



Case of *Fedotova and Others v. Russia* (nos. 40792/10 and 2 others)

**Third Party Intervention by
Human Rights Centre of Ghent University**

Brussels (Belgium), 10 March 2022



European Court of Human Rights – *Fedotova and Others v. Russia* (nos. 40792/10 and 2 others)

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1. Introduction

These written comments are prepared and submitted by the Human Rights Centre of Ghent University (Belgium), pursuant to the leave granted by the President of the European Court of Human Rights on 23 February 2022, in accordance with Rule 44 3 of the Rules of the Court. The interveners submit that the case of *Fedotova and Others v. Russia* raises important issues relating to the right to respect for family life (under Article 8 ECHR) alone and in conjunction with the prohibition of discrimination (Article 14 ECHR). We respectfully submit that this case provides the Court with the opportunity to clarify the rights and obligations afforded to a couple – either different or same-sex – under Article 8.

In order to support our arguments, this submission will first provide a discussion of the state-sanctioned discrimination against the LGBTQI+ community in Russia, which provides the backdrop against which the present case must be assessed (2). This is followed by an overview of the evolution of the Court’s case-law on the protection and recognition of same-sex couples and how the Chamber’s reasoning in *Fedotova and Others v. Russia* is an extension of this dynamic interpretation of the Convention (3.1), followed by a discussion on the balance of interests under Article 8 (3.2), and the clarification of a couple’s core needs (3.3). Lastly, this intervention will invite the Grand Chamber to examine the applicants’ claims under Article 8 in conjunction with Article 14 ECHR (4).

2. Context in Russia

The (daily) systemic human rights violations experienced by the LGBTQI+ community in Russia have been widely documented.² These violations have been endorsed by the Russian Government as has been demonstrated by the Russian President, Vladimir Putin, publicly pursuing policies which severely restrict LGBTQI+ rights, as he describes them to be ‘Western values’.³ A recent amendment to the Russian Constitution gave further expression to this, stipulating that marriage is an institution reserved for the union between a man and a woman, thereby prohibiting same-sex marriage on a constitutional level. Considering that there is no other form of legal recognition of relationships of either different-sex or same-sex couples, this effectively **excludes same-sex couples from any legal recognition**. This amendment is indicative of the Russian Government’s views with regard to same-sex relationships: that they are born out of a regrettable and reprehensible ideology promoted by the West, and consequently a mistake to avoid.⁴ The Russian Government has referred to its adherence to this particular concept of marriage, and relationships worthy of protection by extension, when stating that it did not plan to comply with the Chamber’s judgment in *Fedotova and Others v. Russia*, despite it legally being required to do so.⁵

The new amendment which explicitly excludes same-sex couples is not the only regulatory measure that has negatively impacted the rights of LGBTQI+ people in Russia. Regard must be had for the notorious ‘anti-gay propaganda law’, which has already been found to contravene the values of a democratic society by the ECtHR.⁶

¹ For the Human Rights Centre, the team consisted of Eva Brems, Tobias Mortier and Claire Poppelwell-Scevak.

² ILGA Europe, ‘Annual Review of the Human Rights Situation of Lesbian, Gay, Bisexual, Trans, and Intersex People in Russia Covering the Period of January to December 2021 (ILGA Europe), ‘Freedom of Assembly’, <http://www.ilga-europe.org/sites/default/files/2022/russia.pdf>.

³ ‘‘There will be dad and mum’: Putin rules out Russia legalizing gay marriage’ *NBC News* (14 February 2020) <https://www.nbcnews.com/feature/nbc-out/there-will-be-dad-mum-putin-rules-out-russia-legalizing-n1136936>.

⁴ *Ibid.*

⁵ D. Bartenev, ‘Will Russia Yield to the ECtHR? *Fedotova and Others v. Russia*: Yet Another Test Case of Russia’s Resistance to the European Human Rights Standards’ (*Verfassungsblog*, 16 July 2021) <https://verfassungsblog.de/will-russia-yield-to-the-ecthr/>.

⁶ ECtHR 20 June 2017, App. Nos. 67667/09, 44092/12, 56717/12, *Bayev and Others v. Russia*.

