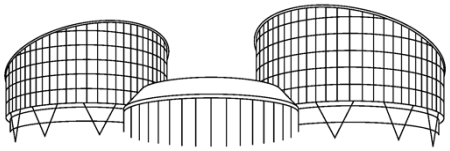

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

THIRD SECTION

CASE OF IBRAGIMOVA v. RUSSIA

(Application no. 68537/13)

JUDGMENT

Art 10 (read in light of Art 11) • Freedom of expression • Disproportionate administrative-offence conviction and fine for applicant's use of a balaclava as a symbol of protest during a solo demonstration • Domestic courts' failure to adequately assess circumstances and provide relevant and sufficient reasons • Relatively high fine conducive of a "chilling effect" on legitimate recourse to protests and solo demonstrations as a form of expression

STRASBOURG

30 August 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.

In the case of Ibragimova v. Russia,

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

Georges Ravarani, *President,*
Georgios A. Serghides,
María Elósegui,
Darian Pavli,
Anja Seibert-Fohr,
Peeter Roosma,
Mikhail Lobov, *judges,*
and Olga Chernishova, *Deputy Section Registrar,*

Having regard to:

the application (no. 68537/13) against the Russian Federation lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Russian national, Ms Naylya Razinovna Ibragimova ("the applicant"), on 23 October 2013;

the decision to give notice to the Russian Government ("the Government") of the complaint under Article 10 and to declare inadmissible the remainder of the application;

the parties' observations;

Having deliberated in private on 24 May 2022 and 21 June 2022,

Delivers the following judgment, which was adopted on the last-mentioned date:

INTRODUCTION

1. The present application concerns the applicant's conviction in administrative-offence proceedings for using a balaclava during a solo demonstration.

THE FACTS

2. The applicant was born in 1988 and lived in Murmansk at the time of the events. She was represented by Mr A. Laptev, a lawyer practising in Moscow.

3. The Government were initially represented by Mr M. Galperin, former Representative of the Russian Federation to the European Court of Human Rights, and later by his successor in this office, Mr M. Vinogradov.

4. The facts of the case, as submitted by the parties, may be summarised as follows.

5. At 3 p.m. on 17 August 2012 the applicant held a solo demonstration at Five Corners Square in Murmansk, to protest against the criminal conviction of the members of the punk group Pussy Riot announced that day. The applicant was wearing a green balaclava – a knitted hat with eyeholes

stretched to the chin – in a manner resembling the group's performances. She had a placard which read *"Don't extend your hand to someone else's fate. Free Pussy Riot"*.

6. According to the applicant, she introduced herself to journalists and other people who talked to her during her demonstration. She did not conceal her identity. One hour later she completed her demonstration and left the square. She had taken her balaclava off before ending her demonstration. Several police officers were standing nearby but did not intervene.

7. The applicant submitted copies of three news items published on local websites on 17 and 18 August 2012. Two of the items gave the applicant's name and were illustrated by photographs showing her wearing a balaclava. According to one of the articles, the applicant told the journalists that she was not hiding her face; and that her mask was as a symbol of protest not only against the Pussy Riot trial but, in a broader context, against what she saw as the poor situation as regards freedom of expression and human rights in Russia and the lack of a protest culture in her country. One of the articles stated that people opposed to the solo demonstration had approached the applicant and another person who staged another solo demonstration at a different location at the square; one of them had thrown eggs at the applicant, and another, an Orthodox priest, had expressed strong disapproval at the protesters' actions; and that the police had been nearby but had not intervened.

8. On 30 September 2012 the applicant was charged in administrative-offence proceedings with hiding her face during a public event, which was prohibited by section 6(4) of the Public Events Act (see paragraph 15 below). The authorities considered that her acts constituted a breach of the established procedure for the conduct of public events committed by the organiser of an event – an offence under Article 20.2 § 1 of the Code of Administrative Offences ("the CAO", see paragraph 16 below).

9. By a judgment of 16 November 2012 a justice of the peace of the 5th Court Circuit of the Oktyabrskiy Administrative District of Murmansk ("the justice of the peace") convicted the applicant as charged and fined her 10,000 Russian roubles ((RUB) – equivalent to 242 euros (EUR) at the time). Referring to section 6(4) of the Public Events Act, the justice of the peace found that the applicant's actions constituted an offence punishable under Article 20.2 § 1 of the CAO, and that her guilt was proven by the administrative-offence report of 17 August 2012, a police officer's report, three police officers' explanations, and a video-recording.

10. On 24 April 2013 the Oktyabrskiy District Court of Murmansk examined the applicant's appeal. During the hearing she argued, in particular, that she had had no intention of concealing her face or identity. On the contrary, she had openly introduced herself to the people at the square who had interacted with her. It had been important for her to show that she was not afraid to stage her demonstration. The police officers who had been

nearby could have easily identified her but had not even attempted to do so. She had taken her balaclava off before ending her solo demonstration.

11. The appellate court rejected her arguments, holding that the findings of the justice of the peace corresponded to the factual circumstances of the case indicated in the decision, as well as the evidence, in particular:

- the administrative-offence report, according to which the applicant had hidden her face during her solo demonstration using a green knitted hat with eyeholes stretched to the chin, and had therefore violated section 6(4) of the Public Events Act;
- a video-recording showing the applicant wearing the balaclava, holding a placard and giving an interview to journalists; and
- explanations and court statements by four police officers, who submitted that the applicant had been wearing a balaclava during her solo demonstration on 17 August 2012. After completing her demonstration, she had taken her balaclava off, and her identity "had been established". The officers reported that there had been no need, or that they had had no instructions, to arrest her.

12. The court also heard two defence witnesses. One of them, a journalist, stated that he had interviewed the applicant who had not concealed her identity and had introduced herself. Another one submitted that the applicant had been wearing a balaclava as part of an artistic concept as she supported Pussy Riot. She had not concealed her face and everyone, including the police officers, had known who she was.

13. The court found that the above witness testimony did not alter the fact that the applicant had committed an administrative offence. It further noted that the fine constituted the minimum possible amount set out in the relevant provision of the CAO, and that the sanction had been imposed with due regard to the nature of the offence and the offender's personality.

