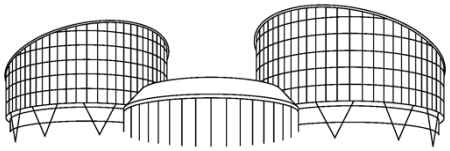

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FOURTH SECTION

CASE OF STOYANOVA v. BULGARIA

(Application no. 56070/18)

JUDGMENT

Art 14 (+ Art 2) • Discrimination • Life • Homophobic motives underlying a murder not constituting a statutory aggravating factor and having no measurable effect on sentencing Art 46 • General measures • Systemic problem • Respondent state to ensure that violent - particularly fatal – homophobic attacks to be treated as aggravated in criminal-law terms in full compliance with Art 7 requirement that criminal law not to be construed extensively to the detriment of the accused

STRASBOURG

14 June 2022

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

COUNCIL OF EUROPE
CONSEIL DE L'EUROPE

In the case of Stoyanova v. Bulgaria,

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

Tim Eicke, *President*,
Yonko Grozev,
Faris Vehabović,
Iulia Antoanella Motoc,
Armen Harutyunyan,
Pere Pastor Vilanova,
Jolien Schukking, *judges*,
and Ilse Freiwirth, *Deputy Section Registrar*,

Having regard to:

the application (no. 56070/18) against the Republic of Bulgaria lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Bulgarian national, Ms Hristina Ivanova Stoyanova ("the applicant"), on 22 November 2018;

the decision to give the Bulgarian Government ("the Government") notice of the complaints concerning the alleged breach of Article 14 taken together with Article 2 of the Convention and to declare the remainder of the application inadmissible;

the observations submitted by the Government and the observations in reply submitted by the applicant;

the written comments submitted by the non-governmental organisations Bulgarian Helsinki Committee and Deystvie, both of which were granted leave to intervene by the Vice-President of the Section;

Having deliberated in private on 17 May 2022,

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

INTRODUCTION

1. The case concerns the alleged failure by the Bulgarian authorities to give a proper legal response to the homophobic motives underlying the murder of the applicant's son – a failure alleged to be due to, in particular, the absence of statutory provisions making such motives an aggravating factor in relation to the crime of murder. The case raises an issue under Article 14 taken together with Article 2 of the Convention.

THE FACTS

2. The applicant was born in 1951 and lives in Sofia. She was represented by Mr M. Ekimdzhiev and Ms K. Boncheva, lawyers practising in Plovdiv.

3. The Government were represented by their Agent, Ms R. Nikolova of the Ministry of Justice.

4. The facts of the case may be summarised as follows.

I. MURDER OF THE APPLICANT'S SON

5. On 30 September 2008 three men beat and choked the applicant's son to death in a park in Sofia. He was then twenty-six years old. They attacked him because they thought that he looked like a homosexual; they had on several previous occasions assaulted other people for that reason.

6. According to the findings of fact made by the domestic courts in the subsequent criminal proceedings (see paragraphs 9-31 below), the three men were members of a group of six secondary-school students who gathered often in a park in Sofia. In the course of their gatherings the group would single out homosexuals known to be frequenting the park and assault them. On several occasions they attacked men whom they perceived as homosexuals, calling their actions "kicking" or a "clean-up".

7. Between 8 p.m. and 9 p.m. on 30 September 2008 five members of the group met in the park and decided to find a man who looked like a homosexual and to assault him. They split into two groups of three and two people, so as to be better able to ambush their potential victim. Shortly after 9 p.m. they came across the applicant's son. One of them hit him in the face, knocking him down to the ground. The applicant's son then got up and tried to run away, but another member of the group ran after him, grabbed his neck and again brought him to the ground, face down. The two attackers, joined by a third, then fell upon the applicant's son, kicking and hitting him. One of them grabbed his neck and began strangling him, breaking his hyoid bone in the process. The applicant's son felt pain and screamed. The three attackers then pushed his torso and head to the ground, face down, using their hands and knees. As a result, his nose and mouth were blocked, which prevented him from breathing. This continued for about five minutes. During the first two minutes the applicant's son tried to resist, but then lost consciousness and subsequently died of mechanical asphyxiation. The first attacker then searched the deceased's pockets and took his wallet and mobile telephone. A few minutes later he threw away the wallet, but kept the telephone. The three attackers then found the two remaining members of the group and told them what had happened.

8. At about 8 a.m. the following morning a passer-by saw the dead body of the applicant's son and called the police and an ambulance.

II. CRIMINAL PROCEEDINGS IN RELATION TO THAT MURDER

A. Arrest

9. The police were able to identify the first attacker through the victim's mobile telephone, which he had used for some time after taking it (see

paragraph 7 *in fine* above). On 28 May 2010 they interviewed him as a witness, and on 3 June 2010 arrested the three attackers.

B. At first instance

1. Course of the trial

10. In 2013-15 two of the attackers were tried for aggravated murder. The third retained the status of a witness. The applicant joined the proceedings as a private prosecutor (acting in parallel to the public prosecutor) and as a civil claimant.

11. In the course of the trial, the public prosecutor argued, *inter alia*, that the circumstances in which the attackers had killed the applicant's son indicated that their act had been motivated by their hostility towards people with a different sexual orientation, and by their disregard for the law, morality and human life. In the public prosecutor's view, that amounted to hooligan motives (*хулигански подбуди*) within the meaning of Article 116 § 1 (11) of the Criminal Code (see paragraph 34 (b) below).

2. Judgment of the Sofia City Court

12. The Sofia City Court convicted the two attackers of murder committed with direct intent and in a way particularly painful for the victim, contrary to Articles 115 and 116 § 1 (6) of the Criminal Code (see paragraphs 33 and 34 (a) below), but acquitted them of the charge that they had acted from hooligan motives, contrary to Article 116 § 1 (11) (see paragraph 11 above and paragraph 34 (b) below). It sentenced them to, respectively, thirteen years' and four years and ten months' imprisonment. Those sentences were below the minimum lengths prescribed by Article 116 § 1 in respect of aggravated murder (fifteen years), and by the special sentencing rules applicable to minors (five years – see paragraph 43 below) (which applied to the second attacker because he had been seventeen years and seven months old when committing the offence; the first attacker could not benefit from those rules as he had been eighteen years and seven months old at the time of the offence). The court fixed those sentences pursuant to a general sentencing rule enabling it to go below the statutory minimum if faced with exceptional or numerous mitigating factors (see paragraph 42 below). Lastly, the court ordered the attackers to pay the applicant 250,000 Bulgarian levs (BGN – equivalent to 127,823 euros (EUR)), plus interest, in respect of the pain and suffering that she had suffered as a result of her son's death (see *прис. № 199 от 22.06.2015 г. по н. о. х. д. № 3766/2013 г., СГС*).

13. The court found that in the run-up to the murder the group of which the two attackers had been members had been assaulting people perceived by them as homosexuals. However, it went on to find that the homophobic motives for the assault had not then driven the attackers to escalate their attack

to the level of murder. It also held that the evidence did not permit a firm conclusion that their sudden decision to escalate the assault to the level of murder had been based on hooligan motives – that is to say to demonstrate disrespect towards society or public order.