This law has resulted in wide-spread oppression of LGBTQI+ people. For instance, in March 2021, a group of teenagers was arrested for posing with rainbow flags during a cosplaying event.⁷ Additionally, four LGBTQI+ groups were labelled as ‘foreign agents’ following amendments to the Russian ‘foreign agents’ legislation which imposes prison sentences of up to five years for those found guilty.⁸

These oppressive laws are motivated by a strict adherence to so-called ‘**traditional values**’. The Russian Government has repeatedly expressed its determination to protect the traditional family, i.e. different-sex relationships. Same-sex relationships are subsequently referred to as ‘non-traditional sexual relations’, thereby contributing to the stigmatisation of them. This narrative **depicts same-sex couples as ‘destructive’ to the traditional values constituting the Russian way of life**, allegedly leading to a reduction in population size.⁹ The harmful stereotypes relied upon by the Russian Government, equating homosexuality with paedophilia and incest, have already been rejected by the ECtHR as unable to justify restrictions imposed onto LGBTQI+ rights.¹⁰

The Russian Federation’s suppression of LGBTQI+ rights in order to protect the ‘traditional values’ has been met with **considerable criticism from various European organisations**. The Venice Commission stated that the exercise of rights ought not to depend on the positive or negative opinions of the heterosexual majority.¹¹ It also asserted that homosexuality cannot be argued to be contrary to the public’s morals, as ‘sexual orientation is protected by Article 8 ECHR’.¹² The Committee of Ministers of the Council of Europe has also reminded its Contracting Parties of the fact that ‘neither cultural, traditional nor religious values, nor the rules of a “dominant culture” can serve to justify any form of discrimination’.¹³

Additionally, the Parliamentary Assembly of the Council of Europe has already called on its Contracting Parties to adopt legislative frameworks in order to ensure legal recognition of same-sex relationships and with that to also confer the same rights onto them as the ones which different-sex couples currently enjoy.¹⁴ The Assembly noted as well that intolerance or negative attitudes towards people’s sexual orientation cannot constitute a justification for states’ failure to adopt such a framework.¹⁵ Allowing such biases against same-sex couples to shape legislation would **legitimise the prejudice and hostility present in societies**.¹⁶ The Court, too, has already found such a positive obligation to provide for legal recognition in *Oliari and Others v. Italy* (which will be discussed further below).¹⁷ Similar recommendations were formulated by the UN Human Rights Committee¹⁸, the UN Committee on Economic, Social and Cultural Rights¹⁹ and the UN Committee on the Elimination of

⁷ ILGA Europe (no. 2).

⁸ Amnesty International, ‘Russia: Frontline group LGBT-Network and human rights lawyers branded “foreign agents”’ (*Amnesty International*, 9 November 2021) <https://www.amnesty.org/en/latest/news/2021/11/russia-frontline-group-lgbt-network-and-human-rights-lawyers-branded-foreign-agents/>.

⁹ Human Rights Watch, ‘License to Harm: Violence and Harassment against LGBT People and Activists in Russia’, para. 22, <https://www.hrw.org/report/2014/12/15/license-harm/violence-and-harassment-against-lgbt-people-and-activists-russia>.

¹⁰ *Bayev and Others v. Russia* (no. 6) paras. 67-70.

¹¹ Venice Commission, ‘Opinion on the Issue of the Prohibition of So-Called “Propaganda of Homosexuality” in the Light of Recent Legislation in Some Member States of the Council of Europe (Opinion 707/2012)’ (*Venice Commission*, 18 June 2013), para. 53, [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2013\)022-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2013)022-e).

¹² *Ibid.* para. 42.

¹³ Committee of Ministers, Recommendation CM/Rec(2010)5 of the Committee of Ministers to member states on measures to combat discrimination on grounds of sexual orientation or gender identity, https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016805cf40a.

¹⁴ Parliamentary Assembly of the Council of Europe, Resolution 2239 (2018) – ‘Private and family life: achieving equality regardless of sexual orientation’, para. 4, <https://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=25166&lang=en>.

¹⁵ *Ibid.* para. 5.

¹⁶ Parliamentary Assembly of the Council of Europe, Resolution 1948 (2013) – ‘Tackling discrimination on the grounds of sexual orientation and gender identity’, para. 5, <http://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=20010&lang=en>.

¹⁷ ECtHR 21 July 2015, App. Nos. 18766/11 and 36030/11, *Oliari and Others v. Italy*, para. 185.

¹⁸ United Nations Human Rights Committee, Concluding Observations – Ireland, CCPR/C/IRL/CO/3, para. 8.

¹⁹ United Nations Committee on Economic, Social and Cultural Rights, Concluding observations on the combined fourth and fifth reports on Bulgaria, E/C.12/BGR/CO/4-5, para. 17.

Discrimination against Women²⁰. However, it does not appear that the Russian Federation has taken this call to heart as of yet.

We submit that this systematic government campaign of curtailing LGBTQI+ rights provides a highly relevant contextualisation to the case of *Fedotova and Others v. Russia*. This case concerns obstacles Russia puts in the way of same-sex couples in their attempts to have their relationships legally recognised and protected.