RELEVANT LEGAL FRAMEWORK AND PRACTICE

I. RELEVANT DOMESTIC PROVISIONS

14. "Public event" is defined in section 2(1) of the of the Federal Law on Gatherings, Meetings, Demonstrations, Processions and Pickets (no. 54-FZ of 19 June 2004, "the Public Events Act") as a peaceful action by way of a meeting, demonstration, march or picket. The Act defines a "picket" as a form of public expression of opinion that does not involve movement or the use of loudspeaker equipment, where one or more citizens with placards, posters and other means of visual expression assemble near the target object of the picket (section 2(6)).

15. Section 6(4) of the Public Events Act, as in force as of 9 June 2012, provides that participants in public events are prohibited from hiding their faces, including by use of masks or other items specifically designed to hinder

identification (*специально предназначенные для затруднения установления личности*). The organiser of a public event must demand that its participants do not conceal their faces, including by use of masks, means of disguise or other items specifically designed to hinder identification. Anyone not complying with the lawful requests of the organiser of a public event may be removed from the site (section 5(4)(11) of the Act). Unlawful actions by participants in a public event, including those related to concealing faces, and failure by the organiser to comply with his or her duties set out in law, are grounds for termination of the public event (section 16(2) and(3)).

16. A breach of the established procedure for organising or running a demonstration, meeting, procession or picket committed by the organiser of a public event is punishable by a fine of RUB 10,000 to 20,000, or up to forty hours' community work (Article 20.2 § 1 of the Code of Administrative Offences ("the CAO"). Same actions committed by a participant are punishable by a fine of RUB 10,000 to 20,000 or up to forty hours' community work (Article 20.2 § 5 of the CAO).

II. DECISION No. 1428-O OF THE CONSTITUTIONAL COURT

17. The Constitutional Court, in its decision of 7 July 2016 (no. 1428-O), examined whether section 6(4) of the Public Events Act and Article 20.2 § 5 of the CAO were compatible with the Constitution. It held that the prohibition on participants hiding their faces during public events – including by use of masks, camouflage or other items specifically designed to hinder identification – applied to all types of public events, regardless of their location, the number of participants, the aim pursued, the issues discussed or opinions expressed. The court noted that such a prohibition had been introduced into the law of the Russian Federation, as well as into the legislation of other European countries (such as Austria, Belgium, Denmark, Germany, Finland, France, Norway, Switzerland and Sweden) owing to the need to identify participants in public events, in order to maintain safety and public order, and to protect civil rights and freedoms, especially during mass public actions. Such a prohibition had a clear preventive and deterrent effect on the conduct of participants in public events, as it prevented them from thinking that they could commit unlawful actions and go unpunished. It also helped to ensure that liability for a breach of the statutory procedure for holding a public event was not avoided. Therefore, it could not be considered inconsistent with the constitutionally significant aims.

18. However, according to the Constitutional Court, it was important to bear in mind that participants in a public event could hide their faces (or parts thereof) for various reasons, not necessarily with an intention to hinder their identification. The prohibition on the use of means hindering identification by participants in public events did not *per se* prevent them from using objects to conceal their faces, if such use was justified by the weather conditions

(such as scarves and hoods) or medical (for example bandages and respirators) or other similar reasons. Furthermore, as the Public Events Act permitted the use of placards, banners and other means of visual expression, participants in public events could (*не лишены возможности*) put some elements of visual expression on their faces, in particular, drawings or stickers, or apply other visual expression accessories. Therefore, in deciding whether the actions of participants in a public event could be characterised as falling under section 6(4) of the Public Events Act, it was important to consider the motives and aims of such actions, the methods and means used, the consequences they had, and their effect on security and public order, including the participants' reaction to warnings from the organisers and law-enforcement officers. Administrative liability of a participant in a public event (Article 20.2 § 5 of the CAO, as in force at the material time) for hiding his or her face was impossible without establishing his or her guilt, which obliged the authorities to establish all the circumstances surrounding the concealing of the face, especially where it had not substantially hindered his or her identification.

III. RELEVANT INTERNATIONAL MATERIAL

19. Opinion no. 686/2012 by the European Commission for Democracy through Law (Venice Commission) on Federal Law no. 65-FZ of 8 June 2012 amending Federal Law no. 54-FZ of 19 June 2004 on Assemblies, Meetings, Demonstrations, Marches and Picketing and the Code of Administrative Offences stated as follows:

> "27. Under the new amendments ([section 5(4)(11) of the Public Events Act] as amended), the organiser is required to demand that participants do not conceal their faces, and participants are obliged ([section 6(4)(1) of the Public Events Act] as amended) not to conceal their faces, including through the use of masks, means of disguise or other items "specially intended to make them more difficult to identify".
>
> 28. The prohibition of the use of masks and other means of disguise, which is part of Assembly Laws of several other countries, can, in principle, be justified. However, the test of proportionality has to be applied in this field as well. The Venice Commission and OSCE/ODIHR have previously expressed the view that "the wearing of a mask for expressive purposes at a peaceful assembly should not be prohibited so long as the mask or costume is not worn for the purposes of preventing the identification of a person whose conduct creates probable cause for arrest and so long as the mask does not create a clear and present danger of imminent unlawful conduct." In the Commission's view, a blanket ban on wearing any kind of mask at a peaceful assembly represents a disproportionate restriction of freedom of assembly."

20. The relevant part of the 2019 Guidelines on Freedom of Peaceful Assembly (CDL-AD(2019)017), prepared by the Office for Democratic Institutions and Human Rights (ODIHR) of the Organization for Security and Co-operation in Europe (OSCE) in consultation with the European

Commission for Democracy though Law (Venice Commission) of the Council of Europe, reads as follows:

> " 153. No blanket or routine restrictions on the wearing of masks and face-coverings. The wearing of masks and face coverings at assemblies for expressive purposes is a form of communication protected by the rights to freedom of speech and assembly. It may occur in order to express particular viewpoints or religious beliefs or to protect an assembly participant from retaliation. The wearing of masks or other face coverings at a peaceful assembly should not be prohibited where there is no demonstrable evidence of imminent violence. An individual should not be required to remove a mask unless his/her conduct creates probable cause for arrest and the face covering prevents his/her identification."

