ECtHR condemns the punishment of women living in poverty and the 'rescuing' of their children

By Valeska David

The recently delivered ECtHR judgment in *Soares de Melo v. Portugal* (application No.72850/14) conveys a strong message on childrearing responsibilities and child protection: families living in poverty (mostly led by women) cannot be punished for their deprivation and their children should not be 'rescued' from them. Instead, and because children are not the exclusive responsibility of parents, states must fulfill their supportive role and provide material and other forms of assistance to make family life possible.

Following a summary of the facts and the findings of the Court, I will first briefly contextualize the importance of such a message within the Council of Europe (CoE). Subsequently, I will highlight some of the main contributions explicitly and implicitly made by the judgment. Finally, I will conclude by taking the opportunity to suggest that the way forward requires the Court to be more attentive to the discrimination and stereotypes often at play in these types of cases.

Facts and judgment

The applicant is a Muslim Cape Verdean national living in Portugal. In 2012 six of her ten children, then aged between seven months and six years, were taken into care with a view to their adoption. The applicant was immediately deprived of parental responsibility and denied all contact with them. The reason? Her poverty. According to the Portuguese Courts, the applicant did not provide the children with adequate material living conditions and neglected them. She was unemployed and survived with a small family allowance, while the father was frequently absent from the family home. Domestic authorities considered that the applicant was incapable of performing her role as a mother and noted that she persistently refused to undergo sterilisation, a condition stipulated in an 'agreement' reached with the social services. The courts relied solely on social services' reports and did not order any expert independent assessment of the applicant's parenting abilities or of the emotional state of her children. No evidence of mistreatment or abuse was ever found. Rather it appeared that the bonds of affection between the applicant and her children were particularly strong.

The Strasbourg Court found for the applicant, who claimed a violation of her right to family life under article 8. The Court was of the view that the placement as well as the deprivation of parental and contact rights was not necessary in a democratic society.

The relevance of the matter within the CoE

Soares de Melo v. Portugal has come to enlarge the list of cases drawing attention to the taking within the CoE.

pe (notably, in the US), last year the Council's Parliamentary Assembly (PACE) made clear that in Europe, we too have reasons to be worried. According to PACE, although statistics are lacking, evidence suggests that children from vulnerable groups are disproportionally represented in the care population of member states, whereas no evidence suggests that parents who are poor, less educated, belong to minorities or have a migration background are more likely to abuse or neglect their children.[1] The jurisprudence of the ECtHR is also gradually reflecting this reality. In fact, prior to this case, at least seven other judgments from the Court dealt with child removals from families living in poverty.[2] In all these cases, including the one discussed here, the disadvantage suffered by parents and children was compounded by their socio-economic status and their ethnic origin or race, gender and/or disability. In a context of economic crisis like the one affecting Europe, the vulnerability of those disadvantaged families to forcible separation may furthermore be exacerbated, as liberalisation trends may reinforce the

'privatisation' of child-care responsibilities.[3] Against this backdrop, the ECtHR has much to contribute to tackle such a serious human rights issue.

Valuable aspects (explicit and implicit) of the Court's ruling

The Court rightly starts by regarding the removal and placement of the applicant's children as *an interference* with the right to family life which can only be justified if prescribed by law, in pursuit of a legitimate aim and necessary in a democratic society. Then, the Court underlines the state's *positive obligations* to create conditions that enable the parent-child bonds to develop. The *international children's rights framework* is subsequently integrated. Alongside the principles of the best interest of the child and the last resort nature of family separation, the Court also refers to concluding observations from the Committee on the Rights of the Child (CRC). From here, and despite the room for improvement, the judgment goes on to offer a number of valuable insights. Here I will just sketch three of them:

Firstly, the Court does not just refer to the general role of social services which are supposed to assist persons in difficult situations, as it already did in previous cases. The Court instead expresses in more concrete terms what is expected from states:

> "les autorités internes n'ont pas essayé de combler ces carences au moyen d'une aide financière supplémentaire afin de couvrir les besoins primaires de la famille (par exemple en matière d'alimentation, d'électricité et d'eau courante) et les frais d'accueil des enfants les plus jeunes dans des crèches familiales pour permettre à l'intéressée d'exercer une activité professionnelle rémunérée [...] Dans le cas des personnes vulnérables, les autorités doivent faire preuve d'une attention particulière et doivent leur assurer une protection accrue." (§ 106).

This speaks strongly and directly to the indivisibility of human rights, whose meaning is very well known to people living in poverty. In the Court's quote, we see no watertight division between the civil right to family life and its socio-economic counterpart. What is more, the Court's approach also implies that child upbringing is *not* a "private" matter of families (let alone of mothers) wherein any 'failure' related to material deprivation may be seen as the result of punishable individual faults.