3. Article 8 ECHR

With this submission, we respectfully invite the Grand Chamber to first support the Chamber’s reasoning that was grounded in a continued principled interpretation of the Court’s current jurisprudence on same-sex couples (3.1). Second, we invite the Grand Chamber to clarify the importance placed upon traditional marriage and community interests when weighed against the interests of same-sex couples who are left in a legal vacuum with respect to the recognition and protection of their relationship (3.2). Lastly, we invite the Court to clarify the nature of the Contracting Parties’ obligation to provide a legal framework which protects the core rights of a same-sex couple (3.3).

3.1. Evolution of Article 8 reasoning on the recognition of same-sex couples

Since the seminal case of *Schalk and Kopf v. Austria (Schalk and Kopf)* in 2010, the Court has held that ‘same-sex couples are just as capable as different-sex couples of entering into stable, committed relationships’, and as such ‘they are in a relevantly similar situation to a different-sex couple as regards their need for legal recognition and protection of their relationship’.²¹ In the twelve years since *Schalk and Kopf*, the Court has repeatedly confirmed this statement.²²

Five years after the Court’s decision in *Schalk and Kopf*, in the case of *Oliari and Others v. Italy (Oliari)*, the Court found that **Contracting Parties have a positive obligation, under Article 8, to provide ‘a specific legal framework’ which recognises and protects a same-sex couple.**²³ In *Oliari*, the Respondent Government argued that they should enjoy a wide margin of appreciation due to the “‘different sensitivities on such a delicate and deeply felt social issue’”.²⁴ However, the Court noted that the margin should be narrowed as the case was concerned ‘solely [with] the general need for legal recognition and the core protection of the applicants as same-sex couples’, and as such this general need for legal recognition and core protection are considered by the Court to be ‘facets of an individual’s existence and identity to which the relevant margin should apply’.²⁵ In support of this narrowed margin, the Court found there to be a consensus in favour of the recognition and protection of same-sex couples.²⁶ This consensus has only continued to grow as 30 Contracting Parties now have some form of recognition of same-sex couples.²⁷

We argue that the Chamber’s reasoning in *Fedotova and Others v Russia (Fedotova)* is the natural evolution of reasoning seen in *Oliari*. The Chamber’s support for the protection of same-sex couples – as part of a persecuted minority group – above the disapproval of the ‘majority of Russians’ is an argument we respectfully

²⁰ United Nations Committee on the Elimination of Discrimination Against Women, Concluding observations on the combined second and third periodic reports of Serbia, CDEAW/C/SRB/CO/2-3, para. 39 (d).

²¹ ECtHR 24 June 2010, App. No. 30141/04, *Schalk and Kopf v. Austria*, para. 99.

²² ECtHR (Grand Chamber) 7 November 2013, App. Nos. 29381/09 and 32684/09, *Vallianatos and Others v. Greece*, para. 78; *Oliari and Others v. Italy* (no. 17) para. 165; ECtHR 26 October 2017, App. No. 28475/12, *Ratzenböck and Seydl v. Austria*, para. 34; ECtHR 14 December 2017, App. Nos. 26431/12, 26742/12, 44057/12, 60088/12, *Orlandi and Others v. Italy*, para. 192.

²³ *Oliari and Others* (no. 17) para. 185.

²⁴ *Ibid.* para. 176.

²⁵ *Ibid.* para. 177.

²⁶ *Ibid.* para. 178.

²⁷ Either by way of marriage or another form of recognition: ECtHR 13 July 2021, App. Nos. 40792/10, 30538/14, 43439/14, *Fedotova and Others v. Russia*, para 29.

submit should be confirmed by the Grand Chamber.²⁸ **The Chamber’s reasoning rejects the notion that ‘social morals’ could justify the complete denial of Convention recognition and protection for same-sex couples.**²⁹ Whilst this position has been expounded in other areas of the Court’s case-law such as the intersection of freedom of expression and LGBTQI+ rights,³⁰ it is the first time that such a connection has been made to the respect for family life under Article 8.