THE LAW

I. ALLEGED VIOLATION OF ARTICLES 10 AND 11 OF THE CONVENTION

21. The applicant complained, under Articles 10 and 11 of the Convention, about her conviction for using a balaclava during her solo demonstration. The Court will examine her complaint under Article 10 of the Convention, taking into account, where appropriate, the general principles it has established in the context of Article 11 of the Convention (see *Fáber v. Hungary*, no. 40721/08, § 19, 24 July 2012, and *Novikova and Others v. Russia*, nos. 25501/07 and 4 others, § 91, 26 April). Article 10 of the Convention reads as follows:

Article 10

> "1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
>
> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

A. Admissibility

22. The Court observes that the applicant was penalised not for the message of her solo demonstration in support of the Pussy Riot group as such, but for the use of an item concealing her face during the demonstration. As the Court has consistently held, the protection of Article 10 extends not only to the substance of the ideas and information expressed, but also to the form

in which they are conveyed (see, among other authorities, *Bédat v. Switzerland* [GC], no. 56925/08, § 58, 29 March 2016, and *Magyar Kétfarkú Kutya Párt v. Hungary* [GC], no. 201/17, § 90, 20 January 2020). The Court has held that opinions, apart from being capable of being expressed through the media of artistic work, can also be expressed through conduct (see *Mariya Alekhina and Others v. Russia*, no. 38004/12, § 204, 17 July 2018; *Tatár and Fáber v. Hungary*, nos. 26005/08 and 26160/08, § 36, 12 June 2012; *Murat Vural v. Turkey*, no. 9540/07, §§ 54-56, 21 October 2014; *Shvydka v. Ukraine*, no. 17888/12, §§ 37-38, 30 October 2014; and *Stern Taulats and Roura Capellera v. Spain*, nos. 51168/15 and 51186/15, § 39, 13 March 2018). The wearing or displaying of symbols has also been held to fall within the spectrum of forms of "expression" within the meaning of Article 10 of the Convention (see *Murat Vural*, cited above, §§ 46-47).

23. The applicant staged her solo demonstration holding a placard stating *"Don't extend your hand to someone else's fate. Free Pussy Riot"* and wearing a colourful balaclava in a manner resembling the group's performances. She stated during the demonstration, and maintained to the domestic authorities and the Court, that she had done so to express her support for the punk group and to protest against their criminal prosecution, but also against a worrying situation as regards freedom of expression and the lack of a protest culture in Russia. The Court considers that the applicant's conduct during her solo demonstration should be interpreted as a symbolic expression of dissatisfaction and protest and that it concerned a matter of public interest (see, in so far as relevant, *Satakunnan Markkinapörssi Oy and Satamedia Oy v. Finland* [GC], no. 931/13, § 171, 27 June 2017).

24. The Court notes that the application is neither manifestly ill-founded nor inadmissible on any other grounds listed in Article 35 of the Convention. It must therefore be declared admissible.

B. Merits

1. The parties' submissions

25. The applicant argued that there had been no evidence to prove that she had refused to take her balaclava off, or that the police officers had either attempted to check her identity or issued any warnings to her during her demonstration. She further argued that she should not have been prosecuted under Article 20.2 § 1 of the CAO, as a violation of the requirements of section 6(4) of the Public Events Act (only applicable to participants of public events) was an offence under Article 20 § 5 of the CAO. She further submitted that the relevant domestic law was excessively rigid and failed to leave room for exceptions to the rule against hiding one's face during a public event. She admitted that a prohibition on concealing one's face was justified for assemblies in which several people participated, to ensure the safe conduct of such gatherings. However, she argued that it would run contrary to

Articles 10 and 11 of the Convention if the authorities interpreted such a restriction as an absolute ban or applied it in an excessively broad manner. For example, the authorities in Germany and Switzerland did not prohibit the use of masks during crowded carnivals preceding the season of Lent. The authorities in France and Norway had not prosecuted participants in the events in support of Pussy Riot in Paris and Oslo, held on the same date as the applicant's demonstration, despite the fact that the demonstrators had worn similar colourful balaclavas as a symbol of support for the punk group. She further noted that the domestic courts had disregarded the fact that she had used the balaclava solely for expressive purposes. Lastly, she argued that the fine imposed on her was an excessive and disproportionate punishment, because her demonstration had not caused any damage.

26. The Government argued that there had been no interference with the applicant's exercise of her Convention rights, as her solo demonstration had not been discontinued and she had not been arrested. Assuming that there had been an interference, they argued that it had been lawful, as section 6(4) of the Public Events Act contained a clear prohibition on concealing one's face during a public event and was therefore foreseeable in its application. Relying on decision no. 1428-O of the Constitutional Court, they submitted that the provision in question, as well as similar provisions of domestic law of several other European States, had been introduced in response to the need to identify participants in public events in the interests of protection of public order, and of the rights and interests of citizens. It had a significant preventive and deterrent effect on participants who might think that they could commit unlawful actions and go unpunished. They further argued that the police officers had acted in compliance with the Police Act, that is to say they had explained to the applicant that her conduct was unlawful. However, she had refused to take the balaclava off "for a considerable period of time", which had hindered her identification. Lastly, they argued that all the relevant circumstances of the case had been duly established by the domestic courts.

2. The Court's assessment

(a) Existence of an interference

27. The Court considers that the actions by State officials leading to the applicant's conviction for the administrative offence of breaching the rules of a public event amounted to an interference with her right to freedom of expression interpreted in the light of her right to freedom of assembly (see *Novikova and Others*, cited above, § 106). The interference will infringe the Convention unless it can be shown that it was "prescribed by law", pursued one or more of the legitimate aims set out in paragraph 2 of Article 10 and was "necessary in a democratic society" to achieve those aims.

(b) "Prescribed by law"

28. The Court notes that the applicant was prosecuted under Article 20.2 § 1 of the CAO, which punished breaches of the established procedure for the conduct of public events committed by the organiser of an event. Accordingly, a question arises whether the applicant could foresee that, while being considered the "organiser" of a public event within the meaning of Article 20.2. § 1, she would be prosecuted for a breach of the rules set out for "participants" in such an event (section 6(4) of the Public Events Act).

