

SOLUTION OUTLINE

Based on – ECHR, *Macatė v. Lithuania*, 23 January 2023, App. No. 61435/19, available at: https://hudoc.echr.coe.int/fre#_Toc124870885; Summary at: [https://hudoc.echr.coe.int/fre#%7B%22itemid%22:\[%22002-13955%22\]%7D](https://hudoc.echr.coe.int/fre#%7B%22itemid%22:[%22002-13955%22]%7D) (Solution regarding Art. 10 ECHR is copied from this summary); and ECJ, *European Commission v. Hungary*, Action brought on 19 December 2022, C-769/22, available at: <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62022CN0769&from=EN>;

Further readings – *Greif/Greuter*, *Es war einmal in Straßburg*, *Verfassungsblog*, 4 February 2023, available at: <https://verfassungsblog.de/es-war-einmal-in-strasburg/>; *Dresler*, *Der Brüsseler Testballon*, *Verfassungsblog*, 21 February 2023, available at: <https://verfassungsblog.de/der-brusseler-testballon/>

Solution Outline

Q1:

- a) Individual application to the ECtHR (Art 34 ECHR), Complaint to the HRC (First Optional Protocol to the ICCPR)
- b) Infringement proceedings before the ECJ (Art 258 TFEU)

Q2: Merits

ECHR

Art. 10 Freedom of expression and freedom to impart information

“(a) Whether the impugned measures can be attributed to the respondent State – The Court found that they could: the measures had been taken by a public-law entity, the University; they had resulted directly from the domestic law which provided for administrative liability for anyone who published or distributed information considered harmful to children, without complying with the labelling requirement, as well as from interventions by several other public authorities. They had also been examined and endorsed by the domestic courts.

(b) Existence of an interference and its lawfulness – The impugned measures had amounted to an interference with the applicant’s freedom of expression, for the following reasons.

Firstly, although the book, during the year-long suspension of its distribution, had remained available in public libraries and, for some time, online, it had been recalled from bookshops. That had certainly reduced its availability to readers.

Secondly, the marking of the book as being harmful to the age group for which it had been intended had affected the applicant's ability to freely impart her ideas. The book had been written in a language and style which would appeal to children, and it was reasonable to assume that, by the age of 14, teenagers were in general far less interested in reading good night stories. Having in mind that similar labels were used to mark, among other things, information which was violent, sexually explicit or promoted drug use or self-harm, the warning labels had been likely to dissuade a significant number of parents and guardians, who could be expected to trust the assessment of the book's contents by the relevant public authority, from allowing children under the age of 14 to read the book. That was especially so in the light of the persistence of stereotypical attitudes, prejudice, hostility and discrimination against the LGBTI community in X.

Thirdly, the restrictions imposed on a children's book depicting various minorities, in particular its labelling as harmful to minors under the age of 14, had affected the applicant's reputation as an established children's author and had been liable to discourage her and other authors from publishing similar literature, thereby creating a chilling effect." (ECHR, *Macatè v. Lithuania*, Judgement of 23.01.2023, Legal Summary, Merits (a) – (b))

The interference had a basis in domestic law, namely § 1 and § 2 CPA (in the original case: section 4 § 2 (16) of the Minors Protection Act).

(c) *legitimate aim* – “a legislative ban on “promotion of homosexuality or non-traditional sexual relations” among minors does not serve to advance the legitimate aims of protection of morals, health or the rights of others.[...B]y adopting such laws the authorities reinforce stigma and prejudice and encourage homophobia, which is incompatible with the notions of equality, pluralism and tolerance inherent in a democratic society.” (ECHR, *Macatè v. Lithuania*, Judgement of 23.01.2023, Legal Summary, Merits (cc)(ii))

“With respect to the *best interests of the child*, – the ECtHR has already held, on several occasions, that there was no scientific evidence or sociological data at its disposal suggesting that the mere mention of homosexuality, or open public debate about sexual minorities' social status, would adversely affect children. It had also held that, to the extent that minors who witnessed demonstrations in favour of LGBTI rights were exposed to the ideas of diversity, equality and tolerance, the adoption of these views could only be conducive to social cohesion. [...]

European Consensus – While there appeared to be no uniformity as to the age at which different member States considered it appropriate to provide children with information about intimate relationships, either same-sex or different-sex, or as to the manner in which such information should be provided to them, it was nonetheless clear that legal provisions which explicitly restricted minors' access to information about homosexuality or same-sex relationships were present in only one member State, Hungary. [...]