14. When fixing the length of the two sentences, the court treated as individual aggravating factors (see paragraph 38 below) in relation to both attackers the young age of the victim and the homophobic motives for the assault and the fact that it fell under a pattern of such assaults. It treated as mitigating factors the attackers' clean criminal records, their "involvement in socially-beneficial activities", and their young age. The court went on to find that there existed, with respect to both attackers, exceptional mitigating factors warranting sentences below the statutory minimum (see paragraph 42 below). For the first attacker, those factors were his very young age when committing the offence (just above eighteen-and-a-half years), and the excessive length of the proceedings. For the second attacker, the sole mitigating factor was the excessive length of the proceedings (since his being less than eighteen years old had already been taken into consideration, given that he was sentenced under the special rules applying to minors – see paragraph 12 above).

C. On appeal

1. Appeals by the parties

15. All parties appealed against the Sofia City Court's judgment. The public prosecutor challenged only the sentences imposed on the attackers. The applicant, acting in her capacity as a private prosecutor, appealed against the decision to acquit them of the charge that they had committed the murder for hooligan motives (contrary to Article 116 § 1 (11) of the Criminal Code), and against their sentences. She argued, in particular, that both the attack on her son and his murder had been driven by the attackers' homophobia.

2. Judgment of the Sofia Court of Appeal

16. In its judgment (*реш. № 330 от 12.07.2017 г. по н. д. № 84/2016 г., САС*), the Sofia Court of Appeal upheld the conviction of the two attackers under Articles 115 and 116 § 1 (6) of the Criminal Code (see paragraph 12 above and paragraphs 33 and 34 (a) below). Its only point of disagreement with the lower court in that respect concerned the form of the *mens rea*: unlike the lower court, the court of appeal held that the two attackers had not acted with direct intent (to cause death) but rather with oblique intent (that is to say through recklessness):

> "The evidence shows that the two accused and the [remaining three members of the group] were walking [in the park] in order to find a person to 'clean up' or 'kick' – as they themselves described their actions with respect to people they perceived as

homosexuals. Although the [first-instance] court found it categorically established that they [had gone to the park] with the intent to beat up (*набият*) a homosexual, it was wrong to hold that during the short time when they were carrying out the attack, both of them suddenly resolved to kill the victim by pushing his torso and head [against the ground]. [This court] finds that the subjective attitude of the accused towards the result [of their actions did not indicate such an intent]. Their direct aim was clearly established – to beat up a random person whom they perceived (on the basis of criteria known only to themselves) as a homosexual. There is no evidence that on previous occasions ... the accused had sought to cause death. The manner in which the incident unfolded categorically excludes the possibility that the two suddenly resolved to cause death. At first the accused were acting sequentially, with [the first attacker] taking the leading role. He clearly manifested his wish to prove his manliness, and attacked the victim without warning. He punched [the victim's] face ... His mindset towards those actions was no different from [that which gave rise to] his initial intention. The [second attacker] joined [the first], and brought the victim to the ground. He had the same mindset [as that of the first attacker] towards his actions. Both accused wished to cause the victim some sort of physical harm. Their aim was to hit him, and the injuries on the victim's body demonstrate that. After they brought the victim to the ground, the dynamics of the situation changed. The victim's physical characteristics rendered it necessary for all attackers to push [down on] him to immobilise him. At that point the victim's hyoid bone was broken; it remains unclear which one of the attackers did that, but the way in which that happened does not suggest that the two accused suddenly resolved to kill him. Nothing in their subjective attitude changed, except that after they managed to immobilise the victim and push him [to the ground], the two began to speculate on whether the victim might suffocate. They did not directly intend for that to happen (although it became more and more likely as they increased the pressure), but they accepted that it could happen. Each of them was aware that by blocking the [victim's] airways they were [preventing him from] breathing. Their gratuitous hatred for the victim, caused by their lack of any intelligence and their improper sense of self-importance and superiority *vis-à-vis* people whom they saw as different, drove them to press [the victim] against the ground. They both realised that as a result of the protracted lack of air he could die. They were, however, fully indifferent to that result, which became likely, and kept up the pressure, which ultimately [resulted as it did]. They did not directly seek to cause [the victim's] death, but they acquiesced to it, realising that it was possible. ..."

17. The court went on to uphold the acquittal of the two attackers on the charge that they had acted from hooligan motives, contrary to Article 116 § 1 (11) of the Criminal Code (see paragraphs 11 and 12 above and paragraph 34 (b) below):

"[This court] is of the view that the accused were not prompted by hooligan motives, [and realised] that their act showed disregard not only for the person and life of the victim, but also for public order and society. The accused's act was carried out in a public space, but it cannot be said that it was indecent and targeted the general interests of society. Their act was not committed in front of many people, and was directed exclusively against the victim's person. This was a brutal assault which led to serious and irreversible consequences. It did not, however, express overt disrespect towards society, but simply disregard for someone else's physical integrity. The accused's act manifested their hatred for homosexuals, which means that they were prompted by homophobic motives rather than hooligan ones."

18. The court nonetheless increased the sentences to, respectively, fifteen and six years' imprisonment, on the basis of its own view of the interplay of aggravating and mitigating factors, and its finding – which differed from that of the lower court (see paragraph 14 above) – that there were no exceptional mitigating factors warranting sentences below the statutory minimum (see paragraph 42 below).

19. With respect to the first attacker, the court highlighted the gratuitous cruelty that he had demonstrated, the fact that he had taken the initiative to attack, and the fact that he had taken and subsequently used the victim's mobile telephone. It also noted both the fact that the attack had resulted from a preconceived plan to assault anyone perceived by the group as a homosexual, and the complete lack of remorse on the part of the first attacker and his subsequent efforts to conceal his participation in the events. For the court, neither the young age of the culprit nor the length of the proceedings constituted exceptional mitigating factors warranting a sentence below the statutory minimum (fifteen years). It was, however, proper to fix his sentence at that minimum.

20. With respect to the second attacker, the court noted, in particular, his active participation in the attack – fully commensurate with that of the first attacker – and the evidence that he had then been content with his actions. The length of the proceedings was not an exceptional mitigating factor in relation to him either. There were hence no grounds to go below the statutory minimum applicable to him as a minor (five years – see paragraph 43 below) either. The appropriate sentence, in view of, in particular, his degree of dangerousness, was slightly above that minimum.

21. Lastly, the court quashed the lower court's decision regarding the applicant's claim for damages, noting that the applicant had sought BGN 250,000 from each of the attackers rather than a total of BGN 250,000 from both of them. It referred that aspect of the case back to the first-instance court for re-examination.

D. Proceedings before the Supreme Court of Cassation

1. Appeals on points of law

22. The two attackers and the applicant appealed on points of law. The applicant challenged the Sofia Court of Appeal's rulings on the form of the *mens rea* and on the absence of hooligan motives, and the length of the sentences that it had imposed (see paragraphs 16-20 above).

2. Judgment of the Supreme Court of Cassation

23. On 21 June 2018 the Supreme Court of Cassation upheld the two rulings of the Sofia Court of Appeal challenged by the applicant, as well as the remainder of the appellate judgment, but reduced the sentences of the two

attackers to, respectively, ten and four-and-a-half years' imprisonment (see *реш. № 39 от 21.06.2018 г. по н. д. № 1258/2017 г., ВКС, III н. о.*).