29. The Court does not consider it necessary in the present case to delve into the issue of whether the domestic court's conclusion as to the applicant's status as organiser or participant was correct, given, in particular, the applicant's failure to raise this matter before the domestic courts. In so far as the domestic courts referred to section 6(4) of the Public Events Act, which expressly prohibits participants in public events from hiding their faces, and in so far as the prohibition was clearly applicable to solo demonstrations (see paragraph 15 above), the Court is prepared to assume that the interference with the applicant's right to freedom of expression was prescribed by law.

(c) Legitimate aim

30. The Court notes that the Government relied on the decision of the Constitutional Court of 7 July 2016. That ruling, albeit issued four years after the events, set out the two main aims of the legislation in question: protection of public order – which, apparently, is to be understood as "prevention of disorder" in terms of Article 10 § 2 or Article 11 § 2 of the Convention, – and protection of the rights and interests of citizens (see paragraph 17 above).

31. In respect of the applicant's conviction, the Court notes the indisputably peaceful nature of the solo demonstration staged by the applicant and the absence of any real risks of disorder in the circumstances. It further notes that neither the aim of "prevention of disorder" nor the protection of the rights and freedoms of others rationale was ever referred to, either explicitly or in substance, in the domestic proceedings or in any domestic documents. While it is doubtful that either of the two legitimate aims relied on by the Government were pursued by the applicant's conviction (see *Navalnyy v. Russia* [GC], nos. 29580/12 and 4 others, §§ 121-22 and 127, 15 November 2018), the interference was in any event not "necessary" for the reasons set out below.

(d) "Necessary in democratic society"

32. The Court reiterates that its task, in exercising its supervisory jurisdiction, is not to take the place of the competent national authorities but rather to review under Article 10 the decisions they delivered pursuant to their power of appreciation. What the Court has to do is, *inter alia*, to look at the interference complained of in the light of the case as a whole and determine

whether the national authorities adduced "relevant and sufficient" reasons to justify it, including whether they relied on an acceptable assessment of the relevant facts (see, among others, *Bédat*, cited above, § 48).

33. Firstly, having examined the domestic decisions, the Court is not satisfied that the applicant's right to exercise her freedom of expression was adequately taken into consideration during the examination of the administrative-offence charges against her. Indeed, her arguments, concerning, in particular, the symbolic meaning of her use of the colourful balaclava did not receive any assessment by the courts (see, in so far as relevant, *Novikova and Others*, cited above, § 188). The courts did not assess the nature of her expression, or the level of protection her expression should have received.

34. Secondly, as noted in paragraph 31 above, the applicant's solo demonstration was entirely peaceful, and was apparently perceived by the authorities as such. There is nothing to indicate in the present case that the applicant disobeyed the orders of the authorities during the demonstration. Contrary to the Government's submissions, there are no indications in the case material – particularly in the domestic courts' decisions or police reports used as key evidence by the courts – to suggest that the police attempted to warn the applicant of the unlawfulness of her conduct or even approach her during her solo demonstration. Indeed, the police officers, according to their own reports, did not see any need to intervene (see paragraph 11 above) for any reason.

35. Moreover, the Court notes that there is no general prohibition in Russian law on face covering in public and that the applicant was sanctioned for breaching national regulations on the conduct of public events (see and contrast, in the context of Articles 8 and 9, *S.A.S. v. France* [GC], no. 43835/11, §§ 141 and 153, ECHR 2014 (extracts); *Dakir v. Belgium*, no. 4619/12, §§ 52-62, 11 July 2017; and *Belcacemi and Oussar v. Belgium*, no. 37798/13, §§ 50-63, 11 July 2017)

36. Finally, the Court notes that the domestic courts did not explore in a meaningful manner whether there had been any intent or conduct preventing the applicant's identification during her demonstration – or, in terms of domestic law, whether her balaclava was "specifically designed" to hinder identification (see the Public Events Act, paragraph 15 above; and the Ruling of the Constitutional Court, paragraph 18 above). Indeed, there is nothing to suggest that she had sought to avoid identification. The officers' explanations referred to by the domestic courts were limited to a remark that she had been identified at a later stage (see paragraph 11 above) but contained no information on a supposed refusal by her to identify herself, in response to a request by the police or otherwise. On the contrary, it appears that she gave her name to journalists at the scene and explained to them the symbolic meaning of her demonstration (see paragraphs 7 and 12 above). Against this background, an assessment of such elements as: the peaceful nature of the

solo demonstration; the lack of intention to hide her identity; and the lack of any indication that either public order or the rights of others were affected by her short solo protest action, would clearly be of relevance. However, this assessment was not performed by the courts either.

37. Instead, the domestic courts limited their findings to an automatic application of the ban under section 6(4) of the Public Events Act, regardless of the circumstances of the case at hand. That provision, read in conjunction with Article 20.2. § 1 of the CAO in this case, was construed by the domestic courts as a blanket ban on covering one's face, leaving no room for exceptions for any legitimate reason, such as, for instance, a consideration of the aims pursued by a participant concealing his or her face (see, for the position of the Venice Commission, paragraph 19 above). The Court finds it significant that in 2016 the Constitutional Court provided a detailed interpretation of section 6(4) of the Public Events Act in conjunction with Article 20.2 § 5 of the CAO and pointed out that the domestic courts had to examine, in each case, the intentions of the participants in a public event; the aims they pursued, the means they used; the presence or absence of any substantive impediments to their identification; the consequences of their conduct; as well as other relevant factors. The Court also notes that, by virtue of that interpretation, there further appears to be room for exceptions justified by meteorological or medical considerations, or other similar reasons. However, the Court notes that the ruling in question, providing a more nuanced interpretation of the domestic provision, was issued four years after the events at issue.