Principles inherent in the ECHR – Equal and mutual respect for persons of different sexual orientations was inherent in the whole fabric of the Convention. It followed that insulting, degrading or belittling persons on account of their sexual orientation, or promoting one type of family at the expense of another was never acceptable under the Convention. Such an aim or effect could not be discerned in the facts of the present case. On the contrary, to depict, as the applicant had done in her writings, committed relationships between persons of the same sex as being essentially equivalent to those between persons of different sex rather advocated respect for and acceptance of all members of a given society in this fundamental aspect of their lives.” (ECHR, *Macatė v. Lithuania*, Judgement of 23.01.2023, Legal Summary, Merits (c)(ii)(β))

(d) The case at hand: Conclusion – “Measures which restricted children’s access to information about same-sex relationships solely on the basis of sexual orientation had wider social implications. Such measures, whether they were directly enshrined in the law or adopted in case-by-case decisions, demonstrated that the authorities had a preference for some types of relationships and families over others – that they saw different-sex relationships as more socially acceptable and valuable than same-sex relationships, thereby contributing to the continuing stigmatisation of the latter. Therefore, such restrictions, however limited in their scope and effects, were incompatible with the notions of equality, pluralism and tolerance inherent in a democratic society. Where there was no other basis in any other respect to consider information about same-sex relationships to be inappropriate or harmful to children’s growth and development, restrictions on access to such information did not pursue any aims that could be accepted as legitimate and were therefore incompatible with Article 10.” (ECHR, *Macatė v. Lithuania*, Judgement of 23.01.2023, Legal Summary, Merits (c)(ii)(β))

Art. 14 Prohibition of discrimination

(a) Existence of an interference and its lawfulness – Furthermore the restrictions imposed on A’s book could constitute a discrimination, and therefore a violation of Art. 14 ECHR, since they were motivated by prejudice against sexual minorities.

(b) Discrimination aimed at content – The ECHR held in *Makatė v Lithuania* that the impugned measures were principally directed at the LGBTI content of the expression rather than the author of the expression herself, and therefore did not investigate a violation of Art 14 ECHR.

In their dissenting opinion Judges YUDKIVSKA, LUBARDA, GUERRA MARTINS AND ZÜND JOINED BY JUDGE KŪRIS, endorsed by literature (see *Greif/Greuter*), argued that also restrictions on expression aimed at promoting the rights of sexual minorities where the individual’s own sexual orientation is not as such the basis for the restriction, that is to say, the ground on which an individual is treated less favourably is not a protected personal

characteristic, should fall within the material scope of Art 14 ECHR. They reiterated:

“The Court should explicitly recognise that measures which seek to restrict the dissemination of pro-LGBTI information or ideas amount to discrimination against the authors or publishers, without it needing to be shown that the sexual orientation of the complainants was also a factor. This approach, which dissociates the finding of discrimination from the personal characteristics of the applicant, would be fully in keeping with the spirit of the Convention and its underlying values, such as the pluralism, tolerance and broadmindedness which are hallmarks of a democratic society, genuine recognition of, and respect for, diversity, and respect for all de facto family ties. We also believe that this approach finds support in the Court’s case-law [...]. It would be artificial to suggest that restricting the expression of pro-LGBTI views is based on something other than prejudice against the LGBTI community as a group. The discriminatory intent and purpose of such measures cannot be concealed, and their inevitable effect is to further the stigmatisation and social exclusion of sexual minorities [...]” (ECHR, *Macatė v. Lithuania*, Dissenting Opinion, para. 11 et seq.)

ICCPR

Art. 19 ICCPR

The same considerations regarding Art 10 ECHR do also apply to the violation of Art 19 ICCPR.

Art. 26 ICCPR

The same considerations regarding Art 14 ECHR do also apply to the violation of Art 26 ICCPR.

EU Law

Art. 34 TFEU

The temporary suspension of the distribution and sale of the book (as well as the labelling of the book as harmful to children under the age of 14), does interfere with the freedom of movement of goods. Taking under consideration that also the distribution of books to University libraries across Europe was affected, a cross-border nexus may also be established. Such interference may not be justified according to one of the exceptions provided for by Art 36 TFEU or any unwritten exception recognized by the ECJ (*Cassis de Dijon*). A legislative ban on “promotion of homosexuality or non-traditional sexual relations” among minors does particularly not serve to advance the legitimate aims of protection of morals, health or the rights of others. The measures constitute an infringement of Art. 34 TFEU.