24. The court noted, in particular, that the lower courts' finding that the attackers had been members of a group assaulting people perceived by them as homosexuals (see paragraph 13 above) had a solid basis in the relevant evidence. It went on to hold that the court of appeal had been correct to find that the attackers had acted with oblique rather than direct intent (see paragraph 16 above):

> "[The] established aim of the [attackers] was to assault people with homosexual orientation without the intention to cause their death. There is no evidence that the victim was attacked with a view to being killed, which is why the court of appeal correctly characterised the form of the *mens rea* as [one of] oblique intent, and its decision to correct [the first-instance court] on that point was fully based on the findings regarding the mental attitude of the [attackers] towards [their] actions. This must be reflected in ... an assessment of whether their sentences are just."

25. The court held as follows with regard to the alleged hooligan motives within the meaning of Article 116 § 1 (11) of the Criminal Code (see paragraph 11 above and paragraph 34 (b) below):

> "Since the [attackers] fell upon the victim because they thought that he had a different sexual orientation, their motives and intentions could be defined as homophobic, as found by the [first-instance] court, but their actions ... were not preceded, accompanied or followed by acts of hooliganism, so as to engage ... Article 116 § 1 (11) of [the Criminal Code]. It is well-established that 'for a murder to be characterised as having been committed for 'hooligan motives', it is necessary for the offender to have carried out indecent actions that grossly violated public order and showed overt disrespect towards society, and for those actions to have motivated and driven him [or her] to commit the murder itself' .... [It is also settled] that the mere fact that a murder has been committed for no apparent reason is not sufficient to find that it has been committed for hooligan motives ..."

26. As for the sentences, the court found the Sofia Court of Appeal's assessment (see paragraphs 18-20 above) unduly harsh, and agreed with the first-instance court that there were grounds to fix them below the statutory minimum (see paragraph 14 above and paragraph 42 below).

27. With respect to the first attacker, the court highlighted his young age at the time of the offence, his clean criminal record, and the excessive length of the proceedings. It went on to note that he had a good employment record and was in a poor state of health (*влошено здравословно състояние*). For the court, those amounted to numerous mitigating factors warranting a sentence below the statutory minimum. The excessive length of the proceedings even constituted grounds in itself to go below that minimum, and thus compensate the first attacker for the excessiveness of that length. An overall assessment of his conduct, and in particular the facts that he had taken the victim's wallet and mobile telephone and had later tried to conceal his participation in the offence by suborning witnesses, led to the conclusion that it was appropriate to sentence him to ten years' imprisonment.

28. With respect to the second attacker, the court found that the excessive length of the proceedings, his clean criminal record, and his good character amounted to numerous mitigating factors warranting a sentence below the statutory five-year minimum applicable to him as a minor (see paragraph 43 below). The main factor in that respect remained the length of the proceedings. However, since the second attacker had been almost an adult at the time of the offence, it was appropriate to set his sentence at just six months below that minimum.

29. The court went on to say that the applicant's request for an increase in the two sentences was unfounded. That request had been based on her arguments that her son's murder had been committed with direct intent and for hooligan motives, both of which allegations had been rejected (see paragraphs 22-25 above). Her further arguments that the seriousness of the offence and the degree of culpability of the attackers called for harsher punishments could not alter the assessment of the factors taken into account in fixing the length of their sentences below the statutory minimum.

E. Re-examination of the applicant's claim for damages by the Sofia City Court and the Sofia Court of Appeal

30. Having re-examined the applicant's claim for damages, as instructed by the Sofia Court of Appeal (see paragraph 21 above), and having obtained a clarification from the applicant that she sought a total of BGN 500,000, plus interest, the Sofia City Court on 8 March 2019 ordered the two attackers to pay her jointly BGN 250,000 (equivalent to EUR 127,823), plus interest, in respect of the pain and suffering caused by her son's murder. The court noted that the prohibition against *reformatio in pejus*, which applied also to civil claims, prevented it from awarding more than BGN 250,000 at that stage of the proceedings, since the applicant had not appealed against its initial decision to award that sum (see paragraphs 12 and 15 above) (see *прис. от 08.03.2019 г. по н. о. х. д. № 2925/2018 г., СГС*).

31. Following appeals by the applicant and the two attackers, on 7 October 2019 the Sofia Court of Appeal upheld the bulk of the first-instance court's judgment but reduced the award to BGN 200,000 (equivalent to EUR 102,258), plus interest, on the basis that this was more consistent with the awards normally made in such cases (see *реш. № 373 от 07.10.2019 г. по в. н. о. х. д. № 874/2019 г., САС*). That judgment was apparently not appealed against and became final.

32. In 2020 the applicant brought enforcement proceedings against the two attackers to secure the payment of that sum. By the end of November 2021 (the last time that the Court received any information from her on that point) she had been unable to secure any payments from them.

RELEVANT LEGAL FRAMEWORK

I. 1968 CRIMINAL CODE

A. Murder and aggravated murder

33. Under Article 115 of the 1968 Criminal Code, murder is punished with ten to twenty years' imprisonment.

34. Article 116 of the Code lays down a multitude of factors that can lead a murder to be classed as "aggravated" and thus liable to harsher punishment (fifteen to thirty years' imprisonment or a life sentence – with or without the possibility of parole). Those factors include (a) committing the murder in a way particularly painful for the victim (Article 116 § 1 (6)), and (b) committing the murder for hooligan, racist or xenophobic motives (Article 116 § 1 (11)). Article 116 § 1 does not distinguish between those aggravating factors in terms of any possible sentence: the presence of any of them may constitute grounds to impose the harsher punishments envisaged by that provision.

35. Article 116 § 1 (11), as originally enacted, referred only to "hooligan motives". Racist and xenophobic motives were added in 2011, when the Criminal Code was amended on the basis of, *inter alia*, a government-sponsored bill (no. 002-01-97) aimed at transposing the European Council's Framework Decision 2008/913/JHA on combating certain forms and expressions of racism and xenophobia by means of criminal law (OJ L 328, 6.12.2008, pp. 55-58), and in particular Article 4 of that Decision.[1]

36. In mid-2019 the Supreme Court of Cassation held that the presence of one of the aggravating factors set out in Article 116 § 1 (11) (xenophobic motives) did not rule out the presence of another factor (namely hooligan motives) (see *реш. № 145 от 08.07.2019 г. по н. д. № 534/2019 г., ВКС, II н. о.*).

B. General sentencing rules

37. The general sentencing rules are set out in Articles 54 to 59 of the 1968 Criminal Code.

38. Under Article 54 § 1, the court must fix the sentence within the statutory range prescribed for the respective offence by taking into account the general rules of the Code, as well as (a) the seriousness of the offence and

[1] Article 4, entitled "Racist and xenophobic motivation", provides: "For offences other than those referred to in Articles 1 and 2, Member States shall take the necessary measures to ensure that racist and xenophobic motivation is considered an aggravating circumstance, or, alternatively that such motivation may be taken into consideration by the courts in the determination of the penalties."

the dangerousness of the offender, and (b) the motives for the offence and the remaining mitigating and aggravating factors.

