Rethinking Likeness and Comparability in Equality Claims Brought Before the European Court of Human Rights

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A is a woman who is paid less than B, a male, equally qualified colleague performing exactly the same job. When she complains about the unequal treatment, she is reminded by her employer, C, that equality means "treating like cases alike". According to C, given that A is a woman and B is a man, they are not "alike"; hence, no obligation to guarantee equal pay arises. To this outrageous argument, A replies that she is equal in dignity to B and she demands to be treated with equal respect. She also maintains that there is absolutely no reasonable justification for her being treated unfavourably, compared to B, given that she has the same duties and responsibilities as B. Moreover, she argues that her sex has nothing to do with her performance or the value attached to it; it is an irrational and irrelevant consideration. C agrees but insists that A is not similar to B as regards sex, so this is the end of the argument. This imaginary exchange takes place in a dystopia where the mere likeness or the unlikeness of one person to another is deemed sufficient to block a discrimination claim. Now let us move the discussion to a real courtroom.

This time we will be dealing with the (real) claim of Mr Van der Mussele, a Belgian lawyer, who was appointed, pursuant to the letter of law, to provide his legal services for free to a person who was facing criminal charges but did not have sufficient means to pay for a lawyer.[1] He brought a claim before the European Court of Human Rights (ECtHR), claiming that he had been forced to represent that client without being entitled to any remuneration or even reimbursement of his expenses. More specifically, he argued, inter alia, that he had been discriminated against in the enjoyment of his right not to perform forced or compulsory labour.[2] This was so because people practicing other professions were never obliged to provide their services for free to indigent clients. For example, judges, registrars, interpreters or bailiffs would receive some reimbursement when they would be involved in legal aid cases. Moreover, other professionals, such as medical

[1] See *Van der Mussele v Belgium* (8919/80) (1984) 6 E.H.R.R. 163.
[2] *Van der Mussele* (1984) 6 E.H.R.R. 163 at [45].

practitioners, pharmacists or dentists were not required by the state to provide their services for free to people who could not afford to pay for them.

To this argument, the ECtHR replied that

> "between the Bar and the various professions cited by the applicant, including even the judicial and parajudicial professions, there exist fundamental differences … namely differences as to legal status, conditions for entry to the profession, the nature of the functions involved, the manner of exercise of those functions, etc. The evidence before the Court does not disclose any similarity between the disparate situations in question: each one is characterised by a corpus of rights and obligations of which it would be artificial to isolate one specific aspect."[3]

The court deemed this reasoning sufficient to support the conclusion that there had been no violation of art.14 ECHR taken together with art.4 ECHR in the case before it.[4] This finding is certainly not out of line with the traditional approach adopted by the court when it comes to adjudicating on discrimination claims under art.14 ECHR. It is a well-known aspect of the European Court's methodology that it will proceed to examine whether or not the difference in treatment is objectively and reasonably justified only after it has been shown that "the situation of the alleged victim can be considered ['relevantly'] similar to that of persons who have been better treated".[5] Failure to find such an appropriate comparator might prove fatal to the discrimination claim, as happened in the case of Mr Van der Mussele.

Such an attitude is not hard to reconcile with the theory of equality. The need for an appropriate comparator might fairly be seen as one of the most distinctive—albeit not unproblematic—attributes of what we consider to be a formal conception of equality.[6] Indeed, the famous formula of treating like cases alike seems to imply quite clearly that a discrimination claim cannot succeed unless we manage to find at least one similarly situated ("like") individual who is treated more favourably than the claimant. On the face of it, this requirement seems to be perfectly reasonable. Nevertheless, cases such as the one of Mr Van der Mussele seem to be imbued with some kind of unfairness. In essence, the Belgian lawyer was denied a proper examination of his claim because his profession was of a different nature to the one of dentists or even judges who did not have to work for free. In other words, the very ground of discrimination, i.e. the difference in professional status, was used to disprove the discrimination claim on the basis that the applicant and the comparator were insufficiently similar for the comparison to hold.[7] Having in mind that anti-discrimination law is designed to protect people who are usually different, and therefore not readily comparable to others, it is perhaps ironic that this very difference can be used to block the examination of the claim at hand.

[3] *Van der Mussele* (1984) 6 E.H.R.R. 163 at [46].
[4] *Van der Mussele* (1984) 6 E.H.R.R. 163 at [46].
[5] See *Fredin v Sweden* (12033/86) (1991) 13 E.H.R.R. 784 at [60].
[6] For a brief discussion and criticism as to the traditional role of comparators in formal equality claims, see Sandra Fredman, *Discrimination Law*, 2nd edn (Oxford: Oxford University Press, 2011), pp.10–13; for a more elaborate discussion of the use of comparators and the problems associated with it, see Suzanne B. Goldberg, "Discrimination by Comparison" (2011) 120 Yale L.J. 728.
[7] See Mark W. Janis, Richard S. Kay and Anthony W. Bradley, *European Human Rights Law: Text and Materials*, 3rd edn (Oxford: Oxford University Press, 2008), p.478.

This paper aims to put forward a normative framework for interpreting what "likeness" entails in a sensible and practical manner, helping us avoid paradoxes such as the ones illustrated by the case of Mr Van der Mussele; it does so with reference to the case law of the ECtHR, where the comparator requirement has been construed traditionally as requiring "similarity" or "analogy" in the situation of those treated differently. The main argument to be advanced here is that there is absolutely no reason to perceive of "likeness" as similarity in the factual situation of groups that are being treated differently. Instead, it makes more sense to assess similarity in terms of the weight of the legitimate interests that a disadvantaged group has in receiving the favourable treatment at hand, as balanced against the legitimate interest possessed by those who have already been treated advantageously; the weight of such legitimate interests being relative, of course, to the legitimate aim pursued by the state. Such an understanding allows us to satisfy the requirement for "likeness" in a more elaborate way, bringing the comparator inquiry closer to the justification inquiry, thereby also enhancing the quality of the overall reasoning; at the same time, it allows us to avoid the main trap associated with comparisons, namely, the failure to perceive respect for difference as an inherent element of the right to equality.

The analysis unfolds in four main steps. The first step argues that the classic formulation of formal equality does not really require, as a matter of necessity, the tracking down of an "analogously situated" comparator and then it proposes a different normative framework for understanding "likeness". The second step explains how the proposed framework can help us navigate through the (very close) interaction between the comparability and the justification stages without conflating the two. The third step deals with the way in which the approach advanced in this paper helps us bring the formal conception of equality closer to what is known as substantive equality, simply by enabling us to look at the requirement for "likeness" from a different angle. Finally, the fourth step explains how the perception of likeness as similarity in the weight of the legitimate interests involved can help provide clearer answers when the court is faced with difficult questions.