Articles 1, 7, 11 and 21 CFR

(a) Application of the CFR according to Art 51 (1) CFR - The provisions of this Charter are addressed to the Member States only when they are implementing Union law. According to the ECJ the CFR is applicable in all situations governed by European Union law (Åkerberg Fransson, para 19). Falling within the material scope of Art 34 TFEU the situation at hand is governed by EU law.

(b) Violation of Fundamental Rights - The measures do also constitute an infringement of the right to human dignity (Art 1), the right to respect for private and family life (Art 7), the freedom of expression and information and the prohibition of discrimination (Art 21). The same considerations regarding the violation of the parallel provision of the ECHR apply.

Art. 2 TEU

The temporary suspension of the distribution and sale of the book, as well as the labelling of the book as harmful to children under the age of 14 could also violate Art 2 TEU, inter alia freedom, equality and respect for human rights. Including Art 2 TEU in the complaint is justified if the concrete violation of human rights is but an instance of a widespread and systematic attack on human rights. So far the ECJ has confirmed violations of Art 2 only in conjunction with other provisions of the EU treaty, e.g. Art 19 TEU (see: e.g. Associação Sindical dos Juizes Portugueses). Linking Art 2 TEU to another provision of the EU treaties has, on the one hand, provided for precise obligations for the member states and, on the other hand, established a link to the material scope of EU law. This reference to the material scope of EU law has the effect of linking it to certain obligations to which the Member States have voluntarily submitted themselves by concluding the EU treaties - such as guaranteeing effective legal protection - even where legislative powers have not been transferred or exercised. Article 2 TEU, on the other hand, goes further. It has an effect beyond the material scope of application of EU law and is therefore prima facie capable of setting standards across the entire spectrum of Member State law-making. In this regard it could be argued, similarly to the line of argument of the ECHR that the principle of non-discrimination, and particularly the equal and mutual respect for persons of different sexual orientations, is inherent in the whole fabric of the EU system and a violation can thus not be acceptable under EU law. This argument, however, is not entirely unproblematic, as it might be seen as an interference with the member states sovereignty. Critics are suspecting an abuse of the broad wording of Art 2 TEU in order to drag cases only remotely related to EU Law under the material scope of the treaties. (Students are free in their reasoning).

Q3: Practical Exercise

This question can be answered either by outlining the steps leading up to the final application (1) or by completing the ECtHR application form (lit. E and F) (2).

(1) Outlining the steps e.g.:

INTRODUCTION

- Briefly describe the case and the applicant (Author A)
- Mention the alleged violation of human rights

FACTS OF THE CASE

- Provide a summary of the facts, including the publication of the book, the concerns raised by Parliament members in country X, the temporary suspension of the book's distribution, and the warning label

ADMISSIBILITY

- Demonstrate that the applicant has exhausted all domestic remedies, including civil proceedings and constitutional complaint
- Confirm that the application is filed within the required time frame from the last domestic decision
- Assert that the applicant is a victim of the alleged violation

ALLEGED VIOLATIONS

- Detail the specific human rights violations:
 - Freedom of expression (Article 10 ECHR)
 - Right to non-discrimination (Article 14 ECHR)
 - Right to respect for private and family life (Article 8 ECHR)
- Present arguments and evidence supporting the claim that the actions of Malta constitute violations of these rights

JUSTIFICATION ANALYSIS

- Analyze whether the restrictions imposed by country x are justified according to the criteria set by the ECHR (E.g., Prescribed by law, legitimate aim, necessary in a democratic society)
- Argue that the restrictions are disproportionate, targeting the book's content related to same-sex couples, trans individuals, and diverse social groups, and that they do not meet the necessity requirement

REMEDY SOUGHT

- Request the ECtHR to find a violation of the relevant articles of the ECHR.
- Seek appropriate remedies, such as recognition of the violation, removal of the warning label, compensation for damages, and possible measures to prevent similar

situations in the future.

CONCLUSION

- Summarize the main arguments and reiterate the request for the court to find a violation of the applicant's rights.

(2) Filling out the Form

You can find the application form attached.