39. The Supreme Court of Cassation has explained that Article 54 § 1 requires the sentencing court to assess those factors as a whole, with due regard to the aims of sentencing and the relative weight and the nature of each of the aggravating or mitigating factors in the specific case, rather than carry out a formalistic or purely mechanical calculation (see *реш. № 262 от 11.07.2011 г. по н. д. № 1259/2011 г., ВКС, I н. о.*; *реш. № 168 от 02.03.2018 г. по н. д. № 791/2017 г., ВКС, III н. о.*; and *реш. № 8 от 14.03.2018 г. на ВКС по н. д. № 1047/2017 г., НК, I н. о.*).

40. Article 56 clarifies that circumstances laid down as elements of the offence do not amount to mitigating or aggravating factors for the purposes of that analysis.

41. The former Supreme Court and the Supreme Court of Cassation have explained that the purpose of Article 56 is to prevent certain factors being taken into account twice: both as statutory aggravating factors (that is, elements of the aggravated offence) and as individual aggravating factors for the purposes of Article 54 § 1 (see *реш. № 474 от 18.04.1972 г. по н. д. № 233/1972 г., ВС, III н. о.*, and *реш. № 87 от 10.05.2004 г. по н. д. № 701/2003 г., ВКС, I н. о.*). However, the Supreme Court of Cassation has also noted that when the number of statutory aggravating factors is not in itself an integral feature of the aggravated offence, it is not contrary to Article 56 to take that number (two or more statutory aggravating factors) into account as an individual aggravating factor within the meaning of Article 54 § 1 (see *реш. № 329 от 14.07.2009 г. по н. д. № 257/2009 г., ВКС, I н. о.*). That court has also clarified that if an offence presents two or more statutory aggravating factors, and even one of those factors is sufficient for it to be characterised as an aggravated offence, then the accumulation of such factors can be taken into account as an individual aggravating factor within the meaning of Article 54 § 1 (see *реш. № 134 от 24.03.2010 г. на ВКС по н. д. № 25/2010 г., I н. о.*, and *реш. № 23 от 12.03.2019 г. по н. д. №1247/2018 г., ВКС, I н. о.*). On the basis of that rationale, that court has held that a finding that an aggravated offence does not present an additional statutory aggravating factor (in the case in question, hooligan motives for a murder) can constitute grounds to fix a lower sentence than that which would otherwise have befitted an offence presenting that additional factor (see *реш. № 256 от 27.03.2019 г. по н. д. № 985/2018 г., ВКС, I н. о.*). It has also held, more generally, that the presence of several statutory aggravating factors becomes an individual aggravating factor within the meaning of Article 54 § 1 (see, for instance, *реш. № 62 от 20.02.2009 г. по н. д. № 696/2008 г., ВКС, III н. о.*; *реш. № 183 от 19.05.2015 г. по н. д. № 289/2015 г., ВКС, I н. о.*; and *реш. № 193 от 30.06.2015 г. по н. д. № 587/2015 г., ВКС, III н. о.*).

42. If faced with exceptional or numerous mitigating factors, when even a sentence fixed at the statutory minimum would be unduly harsh, the court may, *inter alia*, fix the sentence below that minimum (Article 55 § 1 (1)).

C. Special rules on the sentencing of minors

43. Articles 60 to 65 of 1968 Criminal Code lay down special rules on the prosecution, conviction and sentencing of minors. By Article 63 § 2 (1), if a minor who has turned sixteen would be liable to be sentenced to a term of imprisonment of more than fifteen years or life imprisonment if he or she were an adult, he or she must instead be sentenced to a term of imprisonment ranging from five to twelve years. By Article 63 § 3, the specific sentence within that range must be fixed in line with the general sentencing rules (see paragraphs 37-42 above).

II. DRAFT 2014 CRIMINAL CODE

44. In 2009-13 the Bulgarian Ministry of Justice drew up, with the help of many experts, a draft new Criminal Code. In January 2014 the Government presented the bill (no. 402-01-8) to Parliament, but Parliament did not then proceed to examine it.

45. Under sub-paragraph 15 of Article 110 § 1 of that draft Code (which broadly corresponds to Article 116 § 1 of the 1968 Criminal Code – see paragraph 34 above), a murder committed on account of a protected characteristic of the victim is treated as "aggravated" and attracts a higher punishment. The draft Code also contained similar provisions in respect of other offences: causing bodily harm (Article 125 § 1 (15)) and torture (Article 589 § 2 (4)).

46. Paragraph 1 (22) of the draft Code's additional provisions defined "protected characteristic" as "race, skin colour, national origin, nationality, ethnicity, origin, religion, faith, health status, age, sex or sexual orientation".

47. The notes accompanying the draft Code stated (on page 10) that it covered all situations in which an offender might be motivated by some special characteristic of the victim, which is why the people formulating the draft had opted for the technique of referring to a "protected characteristic" as an element in the definition of several basic and aggravated offences, and of specifically defining what that term meant. In the case of some offences, a "protected characteristic" was an integral feature of the basic offence; for other offences, such as murder, causing bodily harm, and inflicting torture, it was a statutory aggravating factor, since offences in which the perpetrator was motivated by such a characteristic indicated a higher degree of dangerousness.

RELEVANT COUNCIL OF EUROPE MATERIAL

48. Point 2 of the Appendix to Recommendation CM/Rec(2010)5 of the Committee of Ministers on measures to combat discrimination on grounds of sexual orientation or gender identity (link) stated:

> "Member states should ensure that when determining sanctions, a bias motive related to sexual orientation or gender identity may be taken into account as an aggravating circumstance."

49. The explanatory memorandum to that Recommendation (CM(2010)4-add3final) stated, in point I.A.1-2 (footnotes omitted):

> "In legislation, hate crimes will generally be punished by a more severe penalty, as the offence is committed with a discriminatory motive. A failure to take into account such biased motives for a crime may also amount to indirect discrimination under the [Convention]. Member states should ensure that when determining sanctions a bias motive related to sexual orientation or gender identity may be taken into account as an aggravating circumstance. They should furthermore ensure that such motives are recorded when a court decides to hand down a more severe sentence. At least [fourteen] Council of Europe member states have already included sexual orientation as an aggravating circumstance in the committing of an offence in their legislation."

RELEVANT COMPARATIVE LAW

50. On 9 December 2021 the European Commission published a Communication to the European Parliament and Council entitled "A more inclusive and protective Europe: extending the list of EU crimes to hate speech and hate crime" (COM(2021) 777 final), proposing an extension of the list of areas of European Union crimes, to include hate speech and hate crime. According to this Communication, nineteen member States of the European Union (Austria, Belgium, Croatia, Cyprus, Denmark, Finland, France, Greece, Hungary, Lithuania, Luxembourg, Malta, the Netherlands, Portugal, Romania, Slovakia, Slovenia, Spain and Sweden) criminalise hate crime on grounds of sexual orientation (ibid., at p. 13, fn. 100). In the United Kingdom, on 22 October 2020 Parliament enacted the Sentencing Act 2020 which provides, in relation to England and Wales, that a court considering the seriousness of an offence must treat the fact that the offence is aggravated by hostility *inter alia* related to sexual orientation as an aggravating factor, and must state in open court that the offence is so aggravated if at the time of committing the offence, or immediately before or after doing so, the offender demonstrated towards the victim of the offence hostility based on the sexual orientation (or presumed sexual orientation) of the victim or if the offence was motivated (wholly or partly) hostility towards persons who are of a particular sexual orientation (section 66(1)(d), (2)(a), (4)(a)(iv) and (4)(b)(iv)) and section 414 of the Act). The Act entered into force on 1 December 2020.