38. The Court is mindful of its fundamentally subsidiary role in the Convention system (see *Dubská and Krejzová v. the Czech Republic* [GC], nos. 28859/11 and 28473/12, § 175, ECHR 2016). However, faced with the domestic courts' failure to adequately assess the relevant circumstances and to give relevant and sufficient reasons to justify the interference as shown above, the Court finds that the domestic courts cannot be said to have "applied standards which were in conformity with the principles embodied in Article 10" or to have "based themselves on an acceptable assessment of the relevant facts" (see, *mutatis mutandis*, *Terentyev v. Russia*, no. 25147/09, § 24, 26 January 2017, with further references).

39. Finally, as regards the sanction, the Court notes that the applicant received a fine equivalent at the time to about EUR 242, which was the minimum statutory amount for an offence under Article 20.2 § 1 of the CAO. In *Novikova and Others* the Court noted the ten-fold legislative increase of fines in 2012 – that is, at the time of the events in the present case – for an offence under Article 20.2 of the CAO (a breach of the established procedure for running a public event committed by a participant), whereas most other offences remained punishable by a fine of up to RUB 5,000 for physical persons (the equivalent of some EUR 125 at that time). The Court considered in that case that the relatively high level of fines was conducive to creating a

"chilling effect" on legitimate recourse to protests and such form of expression as a solo demonstration (see *Novikova and Others*, cited above, §§ 210-12). It considers that this reasoning equally applies to the present case in which, as shown above, the reprehensible conduct consisted only in wearing a balaclava during a solo peaceful demonstration, for expressive purposes and without an intention to hide the applicant's identity (see also *Tatár and Fáber*, cited above, § 41).

(e) Conclusion

40. The Court considers that the applicant's conviction for an administrative offence consisting merely in wearing a balaclava during her solo demonstration, in the absence of any balancing exercise by the domestic courts, constituted a disproportionate interference with her freedom of expression.

41. There has therefore been a violation of Article 10 of the Convention interpreted in the light of Article 11 of the Convention.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

42. 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

43. The applicant claimed 242 euros (EUR) in respect of pecuniary damage, which corresponded to the amount of the fine imposed on her. She also claimed EUR 7,500 in respect of non-pecuniary damage.

44. The Government contested the claim as excessive and ill-founded.

45. The Court considers that there is a direct causal link between the violation of Article 10 of the Convention found and the fine imposed. Regard being had to the documents in its possession, it considers it reasonable to award the applicant EUR 242 in respect of pecuniary damage, plus any tax that may be chargeable. It further awards her the amount claimed in respect of non-pecuniary damage, plus any tax that may be chargeable.

B. Costs and expenses

46. The applicant did not make a claim in respect of costs and expenses. Accordingly, there is no call to make an award under this head.

C. Default interest

47. The Court considers it appropriate that the default interest rate should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT

1. *Declares*, unanimously, the application admissible;

2. *Holds*, by six votes to one, that there has been a violation of Article 10 of the Convention;

3. *Holds*, by six votes to one,
   (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 242 (two hundred and forty-two euros), plus any tax that may be chargeable, in respect of pecuniary damage;
      (ii) EUR 7,500 (seven thousand five hundred euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;
   (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.

Done in English, and notified in writing on 30 August 2022, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Olga Chernishova Deputy Registrar	Georges Ravarani President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the following separate opinions are annexed to this judgment:

(a) Concurring opinion of Judge Elósegui;
(b) Partly dissenting opinion of Judge Lobov.

G.R.
O.C.

CONCURRING OPINION OF JUDGE ELÓSEGUI

1. I am fully in agreement with the judgment, its reasoning and its conclusion.

2. My reflections relate only to the concerns that may exist as to the danger of applying some of the conclusions of our Section's judgments in Russian Article 10 cases to other subsequent cases. In this specific case we found a violation of Article 10 because of the lack of proportionality of the fine of 242 euros imposed on the applicant for wearing a balaclava during a solo demonstration, during which she did not hide her identity. The applicant sought to support the Pussy Riot group and to protest "against their criminal prosecution, but also against a worrying situation as regards freedom of expression and the lack of a protest culture in Russia" (see paragraph 23 of the judgment; see also *Alekhina and Others v. Russia*, no. 22519/02, 13 April 2006). I voted in favour of a violation of Article 10 in the present case, as in a large number of previous Russian cases.

3. It has to be said that "there is no general prohibition in Russian law on face covering in public and that the applicant was sanctioned for breaching national regulations on the conduct of public events" (see paragraph 35 of the judgment). I agree then with the reasoning according to which it was wrong to apply a law designed to cover public events to a solo demonstration. Up to this point I do not have any problem.

4. Nonetheless, even if the present case was not the appropriate case in which to discuss in more depth the question of face coverings and the wearing of balaclavas at public demonstrations, I would like to emphasise that many European countries have prohibited the wearing of face coverings aimed at creating public disorder and attacking the rights of others. It could be said that the Court refers constantly to the protection of peaceful demonstrations under Article 10. However, demonstrations which are intended to be peaceful frequently end in violence. Also, the context is very important. We are not just talking about authoritarian or less democratic countries, eastern or western Europe, North or South. In many western European countries, laws prohibiting the use of balaclavas have been introduced in recent times on account of the increase in violent demonstrations and protests. Examples include Germany, which in the 1980s introduced section 17a(2) into the *Versammlungsgesetz* (Assemblies Act)[1]. At public meetings and demonstrations, it is forbidden to hide one's face, on pain of a fine or even

[1] See "*Leyes antimáscaras*", es.m.wikipedia.org, consulted on 9 July 2022. «§ 17a VersG». dejure.org; see also Clifford Stott, Marcus Beale, Geoff Pearson, Jonas Rees, Jonas Havelund, Alain Brechbühl, *International Norms: Governing Police Identification and the Wearing of Masks During Protest. Two rapid Evidence Reviews*, Ed. Maguire and Megan Oakley, January 2020, 94 pp. I would like to thank my fellow Judges for their help with the research of legislation in respect of Switzerland, the United Kingdom, France and Sweden, although the responsibility for this opinion remain my own.