We respectfully submit to the Grand Chamber that this most recent approach to the recognition and protection of same-sex couples under the Convention strengthens the dynamic interpretation of the Convention to be ‘interpreted in the light of present-day conditions’.³¹ As outlined in Section Two, both the Venice Commission as well as the Committee of Ministers of the Council of Europe have asserted that the rules of a dominant culture cannot be invoked to determine the extent to which LGBTQI+ people can enjoy their fundamental rights.³² Furthermore, Russia’s position towards members of the LGBTQI+ community has in recent years repeatedly been found to violate the Convention (see Section Two). With LGBTQI+ persons in Russia facing such legal uncertainty in their daily lives, we argue that the Chamber’s finding that it ‘would be incompatible with the underlying values of the Convention, as an instrument of the European public order, if the exercise of Convention rights by a minority group were made conditional on its being accepted by the majority’ reflects an interpretation of the Convention which places the lived experiences of the minority at the forefront.³³

In the same sense, a valuable feature of the Chamber’s reasoning in *Fedotova* is that – different from *Oliari* – it does not rely on the existence of a consensus among the States Parties to narrow the margin of appreciation. **In this way, we argue that the Chamber’s reasoning in *Fedotova* correctly positions same-sex couples as part of a vulnerable group that warrants protection and recognition under Article 8 of the Convention, and avoids making the protection of their rights depend on other factors.** This prioritisation will be discussed further below.

At the same time, it is worth noting that there remains a strong European consensus in favour of recognising and protecting same-sex couples. Thus, if the consensus doctrine were to remain an important variable on this issue, we respectfully submit that the margin of appreciation would remain narrow.

3.2. Prioritisation of Minority Rights

Turning to the balance of interests in this case, as mentioned above, the Chamber’s reasoning merely confirms its previous case-law that Contracting Parties have a positive obligation to grant recognition and protection to same-sex couples.³⁴ With this in mind, the onus is on the Respondent State to justify why no measures were implemented which fulfilled this positive obligation. We claim that the Chamber correctly identified the weight to be accorded to the interests of same-sex couples over those of the Russian public opinion who oppose this granting of Convention protection. However, we respectfully submit that clarification of both the importance of traditional marriage (i), with respect to the formalisation of couples (different or same-sex), and the significance of public opinion that supports the limitation of Convention protection for same-sex couples (ii), would be a welcomed addition to the Court’s jurisprudence under Article 8.

(i) The Entrenched Homophobia in Traditional Values

We respectfully submit that this clarification should underscore that **the traditional nature of marriage is no longer an adequate justification to the denial of recognition and protection for same-sex couples**. The Chamber stated in *Fedotova* that the Respondent State’s argument concerning its constitutional amendment of traditional marriage would not be affected if same-sex couples are not legally protected and recognised. We argue that **this**

²⁸ *Ibid.* para. 52.

²⁹ *Ibid.* para. 52.

³⁰ *Bayev and Others v. Russia* (no. 6).

³¹ ECtHR 25 April 1978, App. No. 5856/72, *Tyrer v. the United Kingdom*, para. 31.

³² See Venice Commission (no. 11) and Committee of Ministers (no. 13).

³³ *Fedotova and Others v. Russia* (no. 27) para. 52.

³⁴ *Oliari and Others v. Italy* (no. 17) para. 185.

reasoning fails to acknowledge the discriminatory effect the traditional marriage justification has on the rights of same-sex couples who are part of a protected minority group under Article 14 (see also Section Four). In particular, **we claim that the inclusion of the traditional family or traditional marriage should no longer be referred to in the Court’s jurisprudence where the issue focuses on same-sex couples being denied recognition and protected under the Convention.**

In connection to this submission, we draw the Grand Chamber’s attention to the Court’s reasoning in *Taddeucci and McCall v. Italy (Taddeucci and McCall)*, where the traditional family argument was *not* found to be a “particularly convincing and weighty” reason capable of justifying...discrimination on grounds of sexual orientation’.³⁵ Whilst this argument was applied by the Court under Article 8 in conjunction with Article 14, we argue that this can also apply to the interpretation of the traditional marriage as a possible interest to be weighed against those of a same-sex couple under Article 8 as seen in *Fedotova*. Indeed, as pointed out in the Concurring Opinion of Judge Spano, joined by Judge Bianku, in *Taddeucci and McCall*,

‘The Court thus firmly rejects the argument that States can legitimately invoke the concept of the “traditional family” as a basis for denying a request for a residence permit made by a foreign national who is in a relationship with a citizen of the same sex. In conclusion, the fundamental principle of human dignity, which is one of the cornerstones of Article 8 of the Convention, guarantees to each and every individual the right to found a family with whomever they choose, irrespective of their sexual identity or sexual orientation’.³⁶

The reasoning in *Taddeucci and McCall* centred on the traditional family as opposed to traditional marriage. However, once a couple is married, the marital context is equally important to Article 8. Thus, we invite the Court to apply this reasoning to the concept of traditional marriage no longer being an adequate argument to deny same-sex couples access to recognition and protection under Article 8.