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 14 TAKEN TOGETHER WITH ARTICLE 2 OF THE CONVENTION

51. The applicant complained that the deadly attack on her son, even though motivated by homophobia, had been treated as violence that had not had such overtones because (a) the Bulgarian Criminal Code did not treat homophobic motives as a statutory aggravating factor in respect of murder, and because (b) the courts dealing with the criminal case against the attackers had not characterised those homophobic motives as hooligan ones, or at least had not taken them into account as an individual aggravating factor when fixing the attackers' sentences. She relied on Article 14 taken together with Article 2 of the Convention.

52. Those provisions read, so far as relevant:

Article 2 (right to life)

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

Article 14 (prohibition of discrimination)

"The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status."

A. Submissions of those appearing before the Court

1. The parties

(a) The applicant

53. The applicant submitted that the breach of the Convention had lain in the failure of the legislature to view homophobic motives as a statutory aggravating factor, in the refusal of the Bulgarian courts to deem those motives to constitute hooligan ones, and in the failure of those courts to treat those homophobic motives as an aggravating factor when fixing the attackers' sentences.

54. The applicant averred that she had as a result suffered both direct and indirect discrimination. The indirect discrimination had consisted of the fact that victims of homophobic murders were treated in the same way as victims of murders not characterised by such motivation. The direct discrimination had consisted of the authorities' failure to treat victims of homophobic murders in the same way as victims of racist or xenophobic murders. She drew attention to various reports and other material according to which there existed in Bulgaria intolerance towards vulnerable groups, and to the alleged

failure of the Bulgarian authorities to take effective steps to combat hate crime and domestic and homophobic violence.

55. The applicant went on to say that since homophobic motives were not deemed to constitute an aggravating statutory factor and since (as was plain from their reasoning in this case) the Bulgarian courts distinguished between homophobic and hooligan motives, her only possible line of argument in that respect had been to urge those courts to characterise the motives for her son's murder as hooligan ones.

56. The applicant further criticised the Supreme Court of Cassation for not mentioning homophobic motives when analysing aggravating factors in relation to each of the two attackers. She also took issue with the reasons given by that court to fix their sentences below the statutory minimum and to reject her request for harsher penalties to be imposed; in particular she took issue with the court's assessment of the length of the proceedings and its implications for the sentences. It was, in her view, unacceptable that homophobic motives for an unprovoked, sadistic murder could have resulted in more lenient punishments than those imposed for a murder prompted by hooligan or pecuniary motives.

(b) The Government

57. The Government pointed out that the Bulgarian courts had specifically found that homophobic motives had prompted the attack on the applicant's son, but had also established that those motives had not caused the escalation of the attack to murder. The courts had explained why those motives could not be seen as hooligan ones, but had treated them as an aggravating factor when fixing the sentences of the two attackers. The authorities had thus sufficiently explored that aspect of the case and had taken due account of those homophobic motives. For her part, the applicant had not specifically highlighted those motives during the domestic proceedings.

58. The Government went on to submit that even if homophobic motives had been a statutory aggravating factor or had been accepted as constituting hooligan motives during the proceedings relating to the murder of the applicant's son, that would not have necessarily resulted in harsher punishments for the attackers, since their sentences had been fixed on the basis of a number of factors. The Government also pointed out that the ruling that the homophobic motives for the murder had not been hooligan ones had been intensely fact-specific rather than based on some general distinction drawn by the Bulgarian courts in respect of that particular legal point. The Government further stated that the applicant's assertions about the authorities' response to hate crime in general were baseless and misleading.

2. The third parties

(a) Bulgarian Helsinki Committee

59. The Bulgarian Helsinki Committee submitted that according to the Court's case-law, violence based on discriminatory intent could not be treated in the same way as violence that had no such overtones. It went on to describe the manner in which the Bulgarian Criminal Code dealt with hate crime, noting that it did not deem hostility towards a victim's sexual orientation (or gender identity or expression) to constitute a statutory aggravating factor in relation to any offence. The intervener also outlined the way in which the Bulgarian courts went about assessing individual mitigating and aggravating factors, and pointed out that under the approach followed by those courts, motivation in the form of hostility towards a victim's sexual orientation (or gender identity or expression) could be treated as an aggravating factor, but that that was not necessarily so in each case. The intervener further pointed out that under the rules of criminal procedure, all courts at all levels of jurisdiction had to analyse all mitigating and aggravating factors; thus, in the view of the intervener, failure by a court to mention a specific factor would imply that it had seen that factor as irrelevant.

60. The Bulgarian Helsinki Committee also described (a) various attempts in the period 2014-18 to introduce criminal-law provisions making all types of violence based on sexual orientation, gender or gender identity subject to harsher penalties, and (b) efforts by various stakeholders to highlight the need to combat such violence in Bulgaria.

(b) Deystvie

61. Deystvie noted that although the Bulgarian Criminal Code elevated some protected characteristics to the level of statutory aggravating factors, it did not do so in the case of sexual orientation or gender identity. It went on to describe several incidents involving homophobic or biphobic violence (in particular, incidents that had occurred during public events) and instances of hate speech against people of a homosexual or bisexual orientation, and stated that the authorities had failed to react appropriately in each of those cases. In its view, a particular problem arose from the lack of statutory provisions treating offences motivated by hostility towards LGBTI people as "aggravated" ones.

B. The Court's assessment

1. Admissibility

62. The complaint is not manifestly ill-founded or inadmissible on other grounds. It must therefore be declared admissible.

2. Merits

(a) Applicable principles

63. The general principles governing the duty under Articles 3 and 14 of the Convention to investigate and punish violent attacks by private persons motivated by hostility towards the victim's actual or presumed sexual orientation were set out in *Sabalić v. Croatia* (no. 50231/13, §§ 93-98, 14 January 2021). Those principles apply equally to cases that fall to be examined under Articles 2 and 14 of the Convention because the victim has died as a result of the attack. Indeed, the nature and content of the obligations to investigate and punish violent acts under Articles 2 and 3 of the Convention largely overlap (see *S.M. v. Croatia* [GC], no. 60561/14, § 309, 25 June 2020).

64. There is no need to repeat all those principles here, except to emphasise that:

(a) when investigating violent attacks, the authorities must take all reasonable steps to unmask any possible discriminatory motives for them (see *Sabalić*, cited above, § 94);

(b) the duty to respond appropriately to such attacks extends to the judicial proceedings in which it is decided whether and how to convict and punish the alleged perpetrators (ibid., § 97); and

(c) treating violence with a discriminatory intent on an equal footing with violence having no such overtones is tantamount to turning a blind eye to the specific nature of acts that are particularly destructive of fundamental rights, which is why a failure to handle such situations differently may constitute unjustified treatment irreconcilable with Article 14 of the Convention (ibid., § 94; see also the material cited in paragraphs 48-49 above).