First step: Acknowledging that treating like cases alike does not necessarily require emphasis on comparisons

Peter Westen has famously attacked the principle of equality as being a tautology.[8] The argument has been advanced that "equality is entirely circular in the sense that it tells us to treat like people alike; but when we ask who 'like people' are, we are told they are 'people who should be treated alike'".[9] This is actually the biggest challenge that the comparator requirement poses from a normative standpoint. All people are similar in some respects and dissimilar in other ways. To ask a priori whether or not two people are in an analogous situation is quite an abstract question, for it does not determine the standard in relation to which the two are "alike" or "unalike". But this is far from suggesting that the classic formula of treating like cases alike is a tautology which is devoid of any meaning. In

[8] See Peter Westen, "The Empty Idea of Equality" (1982) 95 Harv. L. Rev. 537.
[9] Westen, "The Empty Idea of Equality" (1982) 95 Harv. L. Rev. 537, 547.

expounding that famous formula, Aristotle himself accurately observed that "this is the origin of quarrels and complaints—when either equals have and are awarded unequal shares, or unequals equal shares".[10] Aristotle also noted that in the same way the "unjust is unequal, just is equal"[11]; and the "unjust is what violates the proportion".[12] But that proportion does not have to be determined with reference to similarity in the factual situation alone; instead, the reasons behind the treatment might actually play a seminal role in determining whether or not some situations are "equal" or "alike".

Let us imagine, for example, that A completes the 100 metres race in 15 seconds, while B completes it in 20 seconds. The two are not similarly situated as regards the basic criterion for establishing who gets to win. Hence, A gets the prize and the glory of finishing first. A is treated unequally to B, the two being "unalike" as regards their ability to run fast. Aristotle does acknowledge the just character of this unequal treatment as he accepts that being slow or swift is a legitimate criterion for determining who is going to win a gymnastics competition; but not in deciding who is going to get an office of state.[13] It follows that people who are "alike" are, in reality, those who have similarly legitimate reasons for asserting their share in a distribution. B is treated differently to A because his performance, which is the legitimate factor to be taken into account in determining who gets the medal, was poorer than A's. But this is not the end of the matter. Very often, a particular distribution or treatment will not be capable of occurring in a symmetrical manner, even between those who have legitimate reasons for demanding an equal share. It is in this context that the "proportion", as maintained in rights discourse through the principle of proportionality, comes into play. It does so by stipulating that an unequal distribution will not be problematic where it is the result of pursuing a legitimate aim in a proportionate manner, i.e. by not disadvantaging those who suffer less favourable treatment any more than is absolutely necessary to achieve the aim at hand.

Formal equality then becomes a formula whereby those who have legitimate reasons to request X, must be treated in the same way in relation to X, unless there exists a legitimate aim the proportionate pursuit of which requires the exclusion of some people from equal treatment in relation to X. Thus understood, it does not appear to require the examination of whether or not A and B are "comparable" in the sense that they find themselves in a similar or an analogous situation as a matter of fact. Instead, the heart of the matter lies on demonstrating the existence of a legitimate interest for requesting equal treatment and the existence, or lack thereof, of a legitimate aim in denying it, the question of proportionality being a pivotal one. People who are "comparable" under this paradigm are those who have a legitimate interest of equal weight to others, as balanced against the legitimate aim of the state, in requesting similar treatment. This likeness as to the weight of the

[10] Aristotle, *The Nicomachean Ethics*, Translation by David Ross (Oxford: Oxford University Press, 2009), Book V, Vol.III, para.1131a. Far more emphasis, of course, was subsequently put on the first limb of that statement, requiring to treat equals (those who are alike) equally (in an alike manner), which led to the maxim of "treating like cases alike" taking precedence over the need to "treat unalike cases, unalike". Within the case law of the ECtHR, that difference in emphasis is clearly demonstrated by the mere fact that indirect discrimination was not acknowledged by the court until 2000, in the case of *Thlimmenos v Greece* (34369/97) (2001) 31 E.H.R.R. 15.

[11] Aristotle, *The Nicomachean Ethics* (2009).

[12] Aristotle, *The Nicomachean Ethics* (2009), Book V, Vol.III, para.1131b.

[13] Aristotle, *Politics*, Translation by H. Rackham (Cambridge, Massachusetts: Harvard University Press, 1959), Book III, Vol.III, para.1283a.

legitimate interest does not necessarily mean likeness as regards the overall situation of the compared groups. Nor does it mean that the legitimate interest at hand must be "similar"; it simply means that it must be of equal weight. Such an understanding of comparability focuses on the idea of proportion as opposed to similarity. Two people are comparable when, on the face of it, their legitimate interest in enjoying a specific treatment carries equal weight when balanced against the legitimate aim of the state in drawing a distinction. Thus construed, comparability is a first—and sometimes final—stage in the assessment of whether or not a difference in treatment is justified.

More specifically, when called upon to review the objective justification behind a difference in treatment, the Strasbourg Court will look into whether or not that difference pursues a legitimate aim and whether or not it does so in a proportionate manner.[14] The comparator requirement simply adds a prior stage to this process, i.e. the need that "there must be a difference in the treatment of persons in relevantly similar situations".[15] This may mean that when two individuals are sufficiently different they can be treated differently, without further question, a conclusion that is irrational as much as it is shallow. Thus, when two elderly unmarried sisters who cohabited and cared for each other complained that they were treated differently than married couples or same-sex civil partners in that one of the sisters would have to pay inheritance tax when the other would pass away, the court found that they were not similarly situated to the couples they compared themselves with.[16] One of the main differences was that their relationship was based on consanguinity, something that was expressly forbidden in the case of marriage or civil partnership. Other differences concerned the lack of a deliberate decision to enter into a formal relationship, and the special status accorded to marriage and civil partnerships, as social institutions.

Tracking factual differences may reasonably constitute a first step in the examination of a discrimination claim, but it should not suffice to mean without further question that the treatment was unproblematic. A more elaborate test of comparability is needed. Indeed, a closer reading of this case may reasonably lead us to conclude that a comparison could not be established because the state was entitled to retain the special status—and the attached benefits—of marriage and civil partnerships for these institutions alone, distinguishing them from situations of simple cohabitation. In this sense, the court might be seen as having decided that the legitimate interest of the two sisters (to enjoy exemption from inheritance tax) was not deemed to be equally weighty to the legitimate interest of married couples or civil partners (again, to enjoy exemption from inheritance tax) in light of the legitimate aim the state pursued (securing the special status of marriages and civil partnerships). This can also be seen as another use of proportionality, in balancing and prioritising the legitimate interests at hand, as opposed to reviewing the way the legitimate aim is being pursued by the state.