The terminology of either the traditional family or traditional marriage has been regularly used by Contracting Parties to try and justify legislation which specifically targets the LGBTQI+ community.³⁷ Importantly, the Court noted in *Bayev and Others v. Russia* that:

‘It is incumbent on the State, in its choice of means designed to protect the family, to take into account developments in society and changes in the perception of social, civil-status and relational issues, including the fact that there is not just one way or one choice when it comes to leading one’s family or private life.’

We understand that values concerning family life should be protected under the Convention. In particular, our argument does not claim that the traditional values of either the family or the marriage should be removed from such protection. Rather, **our claim centres on the manner in which traditional values of either marriage or the family have been used to exclude same-sex couples** from being protected and recognised under Article 8. Accordingly, we understand that traditional marriage has recently been enshrined in the Russian Constitution,³⁸ and that as such there is a certain margin of appreciation to be granted to Contracting Parties on dictating the scope of what constitutes a marriage. However, the concept of traditional marriage creates and perpetuates an image of same-sex relationships as destructive to different-sex relationships and adds to the marginalisation and oppression of LGBTQI+ people. Notably, we wish to emphasise that the Respondent Government has substantiated its adherence to the protection of the traditional family by equating same-sex relationships to paedophilia, incestuous practices and the alleged higher risk of contracting HIV.³⁹ We thus invite the Grand

³⁵ ECtHR 30 June 2016, App. No. 51362/09, *Taddeucci and McCall v. Italy*, para. 93.

³⁶ *Ibid.* Concurring Opinion of Judge Spano, joined by Judge Bianku, para. 3.

³⁷ *Bayev and Others v. Russia* (no. 6) para. 65; ECtHR 2 March 2010, App. No. 13102/02, *Kozak v. Poland*, para. 98; ECtHR (Grand Chamber) 19 February 2013, App. No. 19010/07, *X and Others v. Austria*, para. 139.

³⁸ See above no. 3.

³⁹ *Bayev and Others v. Russia* (no. 6) paras. 67-70.

Chamber **to affirm the rights afforded to same-sex couples under Article 8 and to disavow the application of the traditional marriage or family argument** as it is no longer relevant to the dynamic interpretation of the right to respect for family life under Article 8.

Thus, we respectfully submit that the traditional family or traditional marriage line of argumentation is inherently exclusionary and should no longer be applied in cases where same-sex couples are in a complete legal vacuum with respect to the protection and recognition of their couple status.

(ii) Community Interests

An additional factor in the balance of interests argument was the interpretation of community interests. In both *Oliari* and *Orlandi*, there was no opposition – on the basis of traditional values – that was observed by public opinion. The lack of prevailing community interests in these cases was noted by the Court in its reasoning when finding that a fair balance had not been struck by the Italian Government. In the present case, there is a discernible opinion from both the Respondent State and via public opinion that same-sex couples should not enjoy Convention protection or recognition. Despite this presence of public opinion in opposition to the recognition and protection of same-sex couples, **we respectfully submit that the Grand Chamber should support the Court's reasoning in *Orlandi***, where the Court found that prior to 2016, when recognition of same-sex relationships was enforced, same-sex couples were left in 'a legal vacuum' where the Italian Government had 'failed to take account of the social reality of the situation'.⁴⁰ The social reality of same-sex couples in Russia is also a significantly worrying element of this balance of interests (see Section Two), which we argue is demonstrably linked to the overall balancing test.

In this regard, it is also relevant to note that the Respondent State submitted a survey to illustrate the popular stance held by its citizens that same-sex couples should not be recognised or protected under domestic law. The Chamber in *Fedotova* made a clear distinction between surveys, in general, being used to justify to either restrict or extend the scope of a right.⁴¹ It rightly recognised only the latter invocation of public opinion to be legitimate, and ultimately concluded that the rights of a minority must not be conditional on 'being accepted by the majority'.⁴² We observe that it is not uncommon for the Court to refer to a survey.⁴³ However, we find that the interests of the applicants in this case, where they experienced a legal vacuum on an issue which strikes at the very heart of their 'existence or identity',⁴⁴ should clearly outweigh the inclusion of a survey as a means of denying such protection.