65. In this case, it is also necessary to emphasise that Article 7 of the Convention requires, *inter alia*, that the criminal law not be construed extensively to the detriment of the accused (see, among other authorities, *Kokkinakis v. Greece*, 25 May 1993, § 52, Series A no. 260-A; *Kononov v. Latvia* [GC], no. 36376/04, § 185, ECHR 2010; and *Del Río Prada v. Spain* [GC], no. 42750/09, § 78, ECHR 2013).

(b) Application of those principles

66. Albeit with some delay, the people who had attacked and killed the applicant's son were identified, and two of them were then prosecuted, convicted and sentenced (see paragraphs 9-29 above). It cannot therefore be said that this aspect of the case reveals a lack of determination on the part of the Bulgarian authorities to hold the attackers to account (see, *mutatis mutandis*, *Myumyun v. Bulgaria*, no. 67258/13, § 72, 3 November 2015; also contrast *Identoba and Others v. Georgia*, no. 73235/12, § 75, 12 May 2015, and *M.C. and A.C. v. Romania*, no. 12060/12, §§ 120-23, 12 April 2016). The authorities also clearly established the gratuitously homophobic motives for

the attack (see paragraphs 11, 13, 16-17 and 24-25 above; also contrast *M.C. and A.C. v. Romania*, cited above, § 124). Moreover, the applicant's complaint was not directed against any flaws in the way in which the attack was investigated, but rather against the manner in which such attacks are criminalised in Bulgaria, and the resultant legal characterisation of her son's murder and the sentences imposed in connection with it (see paragraph 51 above, and, *mutatis mutandis*, *Cirino and Renne v. Italy*, nos. 2539/13 and 4705/13, § 107, 26 October 2017). The analysis must hence focus on whether Bulgarian criminal law and its application by the Bulgarian courts in respect of this case made it possible to respond appropriately to the homophobic motives for the attack (contrast *Sabalić*, cited above, § 103).

67. It is not for the Court to say whether the Bulgarian courts were correct to refuse to characterise those homophobic motives as hooligan motives within the meaning of Article 116 § 1 (11) of the Bulgarian Criminal Code (see paragraphs 13, 17, 25 and 34 above). Nor is it within the Court's province to check whether the Bulgarian courts – in particular the Supreme Court of Cassation – properly assessed the interplay of mitigating and aggravating factors when fixing the attackers' sentences (see paragraphs 14, 18-20, 26-29 and 38-39 above). The Court cannot act as a domestic criminal court or hear appeals against national courts' decisions, and it is not for it to pronounce on any points of criminal liability (see, among other authorities, *Myumyun*, cited above, § 75, and *Y v. Bulgaria*, no. 41990/18, § 94, 20 February 2020). It is nonetheless striking that when analysing the interplay of individual mitigating and aggravating factors in relation to both attackers, the Supreme Court of Cassation, in contrast to both courts below, did not even mention the homophobic motives for the attack, even though they were plainly a key feature of the case, and focused entirely on other matters.

68. Further, it is not for the Court to opine about whether the sentences ultimately imposed on the attackers – respectively ten years and four-and-a-half years (see paragraph 23 above) – were just. Still, it is concerning that, in spite of the particular gravity and viciousness of the attack on the applicant's son, the Supreme Court of Cassation considered that the attackers deserved special leniency, and chose to fix their sentences well below the statutory minimum (see paragraphs 26-28 above) – especially since under Bulgarian criminal law that is a possibility reserved only for situations in which even a sentence fixed at that minimum would be unduly harsh (see paragraph 42 above). Ultimately, however, it cannot be said that those sentences were manifestly disproportionate to the seriousness of the attackers' act, as that notion is understood in the Court's case-law (contrast, *mutatis mutandis*, *Myumyun*, § 75 *in fine*, and *Sabalić*, §§ 109-10, both cited above).

69. The Court is, however, competent to examine whether Bulgarian law, as applied in this case, led to results that were at odds with the requirements

of Article 14 taken together with Article 2 of the Convention (see, *mutatis mutandis*, *Myumyun*, cited above, § 75).

70. It is plain that under the Bulgarian Criminal Code murder motivated by hostility towards the victim on account of his or her actual or presumed sexual orientation is not as such "aggravated" or otherwise treated as a more serious offence on account of the special discriminatory motive which underlies it (see paragraphs 34 and 35 above; also contrast *Sabalić*, cited above, § 102). The Bulgarian authorities perceive this as a lacuna which they have attempted to fill (see paragraphs 44-47 above, and, *mutatis mutandis*, *Myumyun*, cited above, § 77 *in fine*).

71. In the instant case, an attempt was made – by the applicant, by the prosecuting authorities in the criminal proceedings against the two attackers, and by the Government in their submissions to the Court – to argue that the absence of a criminal-law provision specifically singling out murder motivated by the actual or presumed sexual orientation of the victim could be overcome by characterising such motives as hooligan motives within the meaning of Article 116 § 1 (11) of the Bulgarian Criminal Code (see paragraphs 11, 15, 22 and 58 above). In the light of the way in which hooliganism is defined in Bulgarian criminal law (see *Genov and Sarbinska v. Bulgaria*, no. 52358/15, §§ 34-35, 30 November 2021), that proposition cannot be dismissed as fanciful. But it remains the case that both the Sofia Court of Appeal and the Supreme Court of Cassation rejected this argument and held that the gratuitously homophobic motives for the attack could not be seen as hooligan ones for the purposes of that provision (see paragraphs 17 and 25 above). As a result, those homophobic motives were not treated as a statutory aggravating factor. As already noted, it is not for the Court to say whether this was correct in terms of Bulgarian law. Without intending to express any approval or disapproval towards the Bulgarian courts' ruling on that point, the Court would nonetheless point out in this connection that the national courts cannot be expected to discharge their positive obligations under Article 14 taken together with Article 2 of the Convention by breaching the requirements of Article 7 of the Convention, one of which is, as noted in paragraph 65 above, that the criminal law is not to be construed extensively to the detriment of the accused (see, *mutatis mutandis*, *Myumyun*, cited above, § 76 *in fine*, and *Advisory opinion on the applicability of statutes of limitation to prosecution, conviction and punishment in respect of an offence constituting, in substance, an act of torture* [GC], request no. P16-2021-001, Armenian Court of Cassation, § 65, 26 April 2022).

72. It does not appear that the absence of legislative provisions rendering motives based on hostility towards the actual or presumed sexual orientation of a murder victim a statutory aggravating factor was made good by the fact that the Sofia City Court and the Sofia Court of Appeal deemed that the homophobic motives for the attack constituted an individual aggravating factor, which they took into account when fixing the specific sentences

imposed on the two attackers. Firstly, the reasoning of those courts does not make it clear what weight they ascribed to that factor in their overall assessment of the mitigating and aggravating factors pertaining to each of the two offenders (see paragraphs 14 and 18-20 above). Secondly, the Supreme Court of Cassation – which, in contrast to the Sofia Court of Appeal, opted to fix sentences below the statutory minimum owing to its conclusion that there were numerous mitigating factors – did not even mention those homophobic motives in its analysis (see paragraphs 27 and 28 above). It cannot therefore be said that the homophobic motives for the attack had any measurable effect at that level of the analysis. Indeed, it appears that, in view of the usual approach of the Bulgarian courts to the assessment of the interplay between mitigating and aggravating factors for the purpose of fixing a sentence within the prescribed statutory range, it is normally not possible to attribute specific weight to any one such factor (see paragraph 39 above).