one year's imprisonment. Austria has since 2002 made it an offence to cover one's face with a mask during demonstrations, except where the mask does not pose a threat to security and public order (section 9 of the *Versammlungsgesetz*), with a possible penalty of six months to one year's imprisonment or a fine. In Denmark the wearing of masks at demonstrations is also illegal[2]. In Spain, under the Public Safety Act (section 33.2.c)[3], it is an offence to hinder the identification of a person at a demonstration by using any kind of garment or object which covers the face. In France, the prohibition on face coverings is based on an Act of Parliament approved by the Senate on 14 September 2010. In other words, the legislation was passed a long time ago, before the "yellow vests" protests. Under this Act, it is an offence to wear – in public spaces, except in specific circumstances – accessories that cover the face, including helmets, masks, balaclavas, Islamic veils (niqabs) and other textiles. In the United Kingdom, during the anti-austerity protests in 2011, one of the temporary policies discussed at the Cabinet Office Briefing Room (COBRA) meeting was a ban on face coverings during riots. Generally, apart from reinforced action in certain areas and stages of demonstrations, no protesters were arrested simply for wearing a mask and were just ordered to uncover their faces. However, many detainees who had committed other crimes such as looting or attacks on police officers were charged in court with not complying with the mask ban, in addition to their other offences.[4] In Sweden, under the Mask Prohibition Act, fifteen participants in a demonstration were prohibited in one case from covering their faces, partially or completely, in such a way as to make identification difficult. This provision applies only if the demonstrations cause a disturbance of public order, or if they involve immediate danger. The prohibition does not apply if the event is part of a religious celebration. It is also not applicable to authorised demonstrators, according to chapter 2, section 7a of the Public Order Act. In Switzerland, in the cantons Basle (1990), Zürich (1995), Berne (1999), Lucerne (2004), Thurgau (2004), Solothurn (2006) and St Gall (2009), there are laws prohibiting the wearing of masks.[5] In Ukraine, several days after Berkut police clashed with

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[2] Ibid., "Denmark: Police brutalise climate protesters. Green Left Weekly". Greenleft.org.au. Consulted on 16 February 2014.

[3] Ibid., "*Ley Orgánica 4/2015, de 30 de marzo, de protección de la seguridad ciudadana*". Official State Gazette (77): 27216-27243. 31 March 2015. ISSN 0212-033X. BOE-A-2015-3442.

[4] See also https://petition.parliament.uk/petitions/300471 and https://www.legislation.gov.uk/ukpga/1994/33/section/60AA for more information on the Face Coverings (Regulation) Bill, pending with the UK Parliament, and a (pre-introduction) BBC report about it at https//www.bbc.com/news/10465209.

[5] See Mise en œuvre de l´interdiction de se dissimuler le visage (art. 10a Cst.): modification du code pénal. Rapport explicatif relatif à l´ouverture de la procédure de consultation. Berne le 20 octobre 2021, Confédération Suisse, Department fédéral de justice et police DFJP, Office fédéral de la justice OFJ, p. 20.

Euromaidan protesters, the *Verkhovna Rada* promulgated Law no. 721-VII which prohibited the use of masks, helmets and camouflage clothing by people participating in rallies, meetings, demonstrations, protests, marches or other mass events. The possible penalty for these violations was a fine of around 400 United States dollars or administrative arrest of up to fifteen days. However, the Law was repealed in January 2014.

5. The issue in all these cases is not that these garments are used for weather-related or medical reasons. These do not usually cause any legal or security problems. This type of exception is a matter of common sense, even when the laws do not expressly provide for it. Similarly, I am not referring to the use of religious objects or garments; instead, I wish specifically to draw attention to the current contexts in which balaclavas are used.

6. The current problems with face coverings are not related to peaceful assembly, but to assemblies, meetings, demonstrations, marches and picketing which are violent from the outset or degenerate into violence. The Court cannot ignore these new realities. One reality, for instance, is the use of balaclavas by the fans of different soccer teams. This is a huge problem in many European countries. In principle, we might say that to support one football club or another goes to freedom of expression or freedom of assembly. We might say that these events are not political or part of any political ideology. But why not? There are right-wing fans and left-wing fans. When I was an expert with ECRI (2013-17) before coming to the Court, we addressed this increasing problem in many reports. Similar incidents have occurred during climate protests, anti-NATO protests and demonstrations against COVID measures, health passes and vaccinations. The following situations offer some concrete and real examples. On 30 January 2021, Marseille ultras beat and robbed Álvaro Gonzalez; the match had to be suspended. Radical elements stormed the team's training centre and caused a huge riot. Twenty-five people were arrested and seven police officers were injured[6]. In 2021, PSG fans were the cause of the riots that occurred at a French Cup match. And on 9 March 2018[7], Athletic fans complained of an attack by hooded ultras from Olympique de Marseille[8]. Some 300 hooded ultras also clashed with the police in Paris after a Paris Saint-Germain match[9].

7. Turning to the use of the balaclava at "anti-system" protests, I would refer to the recent events that occurred in Madrid during the NATO summit

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https://www.bj.admin.ch/dam/bj/fr/data/gesellschaft/gesetzgebug/verhuellungsverbot/vn-ber-stgb.pdf

[6] https://as.com/futbol/2021/01/30/internacional/1612018606_121353.html

[7] http://www.informeraxen.es/hinchas-del-athletic-denuncian-el-ataque-por-parte-de-ultras-encapuchados-del-olympique-de-marsella/ Raxen Report by the NGO Movement against Intolerance.

[8] https://www.europapress.es/deportes/futbol-00162/noticia-300-ultras-encapuchados-enfrentan-policia-paris-partido-psg-20181003221115.html

[9] https://www.la10.com.co/2021/12/19/hinchas-del-psg-fueron-los-causantes-de-los-disturbios-ocurridos-en-un-partido-por-copa-francia/

on 26 June 2022. "The 'anti-system' protestors began a series of acts of sabotage in the capital yesterday to protest against the holding of the summit. A group of hooded men from the Guinda Activa dyed one of the fountains in the Guindalera park, near the Parque de las Avenidas, and another in a park in the Moratalaz district, red"[10]. The police identified 100 "anti-system" protestors ready to blow up the NATO summit. Two demonstrations that had been planned were prohibited by the government delegation because it was expected that radical elements from the extreme left would travel to Madrid from Portugal, Greece and Italy[11].