If the legitimate aim (e.g. recognising the distinct status of relationships that are not based on consanguinity) is deemed to impinge by necessity on the legitimate interests of one category (e.g. sisters) in a different manner than it does on the

[14] See *Belgian Linguistic Case* (1979–80) 1 E.H.R.R. 252 at 284–285
[15] See *Burden v United Kingdom* (13378/05) (2008) 47 E.H.R.R. 38 at [60].
[16] *Burden* (13378/05) (2008) 47 E.H.R.R. 38 at [61]–[66].

legitimate interests of another category (e.g. civil partners or married couples), then, there is no reason to go further, as the difference in treatment has been justified through comparability. But should the legitimate aim (e.g. providing a social service to indigent clients free of charge) be deemed to impinge by necessity on the rights of the two categories (e.g. lawyers and dentists) in the same way, then we would need to decide to what extent the pursuit of that legitimate aim necessitates the different treatment of people whose legitimate interests are similar in terms of their weight; in this stage of justification, the balancing of proportionality would concern the different treatment of people who have legitimate interests of equal weight and would also be informed by a wider range of factors, not directly dealt with at the comparability stage, such as the margin of appreciation and the level of scrutiny to be applied to the discrimination ground.[17]

An understanding of comparability as denoting simply the factual similarity in the situations of groups treated differently, amounts to a failure to recognise this propinquity between comparability and justification. Being an "equal" or "alike" should mean having legitimate interests that equally outweigh the legitimate aim against which they are balanced; not having a "similarly" or "analogously" legitimate interest. For the legitimate interest might be completely different in nature or character while its weight in the balancing exercise remains the same. This is the logical "comparative" element of formal equality, one that is based on the equal weight of (specific) legitimate interests, not on the similarity of (abstract) situations. The similarity or dissimilarity among different situations is a relevant factor to consider only insofar as it affects the strength of the legitimate interests, i.e. the balance of proportionality. This observation can be the key to understanding why in reality the comparator requirement is often conflated with the justification inquiry, as a matter of practice within the case law of the ECtHR. The next section will elaborate further on that phenomenon with a view to showing that what appears as a conflation of two separate steps in the methodology of the court—that is, the comparator and the justification stage—is in reality an indirect acknowledgment of the theory advanced here.

Second step: Merging comparisons with justifications in a normatively sensible way

The argument has been put forward that, in deciding cases on the basis of lack of comparability alone, the court "employ[s] a stealth, 'light touch' justification to obviate the need for a more demanding justification inquiry in which the State must defend the proportionality of its measure".[18] The reality of adjudication attests to the accuracy of this statement. Let us focus, for example, in a case where the court held that a person who has been convicted for a terrorist offence is not in a relevantly similar situation, as concerns automatic parole, to somebody who has been convicted for an ordinary offence.[19] According to the court, the former can legitimately be treated less favourably than the latter, the distinction being "made

[17] For further discussion, see the next section.

[18] See Aaron Baker, "Comparison Tainted by Justification: Against a 'Compendious Question' in Art.14 Discrimination" [2006] P.L. 476, 477.

[19] See *Gerger v Turkey* (24919/94), unreported, European Court of Human Rights, 8 July 1999.

not between different groups of people, but between different types of offence".[20] In other words, two people may be treated differently because of objective reasons which render them "unalike". In this context, the lack of comparability effectively amounts to objective justification in the sense that the distinction was not based on a prohibited ground, but on objective considerations.[21] But the very existence of such considerations is, necessarily, a form of justification. In other words, determining whether or not two situations are comparable is a process which is hard to distinguish from the justification inquiry, in the first place.

A question necessarily arises, then, as to what is the distinct test to be applied in determining comparability, as opposed to investigating whether or not a reasonable justification exists. The standard requiring that the applicants find themselves in an "analogous" or "similar" situation to those being treated more favourably seems quite tautological in this respect. Indeed, to say that people are comparable when they are in an analogous situation is like saying that people are free when they find themselves in a condition of liberty. Given the lack of a more specific standard or test with reference to which comparability takes place, it is no surprise that this stage might often by absorbed by the more structured stage of justification; this might happen when the question of comparability is superficially addressed and practically bypassed in order to proceed with the justification inquiry. The case of *Sidabras and Džiautas v Lithuania*[22] provides a very clear example of such an instance. The applicants had served as KGB employees during the Soviet period and, by reason of that employment history, they were subsequently excluded for a period of 10 years from undertaking employment in the public sector and in certain posts in the private sector in Lithuania. They complained of a violation of art.8 ECHR taken together with art.14 ECHR, as regards their exclusion from private sector jobs.

The court did accept the case fell within the ambit of art.8 ECHR as "a far-reaching ban on taking up private sector employment [did] affect 'private life'".[23] It also observed that "the applicants were treated differently from other persons in Lithuania who had not worked for the KGB, and who as a result had no restrictions imposed on them in their choice of professional activities".[24] It then proceeded right away to the reasonable justification inquiry, accepting that the measure aimed at protecting the values of the newly founded Lithuanian state from those who had collaborated with the previous regime[25]; thus, it "pursued the legitimate aims of the protection of national security, public safety, the economic well-being of the country and the rights and freedoms of others".[26] Nevertheless, the measure was deemed to be disproportionate to the legitimate aim pursued, mainly because it extended to private sector employment, an area where "an employee's loyalty to the State" was not necessarily a requirement in the same

[20] *Gerger*, unreported, European Court of Human Rights, 8 July 1999 at [69]; for a similar approach, see *Kafkaris v Cyprus* (21906/04) (2009) 49 E.H.R.R. 35 at [165].

[21] The usefulness of examining whether or not the situation is analogous as a step in the determination of whether or not the treatment is based on a prohibited ground has been acknowledged time and again: see, for example, Baker, "Comparison Tainted by Justification: Against a 'Compendious Question' in Art.14 Discrimination" [2006] P.L. 476, 477; also see Aileen McColgan, *Discrimination, Equality and the Law* (Oxford: Hart Publishing, 2016), p.108.

[22] *Sidabras and Džiautas v Lithuania* (55480/00; 59330/00) (2006) 42 E.H.R.R. 6.

[23] *Sidabras* (2006) 42 E.H.R.R. 6 at [47].

[24] *Sidabras* (2006) 42 E.H.R.R. 6 at [41].

[25] *Sidabras* (2006) 42 E.H.R.R. 6 at [54].

[26] *Sidabras* (2006) 42 E.H.R.R. 6 at [55].

way as it was for employment to the public sector.[27] Hence, there was a violation. As Judge Loucaides noted in his partly dissenting opinion, it was hardly evident that former KGB agents were in an analogous situation to those who had not worked for the KGB, given that the legitimate aims at hand—that the court recognised—concerned specifically the former as opposed to the latter.

In fact, the case is a good illustration of how the court's eagerness to examine a discrimination claim might prevail over its adherence to the traditional methodology. Alongside Judge Loucaides's critique of the bypassing of the comparator requirement, Judge Thomassen also raised in her partly dissenting opinion a legitimate concern that KGB employment was not clearly a personal characteristic to be protected by art.14 ECHR, as it constituted neither a choice to be respected as an element of one's personality (such as religion), nor an immutable feature (such as race). Finally, the very acceptance by the court that employment claims could come within the ambit of the Convention, which does not include a right to work, was paradigm-shifting and did not go unnoticed.[28] The argument may be advanced, therefore, that the stakes were too high for the court to prevent itself from fully examining that claim by reason of the comparator requirement. The exact opposite attitude seems to have been maintained in the case of *Carson v United Kingdom*,[29] where the ECtHR analysed the comparator issue so exhaustively as to effectively merge it with the justification enquiry, in striking down the claim of the applicants.