In connection to this claim, **there is a concern to how this survey, the primary source used by the Respondent State to substantiate their claims to deny protection to a protected group of persons, was not probed further.** In this way, we respectfully submit that **the damning nature of this survey deserves greater attention by the Grand Chamber.** This is especially the case as, upon further examination of this survey and its use by the Respondent State, it was stated that twenty percent of survey-respondents 'believed homosexuality to be a mental disease' and the same number also thought that LGB persons should be 'treated as dangerous people which should be isolated from society'.⁴⁵ For such a document to be used as the *sole* piece of evidence for the Respondent State's stance that it is the public's will to deny same-sex couples access to some form of recognition and protection **deserves further examination and explicit rejection.** Particularly as **the primary takeaway** from

⁴⁰ *Orlandi and Others v. Italy* (no. 22) para. 209.

⁴¹ *Fedotova and Others v. Russia* (no. 27) para 52.

⁴² *Ibid.*

⁴³ For example, in *Oliari*, the Court does discuss public opinion according to a survey conducted of Italian sentiment on the issue of same-sex couples, see *Oliari and Others v. Italy* (no. 17) para. 181.

⁴⁴ *Fedotova and Others v. Russia* (no. 27) para. 47.

⁴⁵ *Fedotova and Others v. Russia* (no. 27) para. 35.

this survey should not be the fervent denial of support and acceptance of same-sex couples but rather, the **extreme homophobia that is apparent in Russia and is supported by Russian authorities** (see Section Two).⁴⁶

3.3. Clarification of the Core Rights

Finally, we respectfully request the Grand Chamber to clarify what core rights afforded to couples (same-sex or different-sex) should be protected under the Convention. In *Oliari*, the Court delineated between core and supplementary rights of a couple. Specifically, the Court held that:

‘While the Court can accept that the subject matter of the present case may be linked to sensitive moral or ethical issues which allow for a wider margin of appreciation in the absence of consensus among Contracting Parties, it notes that the instant case is not concerned with certain specific “supplementary” (as opposed to core) rights which may or may not arise from such a union and which may be subject to fierce controversy in the light of their sensitive dimension’.⁴⁷

As the Court found that the ‘general need for legal recognition and the core protection of the applicants as same-sex couples’ was directly linked to these core rights, a narrow margin was applied (see also above 3.1).⁴⁸ The concern is that **the Court’s jurisprudence is currently unclear as to what constitutes either a supplementary or core right**. For example, in *Fedotova*, the Chamber looked to the lived experiences of the applicants as examples where the Respondent State had failed ‘to protect the most regular of “needs” arising in the context of a same-sex couple’.⁴⁹ Reference is made by the Chamber to the fact that same-sex couples ‘are prevented from accessing housing or financing programmes and from visiting their partners in hospital, that they are deprived of guarantees in the criminal proceedings (the right not to witness against the partner), and rights to inherit the property of the deceased partner’.⁵⁰ Consequently, this situation ‘creates a conflict between the social reality of the applicants who live in committed relationships based on mutual affection, and the law...That conflict can result in serious daily obstacles for same-sex couples’.⁵¹

The Chamber’s reasoning correctly outlined certain examples that specifically affect the applicants’ lives as same-sex couples living in Russia such as access to housing and financing programs, succession rights, visitation rights in hospital and trial guarantees in criminal proceedings.⁵² However, we respectfully submit that **there are other daily obstacles facing same-sex couples that have not been specifically detailed or are not necessarily perceived by the Court to be in the same category as a core right**. In *Oliari*, the Court sought to remedy such general obstacles for same-sex couples which may arise in domestic proceedings by finding that

‘the necessity to refer repeatedly to the domestic courts to call for equal treatment in respect of each one of the plurality of aspects which concern the rights and duties between a couple...already amounts to a not-insignificant hindrance to the applicants’ efforts to obtain respect for their private and family life. This is further aggravated by a state of uncertainty’.⁵³

The Court’s reasoning in *Oliari* fittingly identifies the situation of same-sex couples, however, this reasoning has largely remained confined to the Italian perspective. For example, in Bulgaria, if one partner or spouse ‘gets sick, the other person may not be able to receive temporary compensation for taking leave from work to take care of

⁴⁶ See e.g. ECRI’s observations in this regard: ECRI, ECRI Report on the Russian Federation (fifth monitoring cycle), paras. 121-123, <https://rm.coe.int/fifth-report-on-the-russian-federation/1680934a91>.

⁴⁷ *Oliari and Others v. Italy* (no. 17) para. 177.

⁴⁸ *Ibid.*

⁴⁹ *Fedotova and Others v. Russia* (no. 27) para. 51.