8. Nowadays, following the use of masks during the pandemic, many young people's blogs are discussing the new discovery that they are unrecognisable behind a mask. For instance, the thousands of blogs include "Keep your Mask on and Protect your Identity! The Anonymity of Mask Wearing"[12] and "Why covering your face at a protest is the right thing to do"[13]. Through the blogs, it is possible to infer the new mood among young people who feel that they are being watched by surveillance cameras all the time and everywhere (see *Big Brother Watch and Others v. the United Kingdom* [GC], nos. 58170/13 and 2 others, 25 May 2021). In that judgment the applicants, legal and natural persons, complained about the scope and magnitude of the electronic surveillance programmes operated by the government of the United Kingdom. A reaction to this omnipresent "big brother" State caused a number of recent protests, with this movement supporting the use of masks to conceal one's identity at public demonstrations against measures taken by States, for instance relating to COVID restrictions. Most of the blogs follow a line of reasoning according to which "the coronavirus pandemic has made wearing face masks widespread and socially acceptable, while unprecedented participation in protests against police brutality has raised awareness about the surveillance state and shown how important it is for protesters to protect their identities"[14]. Hoods as part of sweatshirts are being sold in huge numbers in different countries such as the United States and Chile (during the violent protests by students in 2019).

9. Such is the influence of fashion that balaclavas have been a trending topic in big brands from Prada to Zara[15]. The balaclava has become a

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[10] https://www.elmundo.es/madrid/2022/06/29/62bb4a30fdddffe6a68b4600.html

[11] "*Pancartas, protestas … Las acciones anti OTAN salpican Madrid*". *El Mundo*, 29 June 2022.

[12] Megha Raiguru, posted on 25 May 2021 on blogs.brighton.ac.uk. Log in History of Art and Design Blog, School of Humanities University of Brighton.

[13] Kevin Blowe, "Why covering your face at a protest is the right thing to do"; this article first appeared in *Earth First! UK*, spring 2017 zine. Freedomnews.org.uk

[14] Rachel Kraus, "The future of antisurveillance fashion is bright (because the world is going to hell). Masks aren't going anywhere, 10 September 2020. Mashable.com.

[15] Leah Dolan, "*Por qué el pasamontañas, un accesorio del ejército del siglo XIX, se apodera de las redes sociales*" ("Behold the balaclava: Why a 19th century army accessory has overtaken social media"), CNN, 28 December 2021. cnnespañol.cnn.com.

wardrobe staple, and is a latecomer to the hottest fashion trend race of 2021. According to Leah Dolan, "[o]n TikTok, at the time of writing, there are 102.6 million videos attached to the '#balaclava' hashtag, while another 248,000 people on Instagram have posted about the offbeat accessory." The origin of this garment is the following: "These masks take their name from the Ukrainian port town of Balaclava, the backdrop for a battle in 1854 during the Crimean War, where British and Irish troops were sent to fight Russian soldiers in freezing conditions ... British women began knitting full-face hats for their men"[16].

10. By contrast, the Court has found against several countries, including Spain in the case of *Lopez Martinez v. Spain* (no. 32897/16, 9 March 2021), because at the time the events occurred, the identification numbers of the riot police were hidden by their bulletproof vests. Later the legislation changed and the number must now be visible. In that judgment the Court held as follows (translation by the Registry):

> "38. The Court refers to the Government's observations on the difficulties encountered in distinguishing the identification numbers of the police officers by the distinctive characteristics of their uniforms, and welcomes the change in the domestic regulations in this regard. However, it points out that this change took place after the events in the present case and that it was not possible to identify the police officers responsible for the injuries sustained by the applicant. The Court has already had occasion to find that, when the authorities deploy masked police officers to maintain order or carry out an arrest, those officers must visibly display identifying insignia, such as a personal identification number, allowing them to maintain anonymity while facilitating their subsequent identification in the event of challenges to the methods used by them (see *Hentschel and Stark v. Germany*, no. 47274/15, § 91, 9 November 2017). The Court found a violation because the impossibility of identifying the police officers had not been remedied by thorough investigative measures."

[16] Ibid.

PARTLY DISSENTING OPINION OF JUDGE LOBOV

1. The majority concluded that the imposition of a fine for infringement of the prohibition on concealing one's face during a public event amounted to a violation of Article 10 of the Convention. While "prepared to assume" that the interference with the applicant's right to freedom of expression was prescribed by law, the majority found it "doubtful" that the interference pursued a legitimate aim and held that it was not, in any event, necessary in a democratic society.

2. I respectfully disagree with the above conclusion as it departs from the Court's case-law that has on other occasions recognised the States' wide margin of appreciation on this sensitive issue and found no violation of the Convention on account of similar prohibitions in other countries.

3. At the outset, I see little ground for hesitation and doubt as regards the lawfulness of the interference and the legitimate aim pursued by the impugned restrictions. Firstly, section 6(4) of the Public Events Act can hardly be seen as containing any ambiguity in respect of the prohibition (see paragraph 15 of the judgment). The sanction imposed is therefore neatly prescribed by domestic law and should have been recognised as such in clearer terms without any reservation (see paragraph 29 of the judgment).

4. Secondly, the legitimate aim relating to the "protection of public order" can hardly be reduced to "prevention of disorder" as suggested by the majority (see paragraph 30 of the judgment). The Constitutional Court for its part upheld the legitimate aim pursued by the law in the following terms: "The law must afford a possibility for fully-fledged realisation of the right to freedom of peaceful assembly and, at the same time, ensure observance of the requisite public order and safety without any damage to the health and morals of citizens, based on a balance between the interests of organisers and participants on the one hand and third parties on the other, given the necessity of providing State protection for the rights and freedoms of all persons (both those taking part and those not taking part in a public event), including by the introduction of reasonable measures to anticipate and prevent violations of public order and safety and citizens' rights and freedoms, and by the establishment of effective public-law liability for actions which violate such measures or create a risk of their violation" (see the Constitutional Court decision of 7 July 2016, no. 1428-O, § 2). It is on this basis that the Constitutional Court held that the prohibition on concealing one's face had "a clear preventive and deterrent effect on the conduct of participants in public events" (ibid., § 4, quoted in paragraph 18 of the judgment).