The applicants in *Carson* had spent the greater part of their working life in the UK but had later moved to live in South Africa, Australia and Canada. They complained of the fact that pensions in the UK would be index-linked only for those who either resided within its jurisdiction or whose country of residence had a reciprocal agreement with the UK as regards the uprating of pensions. The applicants not falling within either category, alleged that they had been discriminated against in the enjoyment of their right to property (art.1, Protocol No.1 ECHR), on the grounds of their residence. The court accepted that during the course of their employment in the UK, the applicants had paid the same compulsory national insurance contributions as the categories of people whose pensions were index-linked. Nevertheless, it concluded that they were not in an analogous situation to them. This was so because national insurance contributions were not exclusively linked to the state pension, but were also used to fund a range of other social security benefits.[30] Hence, their contributions did not suffice in themselves to place the applicants in a similar position to the other pensioners.[31]

Moreover, the court noted that it is in the nature of a social welfare system to be concerned primarily with the standard of living of those who were resident within its jurisdiction, also taking into account that the increase in their pension would eventually be returned to the domestic economy.[32] Finally, the court observed that

[27] *Sidabras* (2006) 42 E.H.R.R. 6 at [57]–[58].
[28] See Virginia Mantouvalou, "Work and Private Life: Sidabras and Dziautas v Lithuania" (2005) 30(4) E.L. Rev. 573; also see Hugh Collins, "The Protection of Civil Liberties in the Workplace" (2006) 69(4) M.L.R. 619.
[29] *Carson v United Kingdom* (42184/05) (2010) 51 E.H.R.R. 13.
[30] *Carson* (2010) 51 E.H.R.R. 13 at [84].
[31] *Carson* (2010) 51 E.H.R.R. 13 at [85].
[32] *Carson* (2010) 51 E.H.R.R. 13 at [85]–[86].

> "it is hard to draw any genuine comparison with the position of pensioners living elsewhere, because of the range of economic and social variables which apply from country to country. Thus, the value of the pension may be affected by any one or a combination of differences in, for example, rates of inflation, comparative costs of living, interest rates, rates of economic growth, exchange rates between the local currency and sterling (in which the pension is universally paid), social security arrangements and taxation systems."[33]

The comparison with the residents of those countries that had a reciprocal agreement with the UK to uprate pensions also failed on the grounds that

> "it would be extraordinary if the fact of entering into bilateral arrangements in the social security sphere had the consequence of creating an obligation to confer the same advantages on all others living in all other countries. Such a conclusion would effectively undermine the right of States to enter into reciprocal agreements and their interest in so doing."[34]

It is not hard to see how this reasoning effectively amounts to a justification of the treatment at hand, as opposed to a mere effort to answer the question of whether or not the applicants were similarly situated to those who benefited from an uprating in their pension. Insofar as the applicants had contributed to the national insurance system on the same terms as the other pensioners, it is hard to resist the conclusion that they had a similarly (if not identical) legitimate interest in asking to be treated in the same way. The arguments relied upon by the court in establishing the lack of comparability effectively amount to accepting the proportionality in the pursuit of the legitimate aims put forward by the UK in refusing to do so. Thus, the question of comparator actually absorbed the justification inquiry. In contrast to *Sidabras*, where the comparator requirement was sidestepped in order to protect the applicants, in *Carson* it was overextended in order to stall the complaint brought before the court. But despite this apparent contradiction, the fact remains that in both cases the court effectively never addressed the comparator requirement as an issue which pertains only to the similarity of the situations at hand, in a narrow and ambiguous sense. And yet, there appears to exist an underlying philosophy which allows us to find meaning in that contradiction.

One may fairly argue that in *Sidabras* the applicants were not in an "analogous" situation to those who had not worked for the KGB, especially if we take into account the socio-historical context of the case at hand. Indeed, by conceding that the restriction placed on finding employment in the public sector was legitimate, the ECtHR itself seems to have accepted that reality. But in finding that an issue arose as regards employment in the private sector, despite the same legitimate aim being pursued, the court implied that the applicants were in an analogous situation to non-KGB agents in that respect. Under this light, merging the comparator stage with the justification inquiry can be seen in the following way: While the applicants' legitimate interest in being employed did not carry the same weight as those of non-KGB agents as regards the public sector, it was of equal importance as regards finding employment in the private sector, when measured against the legitimate aim of the state. Such an understanding is illustrated in the finding of the court

[33] *Carson* (2010) 51 E.H.R.R. 13 at [86].
[34] *Carson* (2010) 51 E.H.R.R. 13 at [89].

that employing people who have historically proven their loyalty to the state was important in the public sector but not as important in the private sector.[35]

Hence, the impact that the pursuit of the legitimate aim would have on the applicants' legitimate interest in finding public sector employment was of a different weight to the one of those who had not worked for the KGB; the two were not comparable. But the applicants' legitimate interest in finding private sector employment was of equal weight to the one of those who had not worked for the KGB, when balanced in the same way against the same legitimate aim. Hence, the two interests were comparable. The comparability stage examined the issue of proportionality by reviewing the way the legitimate aim impacted on the two legitimate interests at hand, i.e. of those working in the public sector and those working in the private sector. It concluded that the legitimate interests of the applicants and those working in the private sector were of equal weight and that unlocked the justification stage. The justification stage should have examined then whether or not the difference in the treatment of people who have legitimate interests of equal weight was proportionate to the legitimate aim pursued and, therefore justified, having regard also to a wider range of factors such as the scrutiny normally applied to the ground at hand (KGB employment) and the margin of appreciation. The finding that the legitimate interests of the applicants and those who were allowed to pursue private employment were similar would definitely weigh against the state in that process; but it would not be the end of the matter. Whereas the finding of the different weight of the legitimate interests as regards public sector employment was enough to end the discrimination claim in that respect.

By the same token, one may fairly argue that in *Carson* the applicants were actually in a comparable situation to those treated more favourably, given that they had paid the same amount of money in contributions. But even though they had exactly the same legitimate interest in requesting access to the more favourable treatment, the legitimate aim of the state in administering its social security system in a rational and efficient manner weighed more heavily against the applicants than against those who resided in the UK or those whose country of residence had a bilateral agreement with the UK. Hence, the applicants were not really in an analogous situation to those treated more favourably. In other words, although their legitimate interest in requesting the uprate was practically the same in terms of its nature, given that they had contributed in the same manner, its relative weight, when balanced against the legitimate aim of the state, was different. The fact that the applicants did not have a legitimate interest that was of equal weight to the one of those receiving better treatment rendered any justification of that difference in treatment unnecessary. Thus, we see that both in *Sidabras* and in *Carson*, the comparator requirement was neither sidestepped nor overemphasised, as it might appear in the first instance. Instead, the issue of likeness, in the more elaborate sense put forward here, formed the crux of both cases, the court examining whether or not the legitimate interest of the applicants in asking for better treatment was actually of equal weight to the legitimate aim of those enjoying that treatment, when balanced against the legitimate aim. This is a stage prior to and distinct from justification, but very closely connected to it.

[35] See *Sidabras* (2006) 42 E.H.R.R. 6 at [57].

