared aggressive or otherwise conspicuous outside the family setting, the authorities had only had a limited set of facts at their disposal, on the basis of which they had had to assess the potential danger emanating from him. The level of knowledge had not suggested any risk for the children's lives, particularly in a public area, which is why they had not been expressly mentioned in the police report of 22 May 2012 (see paragraph 15 above) as "endangered persons" within the meaning of section 38a of the Security Police Act. Given that the reported episode of violence of 19 May 2012 had been directed only against the applicant, and not in any way against her children, the public prosecutor's office was not obliged to assume that a situation of acute danger existed as provided for in Article 170 § 1 (4) of the Code of Criminal Procedure (see paragraph 41 above). The applicant had not mentioned any further violence occurring between the alleged crime and her reporting the matter to the police three days later.

60. The Government submitted that the investigations carried out during the official liability proceedings had shown that from the information available at the material time it would have been out of the question to arrest the applicant's husband. The grounds for arrest, namely catching the offender in the act, flight risk or suppression of evidence, did not exist (see Article 170 § 1 (1) - (3) of the Code of Criminal Procedure, paragraph 41 above). The ground for arrest contained in Article 170 § 1 (4), namely the risk that an identical offence directed against the same legally protected right would be committed by the alleged perpetrator, or that he or she would carry out the attempted or threatened act of which he or she was suspected, had been ruled out by the public prosecutor after carefully weighing the information available and the conflicting interests involved. The Government considered it justified to confine the measures applied to the issuance of a barring order with immediate effect, combined with the seizure of E.'s keys to the residential property, and to focus on protecting the applicant rather than recognising the children as endangered persons themselves. Restricting E.'s freedom of movement any further than provided for under the barring order would have been inconsistent with Article 5 of the Convention, as it would have been neither necessary nor proportionate. The Government submitted that the positive obligations under Articles 2 and 3 of the Convention to protect victims of violence did not *a priori* include any measures that would obviously be inconsistent with Article 5. As the legal grounds for pre-trial detention had not been made

out, an order by the public prosecutor for E. to stay away from the children's school, under Article 173 § 5 (4) of the Code of Criminal Procedure, was also not available. Against this overall backdrop, the Government concluded that the public prosecutor's office could not be blamed for assuming that, despite the barring order, E. did not pose a further risk, in particular with relation to the children. In the light of the circumstances, it appeared sufficient that a barring order – with which E. had complied in the past – was issued in respect of the applicant's and her parents' apartments and their vicinities.

61. Turning to the complaint of the lack of protection of the children at their school, the Government reiterated that the tragic incident at hand was one of the reasons for improving the Security Police Act in order to protect minors under 14 years of age from domestic violence, notably by reinforcing the various methods of violence prevention with respect to children and extending the possibility of issuing barring orders in respect of schools and childcare facilities (see paragraph 35 above). The Government submitted, however, that the legislator should not be blamed for having introduced these improvements in connection with the incident in question. It was in the nature of things that a set of legal provisions which has generally proven effective can also be developed further. Performing evaluations as soon as relevant experience caused them to be identified as necessary should not give rise to criticism. Finally, in the civil proceedings it had, in any event, not been demonstrated that a far-reaching barring order would have been regarded as necessary in the light of the facts that were known to the authorities on 22 May 2012.

3. *The Court's assessment*

(a) **General principles**

62. The Court reiterates that Article 2 must be regarded as one of the most fundamental provisions of the Convention and as enshrining one of the core values of the democratic societies making up the Council of Europe (see *Giuliani and Gaggio v. Italy* [GC], no. 24458/02, § 174; *Soering v. the United Kingdom*, 7 July 1989, § 88, Series A no. 161). It requires the State not only to refrain from the "intentional" taking of life, but also to take appropriate steps to safeguard the lives of those within its jurisdiction (see *Fernandes de Oliveira v. Portugal*, cited above, § 104; *Calvelli and Ciglio v. Italy* [GC], no. 32967/96, § 48, ECHR 2002-I).