⁵⁰ *Ibid.*

⁵¹ *Ibid.*

⁵² *Ibid.*

⁵³ *Oliari and Others v. Italy* (no. 17) para 171.

his or her spouse/partner’.⁵⁴ Or in the Czech Republic, where same-sex partnerships are recognised, ‘registered partners do not have the possibility to co-own property jointly in a manner other than as *unrelated* persons’.⁵⁵ Thus, without a clear outline of what rights are protected by this specific legal framework that Contracting States are obliged to create and implement, recognition and protection of same-sex couples remains to be haphazardly mandated across different legal frameworks. We respectfully submit that by **providing clarity on what these core rights are, the Court can concretely outline what is required from a Contracting Party to effectively protect the right to respect for family life for same-sex couples**. Without this clarification of these core rights, the effectiveness of this positive obligation is significantly hampered. In this way, same-sex couples would not have to face undue discrimination between each Contracting Party.

4. Article 14 ECHR

In addition to Article 8 taken alone, the present application also raises important issues under Article 14 in conjunction with Article 8 that we invite the Grand Chamber to consider.

We respectfully invite the Grand Chamber to reconsider the Chamber’s conclusion to not examine Article 14 in conjunction with Article 8 in view of its findings with regard to the latter article. In this regard, it is paramount to **distinguish the Russian State’s failure to comply with the positive obligation under Article 8 to protect relationships from the fact that it denied any protection to the family life of same-sex couples based solely on their sexual orientation**. Indeed, different-sex couples, as opposed to same-sex couples, have a possibility of having their relationship legally recognised in Russia, namely by way of the institution of marriage. Examining the issue under Article 14 would therefore allow the Court to address another dimension, specifically that of the impermissible reasons given to justify the discriminatory nature of the absence of the legal basis for the formal acknowledgement of same-sex relationships. This is all the more important considering how the Court only accepts ‘**very weighty reasons**’ in order to justify differences in treatment based on sexual orientation.⁵⁶ Despite the Government’s persistence that the decisions ruling against the applicants were taken to ‘protect the interests of a traditional family unit’, the inescapable conclusion is that the refusal amounted to discrimination on the grounds of sexual orientation, which cannot be justified in this case because of a lack of weighty reasons able to justify the difference in treatment.

In order for Article 14 to be applicable, two groups who find themselves in relevantly similar situations must be treated differently – or two groups in dissimilar situations must be treated equally. We argue that the former is the case. Any difference in the treatment of same-sex couples compared to different-sex couples must be justified. As discussed above (3.1), ‘same-sex couples are just as capable as different-sex couples of entering into stable, committed relationships’.⁵⁷ This puts same-sex couples and different-sex couples in a similar situation as regards their need to have their relationship legally recognised. However, only the need of the latter group is currently satisfied under Russian law. We argue that a distinction must be made in this regard between the present case and the conclusions reached in *Ratzenböck and Seydl v. Austria (Ratzenböck and Seydl)*, where the Court concluded that different-sex couples to whom the institution of marriage was open, and same-sex couples to whom registered partnerships were available as an alternative to marriage, were not in similar situations as regards the applicants’ desire to enter into a civil union as a different-sex couple.⁵⁸ In *Ratzenböck and Seydl*, the applicants had an option to have their relationship recognised, so their request to apply for a registered partnership came down to a matter of preference based on the ‘modern and lighter’ character of the partnership,

⁵⁴ Third Party Intervention by LGBT Youth Organisation “Deystvie”, Platforma pro rovnoprávnost, uznání a diverzitu z.s. (“PROUD”), the Lithuania Gay League (“LGL”), the Polish Society of Anti-Discrimination Law (“PSAL”) and the Love Does Not Exclude Association (“LDNEA”) in *Relu-Adrian Coman and Others v. Romania* (App. No. 2663/21), para. 21.

⁵⁵ *Ibid.* para 24.

⁵⁶ ECtHR 27 September 1999, App. Nos. 33985/96 and 33986/96, *Smith and Grady v. the United Kingdom*, para. 94; ECtHR 9 September 2003, App. No. 45330/99, *S.L. v. Austria*, para. 37; *Kozak v. Poland* (no. 37) para. 92.

⁵⁷ *Schalk and Kopf v. Austria* (no. 21) para. 99; *Vallianatos and Others v. Greece* (no. 22) para. 78.