The comparability stage as put forward here asks whether or not the legitimate interests of A and B are of equal weight in the first place, proportionality being used to assess the impact of the legitimate aim on the legitimate interests of A and B respectively. If it is established, through the comparison, that A and B have a claim of equal weight, only then can we proceed to the justification stage. The justification stage is concerned with determining whether or not treating people with legitimate interests of equal weight differently in pursuing the legitimate aim is proportionate. Proportionality is used once again here, but in a different way. Moreover, its application is also being informed by aspects not dealt with directly in the comparison stage; most importantly, the level of the scrutiny to be applied, depending on the ground the distinction is based upon and the state's margin of appreciation.[36] The justification stage as envisaged here also differs from the comparison stage in the sense that it provides an opportunity to consider reasons of overriding public interest which might not be reflected on the legitimate aim. To use the example of Mr Van der Mussele, even if lawyers had an interest of similar weight to the one of (e.g.) judges, the state could have claimed that given that more lawyers are needed than judges, as a matter of sheer quantity, it was proportionate that a harsher restriction should be placed on the former. Thus construed, the comparability stage retains its character as a way to dismiss unmeritorious discrimination claims without engaging in the full depths of justification, but it also amounts to a first stage of justification, instead of being a mere inquiry into the similarities and dissimilarities of different groups.

Such an understanding of the comparator helps us escape the abstract notion of "similarity in situations" and allows us to make sense of many cases, like the ones examined here, which could otherwise be seen as confusing. Moreover, it helps us avoid the trap of not examining potentially meritorious claims, such as the one brought forward by Mr Van der Mussele, simply by reason of an abstractly defined similarity. Besides, respect for difference is a necessary aspect of non-discrimination law, as the ECtHR itself has come to understand it.[37] In this sense, approaching the comparator requirement in the way suggested here provides yet another significant service. It helps us, bridge the gap between the formal and the substantive understanding of the right to equality, by enabling the court to protect those who are "unalike" in the situations they find themselves in but "alike" in their need to be treated as equals. The next section will address this issue.

Third step: Bridging formal and substantive equality

The requirement of treating like cases alike has been associated with a formal conception of equality, one that is primarily concerned with rationality and freedom from arbitrariness, dictating that similarly situated people are to be treated in a similar fashion, unless an objective justification exists for a different approach.

[36] It is established in the jurisprudence of the court that distinctions based on certain grounds (e.g. sex, race) require particularly serious reasons before they can be justified: see, for example, Oddný Mjöll Arnardóttir, "Vulnerability under Article 14 of the European Convention on Human Rights: Innovation or Business as Usual?" (2017) 4 *Oslo Law Review* 658. It is worth noting that the issue of what constitutes a ground of discrimination and what does not is itself another complicated issue in the case law of the court: see Janneke Gerards, "The discrimination grounds of Article 14 of the European Convention on Human Rights" (2013) 13(1) H.R.L. Rev. 99.

[37] See Charilaos Nikolaidis, *The Right to Equality in European Human Rights Law: The Quest for Substance in the Jurisprudence of the European Courts* (Abingdon: Routledge, 2015), pp.75–82.

Hence, for example, the argument has been advanced that "[a] strict focus on comparability leads to a very formal approach to equality".[38] But, as already explained above, the advantaged and the disadvantaged group can hardly be considered to be similarly situated when there is considerable difference in the weight of their legitimate interest to request access to the more favourable treatment. Bringing closer the comparator requirement with the justification inquiry in such a way can help us move even further, crossing the line that traditionally separates formal and substantive equality, thereby bridging the two conceptions of equality. Indeed, the argument has been made that a substantive approach to equality is anything but absent from the case law of the court relating to the interpretation of art.14 ECHR.[39] More specifically, it has been argued that the interest of protecting the individual against social oppression in the form of prejudice, stereotyping and lack of reasonable accommodation of difference has come to imbue the traditional methodology which, historically, centred around the formal equality paradigm of securing rationality in the enjoyment of the other Convention rights.[40] But pursuing such an interest is bound to require a reconfiguration of the traditional methodology, especially as regards the comparator requirement.

In the seminal case of *Thlimmenos v Greece*,[41] the court famously held that:

> "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."[42]

More specifically, it found that the state was in breach of its obligations under art.14 in conjunction with art.9 because of its failure to differentiate between a common felon and a person who had been convicted of a felony because he had refused, due to his religious beliefs, to wear a uniform while serving in the army. To that effect, the applicant had been indirectly discriminated against because the state's decision to exclude him from the profession of chartered accountancy failed to take account of the fact that his conviction was closely related to his religious beliefs. It is not hard to see how, in essence, if the comparator requirement is to be understood as requiring a "similar situation" between those treated less and more favourably, it would nullify cases such as this one; for the very essence of the complaint at hand concerns the failure to treat those who are unalike in an unalike manner, that is, to accommodate their difference.[43]

It is no surprise then that the court itself felt obliged to say that the prohibition against "treat[ing] differently persons in analogous situations without providing an objective and reasonable justification … is not the only facet of prohibition of

[38] See Oddný Mjöll Arnardóttir, *Equality and Non-Discrimination under the European Convention on Human Rights* (Martinus Nijhoff Publishers, 2003), p.127.

[39] See Nikolaidis, *The Right to Equality in European Human Rights Law* (2015), pp.50–100; for a similar approach, see Sandra Fredman, "Emerging from the Shadows: Substantive Equality and Article 14 of the European Convention on Human Rights" (2016) 16(2) H.R.L. Rev. 273. Also see Alexandra Timmer, "Toward an Anti-Stereotyping Approach for the European Court of Human Rights" (2011) 11(4) H.R.L. Rev. 707 and Rory O'Connell, "Cinderella Comes to the Ball: Art.14 and the Right to Non-Discrimination in the ECHR" (2009) 29(2) L.S. 211.

[40] Nikolaidis, *The Right to Equality in European Human Rights Law* (2015), pp.50–100.

[41] *Thlimmenos* (2001) 31 E.H.R.R. 15.

[42] *Thlimmenos* (2001) 31 E.H.R.R. 15 at [44].

[43] For a brief discussion of the close relationship between the notions of indirect discrimination and reasonable accommodation, see Nikolaidis, *The Right to Equality in European Human Rights Law* (2015), pp.27–28.

discrimination in Article 14"[44]; thus, distinguishing between the traditional, comparator-driven, approach and the one reflected in the concept of indirect discrimination. But the case remains that a difference in treatment is a common element in both direct and indirect discrimination; the only distinguishing factor being that in the latter case that difference is covert, becoming evident only through its de facto impact on the disadvantaged group. Given that the difference in treatment is a common element, as is, of course, the ambit requirement, the existence of an appropriate ground for discrimination and the justification inquiry, the only part of its methodology that the court had to discard in reviewing indirect discrimination claims is the comparator stage. This appears to highlight even further the unnecessariness of comparators within the court's methodology. But once again, the absence of a distinct comparator inquiry does not imply that there was no "likeness" involved; if we understand the term to require a balancing of the legitimate interest of the applicant and of those with other religious convictions against the legitimate aim of the state.