63. This positive obligation involves, first, a primary duty on the State to secure the right to life by putting in place a legislative and administrative framework designed to provide effective deterrence against threats to the right of life (see, among other authorities, *Öneryıldız v. Turkey*, [GC] no. 48939/99, § 89, ECHR 2004-XII; *Budayeva and Others v. Russia*, nos. 15339/02 and 4 others, § 129, ECHR 2008 (extracts); *Kolyadenko*

and Others v. Russia, nos. 17423/05 and 5 others, § 157, 28 February 2012; *Fernandes de Oliveira*, cited above, §§ 103 and 105-107; and *Talpis*, cited above, § 100). Second, in appropriate circumstances there is a positive obligation on the authorities to take preventive operational measures to protect an individual whose life is at risk from the criminal acts of another individual (see *Osman*, cited above, § 115, cited in *Kontrová v. Slovakia*, no. 7510/04, § 49, 31 May 2007; *Fernandes de Oliveira*, cited above, § 108). Children and other vulnerable individuals in particular are entitled to State protection (see *Talpis*, cited above, § 99).

64. The Court has already held in *Osman* (cited above) that, bearing in mind the difficulties involved in policing modern societies, the unpredictability of human conduct and the operational choices which must be made in terms of priorities and resources, the obligation to take preventive operational measures to protect an individual whose life is at risk from the criminal acts of another individual must be interpreted in a way which does not impose an impossible or disproportionate burden on the authorities. Accordingly, not every claimed risk to life can entail for the authorities a Convention requirement to take operational measures to prevent that risk from materialising (see *Osman*, cited above, § 116; *Opuz*, cited above, § 129; and *Fernandes de Oliveira*, cited above, § 111).

65. For such a positive obligation to arise, it must be established that the authorities knew or ought to have known at the time of the existence of a real and immediate risk to the life of an identified individual from the criminal acts of a third party and that they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk. This is a question which can only be answered in the light of all the circumstances of any particular case (see *Opuz*, cited above, § 130). Another relevant consideration is the need to ensure that the police exercise their powers to control and prevent crime in a manner which fully respects the due process and other guarantees which legitimately place restraints on the scope of their action to investigate crime and bring offenders to justice, including the guarantees contained in Articles 5 and 8 of the Convention (see *Osman*, cited above, § 116; *Opuz*, cited above, § 130; and *Talpis*, cited above, § 101).

(b) Application of these principles to the instant case

66. The Court considers that it needs to establish whether the authorities have complied with their positive obligations under the substantive limb of Article 2 of the Convention.

(i) The positive obligation to take preventive operational measures

67. First, the Court will examine the applicant's complaint concerning the state's positive obligation to take preventive operational measures for the protection of her son's life. The Court reiterates that previously, in 2010,

the police had issued a barring order against E. with respect to the residential premises, immediately after the applicant had made criminal complaints. E. was criminally convicted only six months after the applicant had reported him to the police, and despite her having made use of her right not to testify. In the following two years the applicant never reported any further incidents to the police. However in 2012, right after the applicant's report of domestic violence, the police again immediately issued a barring order, combined with a seizure of E.'s keys, and another barring order with respect to the applicant's parents' home. The police reported the incident to the public prosecutor right away, and on the same day the latter opened a criminal investigation into the allegations of domestic abuse and rape. Unlike in *Talpis* (cited above, § 117), the Court finds that the authorities reacted immediately to the applicant's reports of domestic violence. While the authorities therefore complied with their duty to act without delay once they had learned of the allegations of violence, it remains for the Court to examine whether their actions in 2012 were also sufficient in the light of their knowledge concerning the risk posed by E.

68. In this context the question to be answered is whether, on the basis of the information available at the time, the authorities could or should have known that E. posed a real and immediate risk to his son's life outside the places in respect of which the barring order had been issued, which could only have been averted by taking him into detention.