⁵⁸ *Ratzenböck and Seydl v. Austria* (no. 22) paras. 40-42.

as opposed to a fundamental need of recognition in the absence of any legal institution to have their relationship recognised.⁵⁹ In the present case, no such recognition has been made available to same-sex couples, leaving the applicants unable to have any protection conferred onto their relationship. **Their request to enter into a civil union therefore does not amount to a matter of personal preference, but to a legitimate and justifiable request for the Russian State to comply with its positive obligations under Article 8.** Given their shared need for legal recognition, this puts same-sex couples in a severely disadvantageous situation in comparison to different-sex couples. The unjustifiable distinction created by the legislator ought not to alter the Court's opinion with regard to the similar nature of different-sex and same-sex relationships as such. Deciding otherwise would only **perpetuate the negative stereotypes promoted by Russia concerning the 'different', and therefore inferior, nature of same-sex relationships compared to different-sex relationships.**⁶⁰ **Similarly, this reasoning is a case of vicious circularity,** since same-sex couples are considered to be different because they cannot marry, but at the same time they cannot marry because the legislator considers them to be different.⁶¹ We therefore respectfully call on the Court to adhere to the conclusions it reached in *Schalk and Kopf* and *Vallianatos and Others v. Greece* and conclude that the applicants find themselves in relevantly similar situations to different-sex couples in the present case.

In justifying this difference in treatment on the grounds of sexual orientation, the Russian Government relies on the protection of traditional values. We respectfully remind the Court of the conclusion it reached in *Taddeucci and McCall*, where it stated that this aim cannot be considered a sufficiently weighty reason given the narrow margin of appreciation enjoyed by the Italian Government.⁶² As we have argued in section 2, the protection of the traditional values by Russia essentially amounts to the promotion of homophobia and the perpetuation of harmful stereotypes regarding the LGBTQI+ community. We do not contest that values concerning family life as such must be protected. However, we respectfully submit that this discriminatory interpretation of the traditional values and families, entrenched in homophobia, runs **counter to the core principle of human dignity.**⁶³ Accepting such an aim would amount to the endorsement of a policy embodying the predisposed negative bias of the heterosexual majority against a homosexual minority.⁶⁴ We consequently argue that the aim of the protection of traditional values cannot be deemed legitimate in the present case.

If the Grand Chamber were to accept the aim of protecting traditional values as legitimate, we continue to contend that the complete absence of recognition and protection on a same-sex couple's relationship should outweigh the Government's interest in protecting said values. Firstly, prohibiting same-sex couples from having their relationship legally recognised **does not contribute to the protection of traditional values.** The recognition of same-sex relationships does not prevent different-sex couples from enjoying their family life and/or marriage. We consequently argue that the difference in treatment is not sufficiently pertinent to ensure further protection of these traditional values. Secondly, given the marginal impact on different-sex couples' enjoyment of their rights to family life and marriage, we respectfully submit that **such a severe impact on same-sex couples' right to the protection of family life cannot be outweighed by the interests of the heterosexual majority** to have their traditional values protected, and thereby have LGBTQI+ people oppressed.

Executive Summary

Under current Russian legislation, same-sex couples are barred from any possibility to have their relationship legally recognised and protected. The Russian Government substantiates this by its adherence to the promotion

⁵⁹ *Ibid.* para. 9.

⁶⁰ *Ibid.*

⁶¹ D.A. Gonzalez-Salzberg, *Sexuality & Transsexuality Under the European Convention on Human Rights* (Hart Publishing 2019) 104.

⁶² *Taddeucci and McCall v. Italy* (no. 35) para. 93.

⁶³ See *ibid.* Concurring Opinion of Judge Spano, joined by Judge Bianku.

⁶⁴ *Bayev and Others v. Russia* (no. 6) para. 67.

of 'traditional values'. However, this argument is entrenched in deep-rooted homophobia and thereby contributes further to the stigmatisation and ostracization of LGBTQI+ persons.

With respect to Article 8, we first claim that the Chamber's reasoning in *Fedotova and Others* correctly prioritises the lived experiences of a minority group over other factors, such as the consensus doctrine, that were previously influential to the Court's reasoning in cases concerning the recognition and protection of same-sex couples.

Second, in cases where a same-sex couple have suffered extensive rejection for the protection or recognition of their relationship by the Contracting State, we argue that the inclusion of the 'traditional marriage' as an explanation of community interests should no longer be referred to by the Court.

Third, and in connection to the above point, we invite the Grand Chamber to conduct a more thorough investigation into the Respondent Government's use of this national survey, which is reflective of harmful stereotypes of the LGBTQI+ community, as a means to represent public opinion.

Fourth, we invite the Court to clarify what is meant by the core rights enjoyed by couples (different-sex or same-sex) under Article 8.

Lastly, we argue that the Court should examine the lack of legal recognition under Article 14 in conjunction with Article 8, since legal recognition is provided to different-sex couples, but not to same-sex couples in Russia. We submit that the Respondent Government has not submitted any sufficiently weighty reasons able to outweigh this severe impact on same-sex couples' right to the protection of their family life.

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