Mr Thlimmenos was treated less favourably than those whose religious convictions did not prevent them from wearing a uniform, i.e. those who could move on to be appointed as chartered accountants without any problem. He suffered such treatment because of his religion—a ground specifically covered by art.14 ECHR—and his claim did come within the ambit of the right to freedom of thought conscience and religion (art.9 ECHR). Finally, although Mr Thlimmenos was certainly not in an "analogous" or "similar" position to those who had different religious convictions and had not been convicted of an offence, his legitimate interest in becoming a chartered accountant despite his religious beliefs outweighed the legitimate aim of the state which purported to disallow people convicted of serious offences from doing so. By defeating that legitimate aim, Mr Thlimmenos was effectively put in the same position as the people against whom this legitimate aim did not apply in the first place, i.e. those who could enter the profession freely. In that wider interpretation of what a comparison entails, he was in reality "alike" to those people whose situation was anything but similar.

Such a wider understanding of comparability allows us to build a more coherent framework for the application of the principle of non-discrimination, one that contains all its different manifestations and is not limited to direct discrimination. When the legitimate interest of a group in not being treated with reference to a prohibited ground is deemed sufficient to outweigh the legitimate aim of the state, then, any de jure or de facto difference in treatment is problematic. This is so because, in that case, the legitimate interest of the disadvantaged group is of equal weight to that of the advantaged group whose legitimate interest is properly acknowledged by the action or the inaction of the state. Thus, the two groups are "alike" and must be placed in an equal position. So, when, for example, the court observed that Roma children were far more likely than non-Roma children to be placed into special schools in the Czech Republic, it found a violation of art.14 ECHR taken together with art.2 of Protocol No.1 (right to education).[45] The legitimate aim of the state to provide for those with special educational needs was outweighed by the legitimate interest of Roma children not to be allocated to

[44] *Thlimmenos* (2001) 31 E.H.R.R. 15 at [44].
[45] See *DH v Czech Republic* (57325/00) (2008) 47 E.H.R.R. 3 at [207]–[210].

special schools with reference to their ethnicity. Assessing the educational needs of all the children though the same psychological tests, which did not take Roma specifics into account, led to such covert differential treatment.[46]

The negation of the state's legitimate aim in the face of the applicants' legitimate interest meant that the applicants had a legitimate interest of equal weight to the one of non-Roma children and should be placed in the same place as them in terms of their chance to end up in a special school, even when that would require a corrective difference in treatment, in terms of adapting the psychological tests. Adaptation in this context means that the policy should affect those who had a legitimate interest of equal weight in the same manner. So, to use a more recent example, when a student who had successfully passed the entrance exam was denied access to the Turkish National Music Academy on the sole ground that she was blind and, therefore, unfit to follow the classes, the court found that the lack of reasonable accommodation led to a violation of art.14 ECHR taken together with art.2 of Protocol No.1 ECHR.[47] The ECtHR noted specifically that the applicant had passed the entrance exams thereby demonstrating that "she possessed all the requisite qualities" for studying there.[48] In other words, her legitimate interest in being admitted, outweighed the legitimate aim of the academy to select "students with special talents"[49] in the same way as the legitimate interest of those admitted did. Despite not being similarly situated to them as regards a particular personal characteristic, she had a legitimate interest of equal weight in being admitted, and in that sense, she was comparable.

Once more then, it becomes evident that comparability does not have to be seen as something exterior to substantive equality, just as there is no reason to be perceived as problematic in formal equality cases. In fact, the more we move away from a formal equality model which requires us to give the same treatment to those who are "alike", the more we see the comparator requirement fade away, as cases like *Thlimmenos* demonstrate. But, as suggested thus far, this is only if we understand the comparator to entail a similarity in situation as opposed to an equal or similar weight in the legitimate interests at hand when measured against the legitimate aim. This latter approach of equal weight in the legitimate interests can help the court move even beyond cases of direct or indirect discrimination, without having to reconfigure its methodology and the role of comparators every step along the way. A very good illustration of this assertion can be found in the example of cases involving discrimination by association. That is, instances where people are being discriminated against by reason of their association to persons bearing a specific personal characteristic.

The case of *Guberina v Croatia*[50] concerned the claim of a father who owned a flat on the third floor of a building without an elevator. His new-born child was suffering from various forms of mental and physical disability and the lack of an elevator meant that there was a serious issue of accessibility for the child. As a result, he had to move to a different place. In doing so, he asked to be exempted from the real property transfer tax on the grounds that the move was necessary to

[46] *DH* (2008) 47 E.H.R.R. 3 at [200]–[201].
[47] See *Çam v Turkey* (51500/08), unreported, European Court of Human Rights, 23 February 2016 at [68]–[69].
[48] *Çam*, unreported, European Court of Human Rights, 23 February 2016 at [62].
[49] *Çam*, unreported, European Court of Human Rights, 23 February 2016 at [62].
[50] *Guberina v Croatia* (23682/13) (2018) 66 E.H.R.R. 11.

meet his housing needs, a criterion for exemption that was specifically provided for by the national law. The tax authorities refused his request on the ground that the earlier flat did meet the applicant's housing needs in terms of surface, hygiene, technical requirements and access to basic infrastructure such as water, electricity and other public utilities. The Strasbourg Court found that the specific condition the applicant found himself in was not properly taken into account in determining what the basic infrastructure requirements were in his case.[51] More specifically, the court noted that

> "the applicant's flat … which he had bought three years before the birth of his son, situated on the third floor of a residential building without a lift, severely impaired his son's mobility and consequently threatened his personal development and ability to reach his maximum potential, making it extremely difficult for him to fully participate in the community and the educational, cultural and social activities available for children."[52]

Eventually, a violation of art.14 ECHR taken together with art.1 of Protocol No.1 ECHR (right to property) was established.

The court tackled the issue of comparability by observing that the situation of the applicant's son

> "might be compared to that of an able-bodied person who, for example, had a flat on the third floor of a residential building without appropriate access to it, or had limited access to the necessary relevant public amenities."[53]

It also noted that the applicant himself "was in a comparable position to any other person replacing a flat or a house" to meet his housing needs, but, that

> "his situation nevertheless differed with regard to the meaning of the term 'basic infrastructure requirements' which, in view of his son's disability and the relevant national and international standards on the matter … necessitated access to facilities such as, in the instant case, a lift."[54]

The court, therefore, seems to have suggested that the son was in a similar situation to a person who did not have a disability and the father was taken to be analogously situated to a person whose housing needs did not require the reasonable accommodation that was necessary here, i.e. the existence of a lift. While a finding of similarity in the situations at hand in this case might be highly questionable, given the objective dissimilarities that the court itself acknowledged, the case remains that the applicant had, on the face of it, a legitimate interest of equal weight to the legitimate interest of a father of an able-bodied child in meeting his housing needs, whatever this might have entailed.