69. The Court considers that the facts that gave rise to the instant case must be assessed strictly from the point of view of what was known to the competent authorities at the relevant time, and not with the benefit of hindsight. As stated in *Osman* (cited above, § 116), *Opuz* (cited above, § 129) and *Talpis* (cited above, § 101), the scope of the positive obligation must be interpreted in a way which does not impose an impossible or disproportionate burden on the authorities. The Court is fully conscious of the difficulties encountered by the domestic authorities when deciding, as in the instant case, whether or not to issue a barring order against a suspect or even arrest him or her, on the basis of limited information available, often under time pressure and by nonetheless carefully balancing the rights of the person who poses a threat on the one hand, and the rights of the victim(s) on the other. It is therefore most relevant to recapitulate what was known to the authorities at the time when they decided which measures to take in respect of E., taking into account the competencies accorded to them by the law and a certain discretion offered by this law.

70. The public prosecutor's office had the following information at hand when deciding which measures to take against E.: the applicant's husband had a certain history of violence; two years earlier a barring order had been issued against him; and he had been convicted of causing bodily harm to his wife and uttering dangerous threats towards his brother and his nephew. The sentence had been suspended, but he was still within the three-year

probationary period of that conviction, and there was strong evidence that he had committed the very same offences again. In relation to the new allegations of bodily harm, there was physical evidence, namely haematoma on the applicant's neck and scratches on her chin. In addition, there was the accusation of rape, of which, however, no physical evidence was detected. The applicant gave a detailed account of the alleged rape to the police, while E.'s statements contained several contradictions (see paragraphs 18 and 21 above). However, before reporting the alleged rape the applicant had spent three more days in the apartment she shared with him. E.'s alleged violent outbreaks before the killing of his son had been confined to the marital home, from which he had been effectively barred. Moreover, there were no indications that E. had a gun or any other weapon, or that he had tried to get one. When confronted by police officers, E. had remained calm and cooperative, had gone to the police on his own initiative and did not give the appearance of posing an immediate threat to anyone. In addition, he had complied with the barring order in 2010, the authorities had not been made aware of any further violent acts until the incidents in question in May 2012, and there were no indications suggesting an escalation of the situation.

71. Turning to the applicant's argument that there had been contradictions in E.'s different statements to the police (see paragraphs 18 and 21 above), the Court notes that the authorities had in any event found the applicant's statements to be more credible than those of E. That was why the police issued the barring order, combined with a seizure of E.'s keys, and contacted the public prosecutor's office which immediately instituted criminal proceedings against him.

72. The Court reiterates that a risk must be real and immediate in order to trigger a State's positive obligation under Article 2 to take preventive operational measures for life protection. According to the documents on file, what was known to the authorities was that E. had been convicted once for bodily harm against the applicant and for dangerous threatening behaviour towards his brother and his nephew in 2010, and had allegedly started threatening the applicant and her children in March 2012, two months before the events in question, with the same recurring phrases (see paragraph 14 above). These threats, however, were partly ambiguous (for example, on the one hand E. had threatened to kill his children in front of the applicant, on the other he had threatened to take them to Turkey, but he had also threatened to commit suicide) and allegedly were issued on a daily basis over a period of two months without being acted upon. The Court therefore agrees with the authorities that the threats did not indicate an immediate risk for the children's lives outside the residential premises.

73. When it comes to the question of the possession of weapons, the Court notes that unlike in *Kontrová* (cited above, § 53), *Opuz* (cited above, §§ 133 and 141) and *Talpis* (cited above, §§ 34, 46 and 88), there was no

indication that the applicant's husband had ever had a gun or any other weapon, or that he would try to obtain one. The applicant never mentioned any weapons in her husband's possession. Therefore the authorities had no reason to believe that there was a specific risk for life emanating from the use of weapons.