73. In sum, although the Bulgarian courts clearly established that the attack on the applicant's son had been motivated by the attackers' hostility towards people whom they perceived to be homosexuals (see paragraphs 13, 14, 16, 17, 24 and 25 above), they did not attach to that finding any tangible legal consequences. In the Court's view, this omission was chiefly due to the fact that Bulgarian criminal law had not properly equipped those courts to do so rather than to the manner in which they dealt with the case (see, *mutatis mutandis*, *Myumyun*, § 77, and *Cirino and Renne*, § 111, both cited above).

74. It follows that the State's response to the attack against the applicant's son did not in sufficient measure discharge its duty to ensure that deadly attacks motivated by hostility towards victims' actual or presumed sexual orientation do not remain without an appropriate response.

75. In the light of this conclusion, it is not necessary to examine whether, as argued by the applicant (see paragraph 54 above), her son was treated less favourably than the victims of murders motivated by racism or xenophobia, given the fact that such murders have since 2011 been treated in Bulgaria as "aggravated" (see paragraphs 34-35 above).

76. There has therefore been a breach of Article 14 taken together with Article 2 of the Convention.

II. APPLICATION OF ARTICLE 46 OF THE CONVENTION

77. Under Article 46 §§ 1 and 2 of the Convention, a judgment in which the Court finds a violation of the Convention or its Protocols imposes on the respondent State a duty to choose, subject to supervision by the Committee of Ministers, the general and/or, if appropriate, individual measures to be taken in its domestic legal order to end the violation and make all feasible reparation for its consequences by restoring as far as possible the situation which would have obtained if it had not taken place. Furthermore, it follows from the Convention, and from its Article 1 in particular, that in ratifying the

Convention and its Protocols the Contracting States undertake to ensure that their domestic law is compatible with them (see, among other authorities, *Maestri v. Italy* [GC], no. 39748/98, § 47, ECHR 2004-I; *Roman Zakharov v. Russia* [GC], no. 47143/06, § 311, ECHR 2015; and *Ekimdzhiev and Others v. Bulgaria*, no. 70078/12, § 427, 11 January 2022).

78. Since the breach of Article 14 taken together with Article 2 of the Convention found in this case appears to be of a systemic character, in the sense that it resulted from the content of the relevant Bulgarian criminal law, as interpreted and applied by the Bulgarian courts, it seems appropriate for the Court to give some indications on how breaches of this kind are to be avoided in the future.

79. The breach resulted, depending on how the matter is seen, either from a lacuna in the Bulgarian Criminal Code, or from the way in which the Bulgarian courts construed and applied the relevant provisions of that Code. It is not for the Court to say whether one or the other has to change to avoid future breaches of this kind. Be that as it may, Bulgaria should ensure that violent attacks (in particular, those resulting in the victim's death) motivated by hostility towards the victim's actual or presumed sexual orientation are in some way treated as aggravated in criminal-law terms – naturally, in full compliance with the requirement that criminal law is not to be construed extensively to the detriment of the accused.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

80. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

81. The applicant claimed 60,000 euros (EUR) in respect of the non-pecuniary damage that she had suffered as a result of the allegedly inadequate response of the authorities to her son's murder. She pointed out that she had been unable to obtain the payment of any part of the 200,000 Bulgarian levs (BGN) that the two attackers had been ordered to pay her in non-pecuniary damages (see paragraphs 30-32 above).

82. The Government submitted that in view of the nature of the alleged breach and the facts of the case more generally, the claim was exorbitant. In their opinion, the finding of a violation would in itself constitute sufficient just satisfaction for any non-pecuniary damage suffered by the applicant.

83. The Court finds that the applicant must have experienced mental suffering on account of the failure of the Bulgarian authorities to discharge

their duty under Article 14 taken together with Article 2 of the Convention to respond appropriately to the homophobic motives for the lethal attack on her son. Ruling in equity, as required under Article 41 of the Convention, it awards her EUR 7,000, plus any tax that may be chargeable on that sum.

B. Costs and expenses

1. The applicant's claim and the Government's comments in respect thereof

84. The applicant sought reimbursement of:

(a) EUR 5,640 incurred in fees charged by her lawyers for forty-seven hours of work in respect of the proceedings before the Court, at EUR 120 per hour;

(b) EUR 12 spent by those lawyers' firm on postage;

(c) EUR 15 spent by those lawyers' firm on office supplies; and

(d) EUR 171.90 spent by those lawyers' firm on the translation into English of the observations and the claim for just satisfaction lodged on her behalf.

85. The applicant requested that any award under this head, except for BGN 1,200 (equivalent to EUR 613.55), which she had already paid to her lawyers' firm, be made directly payable to that firm.

86. In support of her claim, the applicant submitted two fee agreements that she had concluded with her lawyers' firm, an invoice, a bank transfer order, a time sheet and expenses report by the lawyers' firm (which she had accepted), receipts for postage payments, and a contract for translation services between the lawyers' firm and a translator.

87. The Government submitted that the claim in respect of lawyers' fees was exorbitant, and that the applicant should only be reimbursed for the BGN 1,200 that she had already paid, since it could not be accepted that she was bound to pay anything in addition to that sum. The Government also contested the remaining expenses claimed by the applicant.

2. The Court's assessment

88. According to the Court's settled case-law, costs and expenses may be awarded under Article 41 of the Convention if it is established that they were actually and necessarily incurred and are reasonable as to quantum. A representative's fees shall be deemed to have been actually incurred if the applicant has paid them or is liable to pay them (see, among other authorities, *Merabishvili v. Georgia* [GC], no. 72508/13, § 371, 28 November 2017).

89. The documents in support of the applicant's claim (see paragraph 86 above) show that she has paid to her lawyers' firm BGN 1,200 (equivalent to EUR 613.55) and has agreed to pay that firm a further EUR 5,026.45 in fees for the work of her two lawyers in respect of the proceedings before the Court.

There is thus no doubt that those fees were actually incurred by her. It can also be accepted that they were necessarily incurred. The only question giving rise to some difficulty is whether the fees are reasonable as to quantum. The hourly rate charged by the applicant's lawyers, EUR 120 (see paragraph 84 (a) above), is higher than the rates claimed and accepted as reasonable in recent cases against Bulgaria of similar or perhaps even higher complexity (see, for instance, *Vasil Vasilev v. Bulgaria*, no. 7610/15, §§ 123 and 126, 16 November 2021). The number of hours cited also seems somewhat overestimated, in the light of, in particular, the content of the submissions made on behalf of the applicant. In view of these considerations, the Court awards the applicant EUR 3,000, plus any tax that may be chargeable to her, in respect of lawyers' fees.

90. As requested by the applicant (see paragraph 85 above), this sum – except for the BGN 1,200 that she has already settled – is to be paid directly into the bank account of her lawyers' firm, Ekimdzhiev and Partners. The above-mentioned sum of BGN 1,200 (equivalent to EUR 613.55), which the applicant has already settled, is to be paid to her.