Letting go of the insistence on similarity can help us deal with cases of discrimination of association and reasonable accommodation, like *Guberina*, in a more simplified and rational way, without the need to compare separately (and often paradoxically) the person bearing the characteristic and the person associated with him or her among different comparators. By the same token, it can help us

[51] *Guberina* (2018) 66 E.H.R.R. 11 at [86].
[52] *Guberina* (2018) 66 E.H.R.R. 11 at [82].
[53] *Guberina* (2018) 66 E.H.R.R. 11 at [82].
[54] *Guberina* (2018) 66 E.H.R.R. 11 at [83].

deal with cases of intersectional discrimination, where the unfavourable treatment, be it overt or covert, might stem from a combination of characteristics.[55] For example, the nature of the unfavourable treatment faced by an old (age) woman (sex) belonging to an ethnic minority (race) might not be easily understood with reference to a comparison based on a younger woman, a younger man, or a man or a woman of a different ethnic minority. By focusing on the weight of the legitimate interest of the applicant and of those treated more favourably as balanced against the legitimate aim pursued, the issue could be addressed without having to worry about establishing similarity. This would be an important step in understanding better the interconnection in the different manifestations of equality. But it would not be the end. Yet another important contribution of understanding comparability as being focused on the equal weight of the legitimate interest at hand, as opposed to the similarity in the situation of those treated more favourably, stretches even beyond the notions of formal and substantive equality. It concerns the quality of decision-making and the sheer clarity with which the court articulates its decisions. The next section will address just that.

Fourth step: Addressing hard questions for what they are

The case of *Ratzenböck and Seydl v Austria*[56] concerned the application of a different sex couple who complained of the fact that only same sex couples could enter into a registered partnership in Austria. The applicants alleged that in not being allowed to register as partners, they had been discriminated against on the grounds of their sex and sexual orientation. Quite evidently, what distinguishes this case from previous instances brought before the ECtHR is the fact that the applicants belonged to what could fairly be described as the "advantaged" group. This is so because different sex couples in Austria could marry while, at the time, access to the institution of marriage was denied to same sex couples.[57] The Fifth Section of the court concluded that there had been no violation of art.14 taken together with art.8 ECHR (right to family life) on the grounds that

> "the applicants, being a different-sex couple to which the institution of marriage is open while being excluded from concluding a registered partnership, are not in a relevantly similar or comparable situation to same-sex couples who, under the current legislation, have no right to marry and need the registered partnership as an alternative means of providing legal recognition to their relationship."[58]

In essence, the court found that different sex couples could be treated differently to same sex couples (as regards registered partnerships) because same sex couples

[55] It should come as no surprise that the traditional view of comparators would be particularly hard to reconcile with instances of intersectional discrimination: see, for example, Goldberg, "Discrimination by Comparison" (2011) 120 Yale L.J. 728, 764–766.

[56] *Ratzenböck and Seydl v Austria* (28475/12), unreported, European Court of Human Rights, 26 October 2017.

[57] It is worth noting that the Austrian Constitutional Court subsequently ruled that drawing a distinction between registered partnerships and marriage on the basis of sexual orientation was discriminatory against same sex couples and, thus, unconstitutional: see *G 258/2017 ua: Unterscheidung zwischen Ehe und eingetragener Partnerschaft verletzt Diskriminierungsverbot*, judgment of 4 December 2017. As a result, same sex marriage was formally legalised in Austria on 1 January 2019.

[58] *G 258/2017 ua: Unterscheidung zwischen Ehe und eingetragener Partnerschaft verletzt Diskriminierungsverbot*, 4 December 2017, at [42].

could be treated differently to different sex couples (as regards marriage). Since different sex couples could have their relationship recognised through marriage, there was no need for them to have access also to registered partnership, such partnerships serving the sole aim of allowing same sex couples to have their relationships recognised. But this reasoning seems to justify the existing segregation as regards the means of legal recognition on the grounds that there was such segregation, without providing any other objective justification. It is fair to argue then that in that case the court made full use of the cyclical or tautological use of equality in order to avoid touching upon a sensitive issue, that is, marriage equality. Indeed, if it held that different sex couples were similarly situated to same sex couples as regards their need to be free to enter into a registered partnership, then the issue of why the exact opposite (i.e. access to marriage by same sex couples) was not true would become even more pertinent; this would be so because the court would have practically negated, at least as concerns different sex couples, the very segregation that it has itself refused to strike down.

In fact, the ECtHR has held that art.14 ECHR cannot be interpreted as conferring a right to same sex marriage, which is not provided for by art.12 ECHR (right to marry), given that "the Convention is to be read as a whole and its Articles should therefore be construed in harmony with one another".[59] However, the court has also indicated, under the light of current developments in national and international law, that art.12 should no longer be interpreted as being

> "in all circumstances … limited to marriage between persons of the opposite sex [although] as matters stand, the question whether or not to allow same-sex marriage is left to regulation by the national law of the Contracting State."[60]

It may fairly be argued then that we are in a transitional period, where same sex marriage gains more and more recognition, the court recognises this and it might eventually intervene, once sufficient consensus has been formed; but in the meantime, it treads carefully in what is still considered to be a controversial issue in several Member States. In this context, the use of the comparator in the traditional sense of requiring similarity in the factual situation between those who were treated differently served its purpose in *Ratzenböck*, insofar as it helped the court to avoid dealing with a difficult issue in more depth.

Nevertheless, as already indicated, this happened in a way that leaves a lot to be desired in terms of logical structure. Once again, the question at hand in *Ratzenböck* could have been dealt with in a more elaborate fashion, respecting the need for "likeness" without allowing the dialectics of similarity in the situation to imbue the reasoning and render it a tautology. This could have been done by indicating that the legitimate interest of the applicants in accessing registered partnerships was not of an "equal" or "similar" weight to the one of same sex couples as balanced against the legitimate aim pursued by the state in introducing registered partnerships; that aim being to provide for the legal recognition of same sex couples whilst reserving the institution of marriage for different sex couples. In his concurring opinion for *Ratzenböck*, one member of the court did seem to follow this line of thought by extending the reasoning of the majority so as to

[59] *Schalk and Kopf v Austria* (30141/04) (2011) 53 E.H.R.R. 20 at [101].
[60] *Schalk* (2011) 53 E.H.R.R. 20 at [61].

include an examination of relevant state practice, relying upon such practice to conclude "that different-sex couples are not in a comparable situation to same-sex couples".[61] Thus, examined in light of the approach suggested here, the conclusion seems to be that the legitimate interest of the applicants was not of equal weight to the one of same sex couples and, thus, the justification inquiry would be unnecessary, sufficient justification having already been provided at the stage of comparison. But this does not mean that this will always be the case. The way the court deals with hard cases such as this might be particularly useful in helping us provide yet another illustration of how the justification stage complements—instead of absorbing or being absorbed by—the comparison stage.

Indeed, very hard cases might arise where the legitimate interests at hand would be exactly the same, in terms of their weight, but the court might still decide that the treatment at hand is objectively justified. A very good example is provided by the case of *Khamtokhu and Aksenchik v Russia*[62] which concerned the exemption of women and people aged 65 or over from life imprisonment. The court had no problem establishing comparability as men and people below the age of 65, who were not so exempted, were convicted of the same or similar offences.[63] Even if we were to examine the case in terms of whether or not men had a legitimate interest of equal or similar weight to the one of women in being exempt from life imprisonment, the result seems to be the same. The legitimate aim of "promot[ing] the principles of justice and humanity",[64] put forward by the defending government, does not, on the face of it, seem to weigh more heavily against the legitimate interest of men or people below the age of 65 not to be subjected to life imprisonment.