74. Hence, after having considered all aspects of the case (unlike the authorities in *Talpis*, cited above, § 118), the public prosecutor decided to start a criminal investigation and decided, after a comprehensive risk assessment, not to take the applicant's husband into detention or to take other measures in addition to the barring order.

75. The Court notes that after the murder, the domestic authorities conducted a comprehensive investigation into the circumstances of A.'s death and the events leading up to it. This was not contested by the applicant. The domestic courts' assessments of the facts in the liability proceedings initiated by the applicant in 2014 were comprehensive, relevant, persuasive and in line with the Court's case-law on the issue. The courts balanced the applicant's rights under Articles 2 and 3 of the Convention on the one hand and E.'s rights under Article 5 on the other. They essentially found that because E. had never been aggressive in public, had never acted upon his threats before, had complied with the terms of a barring order two years earlier, had not been reported for any further incidents for two years and, finally, as the applicant had not contacted the police immediately after the reported incident, it would not have been proportionate to arrest him and take him into pre-trial detention. In addition, no one had known that E. was in possession of a gun or any other weapon or that he had tried to obtain one. In the authorities' view, the public prosecutor had acted lawfully and not culpably, which excluded State liability in the case.

76. The Court agrees with the domestic authorities that on the basis of the above factors, when looked at cumulatively, they were entitled to conclude that the barring order for the applicant's and her parent's homes and vicinities combined with a seizure of E.'s keys, would be sufficient for the protection of the applicant's life, as well as those of A. and B. His violent outbreaks had previously been limited to the vicinity of the home, which a barring order was capable of preventing, especially since he had fully complied with such a measure in 2010. Even though there were indications of a certain escalation of violence because of the pending divorce proceedings, this did not lead to the conclusion that there was a danger to the children's lives in a public place. In these circumstances, the real and immediate risk of a planned murder by E. obtaining a gun and shooting his son at his school was not detectable (see paragraph 25 above). The Court therefore sees no reason to depart from the domestic authorities' assessment that, considering all circumstances, given that a barring order that prohibited him from returning to the marital home, to the surrounding

areas, to the applicant's parents' apartment and to its surrounding areas had been issued on the basis that such an order had been effective two years before, no other incident had been reported in the period from July 2010 until May 2012 and it was not known that E. was in possession of a weapon, there was no discernible real and immediate risk to the children's lives. The Court agrees that they were entitled to conclude that a more serious measure against E. such as pre-trial detention was not warranted under the circumstances known to the authorities.

(ii) The positive obligation to put in place a regulatory framework

77. Second, the Court turns to the applicant's complaint that the regulatory framework at the time of the events had been insufficient to protect her son's life. In this context, the Court reiterates that its review of the domestic regulatory framework is not an abstract one, but rather one that assesses the manner in which it affected the applicant in the specific case (see *Fernandes de Oliveira*, cited above, § 116).

78. The applicant complained that the Security Police Act, as worded at the time, had contained a "loophole" as it had not allowed the police to extend the barring order to premises outside the vicinity of the home. In this respect, the Court refers to its reasoning above, that under the circumstances known to the authorities a risk to the applicant's son's life when he was at school was not discernible (see paragraphs 67-76 above). Her argument that the amendment of section 38a of the Security Police Act, adopted after the events in question (see paragraph 35 above), had to be interpreted as a "recognition" of the alleged legal deficiencies and should consequently lead to an award of compensation in her favour, is inconclusive. An improvement made to a legal framework in the aftermath of a crime cannot be interpreted, as such, as recognition of a previous deficiency.

79. The Court finds it worth noting that the applicant herself seemed not to have been aware of the acute danger emanating from her husband in respect of their children following the incident reported on 22 May 2012. She remained in the marital home for three days after that incident before going to the authorities, and there are no indications that she was unable to seek police protection earlier. Furthermore, she knew that she could get a temporary restraining order from the competent district court under section 382b or section 382e of the Enforcement Act, and an order under the latter section could have banned E. from public places beyond the residential premises (see paragraphs 8, 17 and 48 above). The fact that she did not lodge such a request in the aftermath of her husband's violent outbreak indicates that she herself did not see an imminent need for such a measure. In this context the Court also notes that after the issuance of the barring order the applicant told her children that they could see their father whenever they wanted to (see paragraph 23 above). These considerations do not imply any criticism towards the applicant, but show that, although a

legal framework for the applicant's and her children's protection existed, full use of it was not made because, tragically, a real and immediate risk for A.'s life at school was not discernible at that time.