The above brings us to a second important point: the Court takes into account that, although in some cases it declared inadmissible the placement of children was motivated by unsatisfactory living conditions; this was never the sole basis for such a decision (see §§ 107-108 and 118). The Court observes that, unlike in those earlier cases, in the applicant's case there was no sign of emotional deprivation, violence or abuse. In my view, these words implicitly uphold the following crucial principles: (1) poverty must not be conflated with neglect, and (2) poverty can never be the sole ground for separating children from their families. Just like the Convention on the Rights of People with Disabilities prohibits separation on the sole ground of children's or their parents' disability (CRPD, Article 23.4), we should acknowledge that child removal for economic reasons alone is not acceptable either. The Court should not shy away from stating so more explicitly.

Thirdly, the Court underlines that, as a matter of principles, parental rights can never be made conditional upon the practice of a sterilization procedure. Thus,

> "le non-respect par la mère de son engagement à se soumettre à une telle opération ne saurait en aucun cas être retenu contre elle, même dans le cas d'un engagement volontaire et éclairé de sa part." (§ 111)

Although the Court does not really unfold the gendered violations encompassed by the coercion exerted on the applicant to undergo sterilization, it does send a sing of alert. This aspect of the case reminds us that women living in poverty, especially when they belong to minorities, are more at risk of being victims of discrimination and violence, including that consisting of forced sterilization.[4] Of note, this and other denials of women's sexual and reproductive rights are often motivated by the assumption that poverty is caused by their sexual irresponsibility or that

poor women are unfit to care for children. I discuss such stereotypes in the concluding remarks of this post.

The way forward: the Court should keep an eye on stereotypes and discrimination

PACE has expressed concern about social services taking some children into care too rashly and without making enough effort to support families. In its view "these unwarranted decisions usually have a – sometimes unintended – discriminatory character, and can constitute serious violations of the rights of the child and his or her parents."[5] Indeed, it is not accidental that in most of the poverty-related child removal cases previously submitted to the Court, applicants alleged – unsuccessfully – a violation of the prohibition of discrimination (Article 14 ECHR). Albeit this was not the case in *Soares de Melo*, the judgment still provides an opportunity to briefly reflect on the need to pay more attention to discrimination issues in these types of cases. In short, the removal of children from poor or otherwise 'deviant' families is frequently the result of decisions based on stereotypes constitutive of discrimination. Gender stereotypes are not the only ones falling under this label. Harmful stereotypes about persons living in poverty which portray them as lazy, irresponsible or neglectful of their children also deserve scrutiny under the right to equality and non-discrimination. In practice, stereotyped views on unfitness to childrearing based on gender roles, economic situation, disability and other social traits usually intersect, as demonstrated by most of the poverty-related child removal cases submitted to the Court. Besides violating human rights, such stereotypes sustain existing inequalities. However, the Court has so far been rather reluctant to engage in this analysis.

The Court's stance might nonetheless be undergoing changes. The dissenting opinion in the recent case of *Garib v. The Netherlands* has precisely invited the Court to challenge the impact of measures that rely on or entrench the social stigma attached to poverty. It is to be seen whether the rest of the Court will take up the invitation. If it does, cases like the one discussed here could be analyzed under a new light.

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[1] Council of Europe, Parliamentary Assembly, *Social services in Europe: legislation and practice of the removal of children from their families in Council of Europe member States*, Doc. 13730, 13 March 2015, para. 4.

[2] ECtHR, Cases of *Moser v. Austria*, App. no. 12643/02, Judgment of 21 September 2006; *Wallová and Walla v. The Czech Republic*, App. no. 23848/04, Judgment of 26 October 2006; *Havelka and Others v. the Czech Republic*, App. no. 23499/06, Judgment of 21 June 2007; *Saviny v. Ukraine* , App. no. 39948/06, Judgment of 18 December 2008; *A.K. and L. v. Croatia* App. no. 37956/11, Judgment of 08 January 2013; *R.M.S. v. Spain*, App. no. 28775/12, Judgment of 18 June 2013; *N.P. v. the Republic of Moldova*, App. no. 58455/13, Judgment of 6 October 2015.

[3] D. Roberts, 'The Dialectic of Privacy and Punishment in the Gendered Regulation of Parenting" in 5 *Stanford Journal of Civil Rights & Civil Liberties* (2009) pp. 192-93.

[4] The Court emphasizes the gravity of forced sterilization and recalls its jurisprudence on the matter. See e.g. *V.C. v. Slovakia*, App. no 18968/07, judgment of 8 November 2011 §§ 106-107; *N.B. v. Slovakia*, App. no 29518/10, § 80, Judgment of 12 June 2012.

[5]Council of Europe, Parliamentary Assembly, *Social services in Europe: legislation and practice of the removal of children from their families in Council of Europe member States*, Doc. 13730, 13 March 2015, para. 6.