91. The sums spent by the applicant's lawyers on postage expenses, office supplies and translation services (see paragraph 84 (b), (c) and (d) above) in connection with the proceedings before the Court are in principle recoverable under Article 41 of the Convention (see *Handzhiyski v. Bulgaria*, no. 10783/14, § 74, 6 April 2021, with further references). There is evidence, except for the sum claimed in respect of office supplies, that those expenses were actually incurred by their firm. Moreover, under the terms of the second fee agreement between the applicant and the firm, she is liable to cover all expenses made by the firm in connection with the case. The expenses for postage and translation, which amount in total to EUR 183.90 (see paragraph 84 (b) and (d) above), seem furthermore necessary and reasonable as to quantum. They are hence to be awarded in full. To this should be added any tax chargeable to the applicant.

92. As requested by the applicant, this sum is likewise to be paid directly into the bank account of her lawyers' firm, Ekimdzhiev and Partners.

FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Declares* the application admissible;

2. *Holds* that there has been a violation of Article 14 taken together with Article 2 of the Convention;

3. *Holds*

   (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts, to be

converted into the currency of the respondent State at the rate applicable at the date of settlement:

(i) EUR 7,000 (seven thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;

(ii) EUR 3,183.90 (three thousand one hundred eighty-three euros and ninety cents), plus any tax that may be chargeable to the applicant, in respect of costs and expenses; EUR 613.55 (six hundred thirteen euros and fifty-five cents) of this sum is to be paid to the applicant, and the remainder into the bank account of the firm of her legal representatives, Ekimdzhiev and Partners;

(b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period, plus three percentage points;

4. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 14 June 2022, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Ilse Freiwirth	Tim Eicke
Deputy Registrar	President

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

T.E.I.
I.F.

CONCURRING OPINION OF JUDGES EICKE AND VEHABOVIĆ

1. The offence at issue in the present case was a most horrific homophobic murder committed – it appears in an almost casual fashion – by a group of secondary school students who (judgment, § 6) "gathered often in a park in Sofia [and, in] the course of their gatherings ... would single out homosexuals known to be frequenting the park and assault them ..., calling their actions 'kicking' or a 'clean-up'". The events on 30 September 2008 were the consequences of just another one of these frequent "gatherings" and again (judgment, § 7) "decided to find a man who looked like a homosexual and to assault him". Nevertheless, despite having clearly established the homophobic nature of the murder, the domestic Supreme Court ultimately sentenced the perpetrators to a sentence (well) below the minimum sentence prescribed by the Criminal Code.

2. In light of the evidence before the Court, we wholly agree with our colleagues that there was here a violation of Article 14 taken together with Article 2 of the Convention on the basis that (judgment, § 74) "the State's response to the attack against the applicant's son did not in sufficient measure discharge its duty to ensure that deadly attacks motivated by hostility towards victims' actual or presumed sexual orientation do not remain without an appropriate response".

3. Where we differ from our colleagues is when they conclude (judgment, § 73) that the violation in the present case was "chiefly" due to the fact that Bulgarian criminal law had not properly equipped those courts to do so rather than to the manner in which they dealt with the case. While the deficiencies in Bulgarian criminal law certainly provide a valid basis for a finding of a violation, the failings in the present case, in our view, go much further. After all, as we see it, the domestic courts failed even to use the "tools" at their disposal to reflect appropriately in the sentences actually imposed the homophobic nature of the murder of the applicant's son.

4. Our disagreement with our colleagues finds its origins in their conclusion in paragraph 68 of the judgment that "it cannot be said that those sentences were manifestly disproportionate to the seriousness of the attackers' act, as that notion is understood in the Court's case-law". That conclusion is expressed to be based on an application of the Court's established case-law to the effect that:

> "... it is not the task of the Court to ascertain whether the domestic courts correctly applied domestic criminal law; what is at issue in the present proceedings is not individual criminal-law liability, but the State's responsibility under the Convention. There is also no absolute obligation for all prosecutions to result in conviction, or indeed in a particular sentence. The Court must grant substantial deference to the national courts in the choice of appropriate measures, while also maintaining a certain power of review and the power to intervene in cases of manifest disproportion between the gravity of the act and the punishment imposed" (*Smiljanić v. Croatia*, no. 35983/14,

§ 97, 25 March 2021, see also *Sabalić v. Croatia*, no. 50231/13, § 98 (iii), 14 January 2021)."

5. Again, we do not wish to gainsay the validity of this approach in principle. On the contrary, we agree with it and would certainly have come to the same conclusion as our colleagues had the Supreme Court imposed a sentence within the statutory range of available sentences.

6. As indicated above, the factor which leads us to conclude that, in fact, the sentences in the present case were "manifestly disproportionate" to the seriousness of the attackers' act so as to justify a (separate or alternative) finding of a violation of Article 14 taken together with Article 2 of the Convention lies in the Supreme Court's (significant) departure from the minimum sentence required by law.

7. After all, the Court in its judgment in *Sabalić* (cited above, § 111) stressed the need for the domestic authorities to demonstrate the State's Convention commitment to ensuring that homophobic ill-treatment does not remain ignored by the relevant authorities and to providing effective protection against acts of ill-treatment motivated by the applicant's sexual orientation, showing that such acts could in no way be tolerated, rather than fostering a sense of impunity for the acts of violent hate crime (compare also *Milanović v. Serbia*, no. 44614/07, § 100, 14 December 2010; and also *Kopylov v. Russia*, no. 3933/04, § 141, 29 July 2010; *Darraj v. France*, no. 34588/07, §§ 48-49, 4 November 2010; *Zontul v. Greece*, no. 12294/07, §§ 106-109, 17 January 2012; and *Pulfer v. Albania*, no. 31959/13, § 88 *in fine*, 20 November 2018).

8. Applying this approach in the context of the present case where, as the judgment makes clear (§§ 38 and 42), domestic law provided for:

(a) a duty ("must") under Article 54 § 1 of the Criminal Code to "fix the sentence within the statutory range prescribed for the respective offence by taking into account the general rules of the Code, as well as (a) the seriousness of the offence and the dangerousness of the offender, and (b) the motives for the offence and the remaining mitigating and aggravating factors"; and

(b) at best a discretion ("may") "[i]f faced with exceptional or numerous mitigating factors, when even a sentence fixed at the statutory minimum would be unduly harsh, the court may, *inter alia*, fix the sentence below that minimum (Article 55 § 1 (1) [of the Criminal Code])";

leaves us with no doubt that the sentence imposed by the Supreme Court in the present case amounted to a separate/alternative violation of Article 14 taken together with Article 2 of the Convention.

9. None of the mitigating factors identified by the Supreme Court, read in light of the above-mentioned Convention commitment to ensure that homophobic ill-treatment does not remain ignored by the relevant authorities and to provide effective protection against such acts, are even remotely capable of justifying a reduction of the sentence, such as that in relation to the first attacker, by a third of the minimum statutory sentence. This is most

clearly underlined by the fact, as recorded at paragraph 27 of the judgment, that the attacker's "clean criminal record" was one of the mitigating factors identified without any reference to the fact that it had been established that this murder occurred in the context and as a result of an established routine by which the attackers and their friends appeared to have routinely gathered in the same park, known to be frequented by homosexuals, and, for want of a better word, "hunted" people who "looked like a homosexual" and assaulted them, something the judgment notes they called "'kicking' or a 'clean-up'".