(iii) Conclusion

80. In these circumstances, the Court concludes that the competent authorities did not fail to comply with their positive obligations to the life of the applicant's son. The Court therefore finds that there has been no violation of Article 2 of the Convention.

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Declares* the complaints under Article 2 admissible;
2. *Holds* that there has been no violation of Article 2 of the Convention.

Done in English, and notified in writing on 4 July 2019, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Claudia Westerdiek
Registrar

Angelika Nußberger
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the separate opinion of Judge Hüseyinov is annexed to this judgment.

A.N.
C.W.

CONCURRING OPINION OF JUDGE HÜSEYNOV

1. I agree that in the particular circumstances of this case it would be difficult to conclude that there was a violation of Article 2 of the Convention and that the Austrian authorities failed to comply with their positive obligation to protect the applicant's son. What has nonetheless prompted me to write a separate opinion is that in its judgment the Court has robustly applied the so-called *Osman* test to a domestic violence case. Having done so, the Court has overlooked the peculiarity of domestic violence as a distinctive social phenomenon.

2. The *Osman* test as developed by the Court in the case of *Osman v. the United Kingdom* (28 October 1998, § 116, *Reports of Judgments and Decisions* 1998-VIII), implies that the right to life is violated if the authorities knew or ought to have known at the time of the existence of a real and immediate risk to an identified individual or individuals from the criminal acts of a third party, and they failed to take measures within the scope of their powers which, judged reasonably, might have been expected to avoid that risk.

3. Since then the Court has invariably employed the *Osman* test when deciding on whether the respondent State has complied with its positive obligation to protect an individual whose life is at risk from the criminal acts of another individual. However, in my view, the relevance of this test is questionable in the particular context of domestic violence, that is to say, in cases where domestic violence has fatal results.

4. It is widely recognised that domestic violence often constitutes not just an isolated incident, but rather a continuous practice of intimidation and abuse. Therefore the State authorities should react, with due diligence, to each and every act of domestic violence and take all necessary measures to make sure that such acts do not lead to more serious consequences. It follows that the duty to prevent and protect comes into play when the risk to life is present, even if it is not imminent. In other words, in a domestic violence case, the positive obligation to protect life can be violated even where the risk to life is not immediate. I fully share the view of my learned colleague Judge Pinto De Albuquerque expressed several years ago in his concurring opinion in the case of *Valiuliene v. Lithuania* (see *Valiuliene v. Lithuania*, no. 33234/07, 26 March 2013) that “[r]ealistically speaking, at the stage of an “immediate risk” to the victim it is often too late for the State to intervene. In addition, the recurrence and escalation inherent in most cases of domestic violence makes it somehow artificial, even deleterious, to require an immediacy of the risk”. I am of the opinion that seeking to prove the immediacy of the risk to life in domestic violence cases in order to establish a violation of Article 2 would not be consonant with the scope of the due-diligence obligations of States in the field of preventing and combating domestic violence, particularly in the light of the Council of

Europe's Convention on Preventing and Combating Violence against Women and Domestic Violence (the Istanbul Convention).

5. The recent *Talpis* judgment (*Talpis v. Italy*, no. 41237/14, 2 March 2017) gave hope that the Court was ready to deviate from an incident-based understanding of domestic violence and reconsider the application of the *Osman* test to the particular situation of domestic violence, or at least to interpret the concept of immediate risk flexibly. I believe that in the present judgment the Court could have followed the emerging positive trend, even without finding a violation of Article 2.