Comparability in that case then was established in terms of "similarity" in the situations of the groups treated differently. By the same token, it seems to be established in terms of similarity in the weight of legitimate interests of these groups, when balanced against the legitimate aim at hand. Nevertheless, the court did eventually sympathise with the effort of the defending government to restrict the number of cases in which life imprisonment could be imposed by exempting certain groups with reference to their personal characteristics. According to the court, this difference in treatment was justified on the grounds that it indicated "social progress in penological matters", which was "not in breach of the applicable international law or markedly at variance with the solutions adopted by other member States of the Council of Europe in this sphere".[65] What emerges once again from cases such as this is that the key difference between the comparability stage, as understood here, and the justification stage is that in the latter instance the court is called upon to decide whether or not otherwise similar situations (i.e. individuals recognised as carrying legitimate interests of equal weight) can be treated differently on the grounds of a prohibited characteristic, with reference to the principle of proportionality and the width of the margin of appreciation. In essence, the conclusion of the Russian life imprisonment case was that men, women

[61] See *Ratzenböck*, unreported, European Court of Human Rights, 26 October 2017, concurring opinion of Judge Mits.

[62] *Khamtokhu and Aksenchik v Russia* (60367/08; 961/11) (2017) 65 E.H.R.R. 6.

[63] *Khamtokhu* (2017) 65 E.H.R.R. 6 at [67]–[68].

[64] *Khamtokhu* (2017) 65 E.H.R.R. 6 at [70].

[65] *Khamtokhu* (2017) 65 E.H.R.R. 6 at [86]. It is worth noting that this position was criticised by the dissenting minority.

and people below or above 65 were similarly entitled to avoid life imprisonment, in light of the legitimate aim (comparability), but the proportionate pursuit of the legitimate aim justified that a distinction could be drawn on these prohibited grounds, the margin of appreciation being considered sufficiently wide to allow this as the difference in treatment concerned "delicate issues" of penal policy, it aimed to promote "the interests of the society as a whole", there was little "common ground" among Member States and the law was "at a transitional stage" (justification).[66]

By the same token, to bring yet another example, we can look into a case where the court was faced with the application of an Uzbek national who had been married to a Russian national and they had a daughter together.[67] The applicant was denied permission to stay with his family in Russia due to the fact that he was HIV positive. The court found that he was similarly situated to other people with family ties in Russia, who wanted to reside there, for the simple reason that the different treatment he received was related to his health status and, thus, but for that status he would have been placed in the same position.[68] This is certainly not an analysis based on similarity in the situation as this is traditionally understood by the court itself and it mostly resembles a direct examination of whether or not the treatment was based on a prohibited ground, demonstrating once again the volatility and ambiguity in the application of the comparator requirement.

A more substantive analysis of the comparator requirement would be to say that the legitimate aim of protecting public health could not be seen as being jeopardised simply by admitting HIV positive residents into the country and thus, the legitimate aim being neutralised, the legitimate interest of the applicant was that of any other person in his position. This was actually acknowledged, but only later, in the justification stage.[69] The true purpose of the justification stage should have been to focus solely on whether or not a distinction on the ground of being HIV positive should have been allowed, despite the fact that a proper comparison had been established. The weighting of the legitimate interests would have certainly been relevant here as well, but so would other factors, such as the "widespread stigma and exclusion" suffered by people living with HIV historically, which might serve (as they did, in this case) to narrow the margin of appreciation allowed to the state.[70] For, as already indicated, while establishing comparability as similarity in the weight of legitimate interests might often help resolve the justification inquiry, it does not necessarily follow from this that comparability is merged with justification.

Conclusion

The fact that the maxim "treat like cases alike" is often seen as a stand-alone basis for understanding formal equality means that justification is in fact engraved into the concept of likeness (or lack thereof). In cases such as the one of *Gerger*, we have seen how the comparator requirement can be used as a way to produce evidence that the treatment at hand is (or is not) based on a prohibited ground.

[66] *Khamtokhu* (2017) 65 E.H.R.R. 6 at [85] and [87].
[67] See *Kiyutin v Russia* (2700/10) (2011) 53 E.H.R.R. 26.
[68] *Kiyutin* (2011) 53 E.H.R.R. 26 at [59]–[61].
[69] To use the exact words, the court noted, inter alia, that "the mere presence of an HIV-positive individual in a country is not in itself a threat to public health" (*Kiyutin* (2011) 53 E.H.R.R. 26 at [68]).
[70] *Kiyutin* (2011) 53 E.H.R.R. 26 at [64].

Indeed, when two similarly situated individuals are treated differently, the question of why this is the case becomes even more pertinent and harder to justify. But to construe the comparator requirement simply as a way of examining, albeit superficially, whether or not there has been reliance on a prohibited ground is too little to ask from it. By the same token, if we take the comparison stage to be sufficient in fully justifying the treatment at hand, due to dissimilarities in the factual situation of those compared, as happened in cases such as *Van der Mussele* or *Ratzenböck*, this is too much to ask from the requirement of likeness; for there is a justification element that stretches beyond it and will remain unexamined if we do so.

This paper has suggested a middle way by construing likeness, and by implication the comparison stage, as an element that pertains to the justification inquiry but is not completely submerged into it. It has done so by proposing an understanding of comparability that is based on the weight of the legitimate interests involved in demanding a specific treatment. Under this model, when the legitimate interest of A (the disadvantaged group) to enjoy a social good outweighs the legitimate aim of the state in withholding it in a similar or analogous manner as the legitimate interest of B (the advantaged group) does, then, comparability is satisfied. This formula is certainly more demanding than the one based on mere similarity, but it does seem to be in line with the jurisprudence of the ECtHR, as this has been reviewed here. Moreover, it is capable of forming part of the justification requirement, without completely replacing it, as cases such as the one of *Khamtokhu* demonstrate. Thus, it helps us clarify the confluence between comparisons and justifications in a more sensible way. This, in turn, helps us bring closer the notions of formal and substantive equality, allowing for the former to accommodate a wider range of discriminatory instances by focusing less on the similarity of situations and more on the similarity of the demands.

Finally, by clarifying the role of comparator in the sense proposed here, the quality of the reasoning can certainly be improved. For while a model based on the equal weight of the legitimate interests at hand might be more complicated than the one that revolves around the question of similarity in situations, it is also far less ambiguous. This becomes even clearer if we consider that the closest the Strasbourg Court has come to creating a formula for assessing the comparator requirement, as currently espoused, is to ask whether or not "the persons subjected to different treatment are in a relevantly similar situation, taking into account the elements that characterise their circumstances in the particular context"[71]; the comparability of such elements being examined "in the light of the subject-matter and purpose of the measure which makes the distinction in question".[72] The time has come for a more elaborate approach, one that will interpret likeness in a more sensible and precise manner, allowing for a more appropriate consideration of the issues, a better quality of reasoning and, of course, the delivery of a fairer, better informed, judgment as a matter of outcome. This paper has aimed to propose such a different approach, in a manner that also helps us make more sense of the existing case law of the court.

[71] See *Fábián v Hungary* (78117/13) (2018) 66 E.H.R.R. 26 at [121].
[72] *Fábián* (2018) 66 E.H.R.R. 26 at [121].