5. The Constitutional Court clearly grounded the above reasoning on both anticipation and prevention, thus upholding the ban on intentional face covering (except in some justified circumstances) as a reasonable preventive response to either an imminent or a potential danger of unlawful behaviour. The judgment contains no element capable of challenging the legitimacy of

this approach or excluding the impugned ban from the permissible measures for protecting "public safety" under paragraph 2 of Article 10. Nor does the judgment address the ban as a possible element of the "protection of the rights and freedoms of others". The doubts voiced in the judgment therefore reflect, once again, a far too restrictive view of the legitimate interests that may justify interference with the right to freedom of expression (see another recent example discussed in the separate opinion of Judges Ravarani, Serghides and Lobov in *OOO Memo v. Russia*, no. 2840/10, 15 March 2022).

6. Turning to the central point of the judgment, I fundamentally disagree with the way it avoids addressing the "*wide margin of appreciation*" which the Court had previously left to the States in imposing a ban on face covering in public places (see *S.A.S. v. France* [GC], no. 43835/11, §§ 155-56, ECHR 2014 (extracts); *Dakir v. Belgium*, no. 4619/12, § 59, 11 July 2017; and *Belcacemi and Oussar v. Belgium*, no. 37798/13, § 55, 11 July 2017). Strikingly, the judgment does not even mention any margin of appreciation left to the respondent State in this area. While being fully aware of the case-law which consistently accepted blanket prohibitions on face coverings in public places in other countries (see paragraph 35 of the judgment), the majority failed to consider its implications in the context of the present case.

7. The reasoning followed in order to distinguish the above-mentioned cases from the present one is as cursory as it is flimsy. The cases have been contrasted on the ground that there was no general prohibition in Russian law on face covering in public, unlike in the other States which apply a blanket and indiscriminate prohibition (ibid.). The relevance of this argument is open to doubt, to say nothing of the paradoxical conclusion that seems to flow therefrom: a more restrictive approach in respect of face coverings turns out to be more compliant with the Convention than a less restrictive one.

8. Furthermore, the majority surprisingly seek to limit the *S.A.S.* case-law to the context of Articles 8 and 9 (ibid.), thus running contrary to the way in which the relevant cases were pleaded, discussed, and eventually decided by the Court. Indeed, Article 10 was at the centre of the applicants' complaints to the Court in the French and Belgian cases, being closely interlinked with their complaints under Articles 8 and 9. Likewise, it was clearly understood that the French Law did not expressly bear any religious connotation as it was "*deliberately worded in a much broader manner, generally targeting 'clothing that is designed to conceal the face' and thus going far beyond the religious context*" (see the separate opinion of Judges Nußberger and Jäderblom in *S.A.S. v. France*, cited above, § 18, emphasis added).

9. Ultimately, the Court was not "*unaware that by imposing a ban on wearing in public places a garment designed to conceal the face the respondent State restrict[ed] to a certain extent the reach of pluralism*". The Court decided nonetheless "*to show restraint in its scrutiny of Convention compliance*". "*While it is true that the scope of the ban is broad, because all places accessible to the public are concerned, the contested provisions do not*

affect the freedom to wear in public any garment or item of clothing – with or without a religious connotation – which does not have the effect of concealing the face" (see *Dakir*, cited above, §§ 55-58).

10. The application of these principles to the present case, with due regard for the respondent State's wide margin of appreciation, should inevitably have led to a similar conclusion, namely that the impugned provisions of the Public Events Act did not affect the freedom to demonstrate and convey a message through *any garment or item of clothing which does not have the effect of concealing the face*. Interestingly, the material submitted by the parties demonstrates that other solo demonstrations took place in Murmansk on the same day and for the same purpose, using various inventive forms of expression which were no less "symbolic" or indicative of "dissatisfaction and protest" on "a matter of public interest" (see paragraph 23 of the judgment). Unlike the applicant, however, the other solo demonstrators did not conceal their faces and were accordingly not prosecuted under the Public Events Act.

11. The judgment heavily criticises the domestic courts on account of the automatic application of the ban (paragraph 37), the insufficient assessment of the circumstances, the summary reasoning (paragraph 38) and the disproportionate amount of the fine (paragraph 39). Yet the absence of a balancing exercise at the domestic level does not in itself amount to a violation of the Convention and compels the Court to conduct its own assessment of proportionality, bearing in mind its "fundamentally subsidiary role" (see *Belcacemi and Oussar,* cited above, § 51). Thus, in the last-mentioned case the Court specifically addressed the question of sanctions for wearing a full-face veil in public. While the domestic law made it punishable by a fine or even by a prison sentence in the event of reoffending, the Court found the approach of the Belgian courts to be proportionate as they gave priority to the lightest possible fines allowed by the legislation, thus avoiding the application of more stringent sanctions (ibid., § 57). This approach seems to be consonant with the one taken by the Russian courts in the present case as they imposed the minimum fine, taking account of the minor nature of the offence and the applicant's personality (see paragraph 13 of the judgment). Lastly, the amount of the fine imposed was also comparable to those examined by the Court in *Belcacemi and Oussar*.

12. The foregoing leads me to conclude that there has been no violation of Article 10 of the Convention in the present case.

13. On a more general note, a comparative overview suggests that face-covering practices in public places, which may be motivated by various reasons, are an increasing source of controversy in European societies and thus lead to tangible restrictions. Notwithstanding the adverse effect of such restrictions (see paragraph 9 above) and of the criticism thereof by various bodies (see paragraphs 19-20 of the judgment), the Court has previously decided as a matter of principle that the lack of European consensus justifies

"*a wide"* or even *"a very wide"* margin of appreciation in this sensitive area (see *S.A.S. v. France*, § 155; *Dakir*, § 59; and *Belcacemi and Oussar*, § 55, all cited above). While the situation at issue in the present case is not identical to those considered by the Court in connection with the full-face veil, this cannot explain the radical difference in the Court's approach to the assessment of whether the respondent State overstepped its margin of appreciation and thus violated the Convention. Such an unfortunate fragmentation of the Court's case-law across different countries and regions runs an ultimate risk of undermining its coherence and authority.