



Strasbourg, Russia and the Right to Same-Sex Marriage

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The issue of lack of legal recognition for same-sex partnerships has come before the European Court of Human Rights yet again, but this time before the Grand Chamber.¹

BACKGROUND

Three same-sex couples – two female and one male – wished to marry. On various dates they gave notice of marriage to the Register Office's local departments in Moscow and St Petersburg, but their notices were rejected. Article 1 of the Russian Family Code defines marriage as a voluntary marital union between a man and a woman, and because the applicant couples were not made up of 'a man and a woman' they were told that their notices could not be processed. Their appeals to the domestic courts were unsuccessful and they took the matter to Strasbourg.

At first instance, the President of the Third Section ECtHR gave notice of the applications to the Russian Government in May 2016 under Article 8 (taken alone) and Article 14 (taken in conjunction with Article 8). He declared the complaints under Article 12 (right to marry) inadmissible as being manifestly ill-founded.² The Third Section joined the three applications and in its judgment on 13 July 2021 declared them admissible, holding that there had been a violation of Article 8 (respect for private and family life) and that there was no need to examine the merits of the complaints under Article

- 1 An earlier version of this Comment appeared on the *Law & Religion UK* blog on 30 January 2023. I should like to thank Professor Russell Sandberg for his comments, helpful as always, on this article in draft.
- 2 *Fedotova and Others v Russia* [2023] ECHR 55 at para 82.

14 (discrimination) taken in conjunction with Article 8.³ The Russian judge, Dedov, did not dissent and the Chamber judgment was unanimous. The Russian Federation appealed.

THE JUDGMENT

Before the Grand Chamber, the three couples relied primarily on Articles 8, 12 (right to marry and found a family) and 14. They had been in stable relationships as same-sex couples and they argued that Article 8 was therefore applicable under the heads of both ‘private life’ and ‘family life’, in accordance with the Court’s case-law. They submitted that Russia had a positive obligation to put in place a legal alternative to marriage that would enable them to exercise their Article 8 rights. Such an alternative could take the form of a civil partnership, a civil union, a civil solidarity agreement or another arrangement, *always provided that same-sex couples were in a similar position to that of married different-sex couples*.⁴

The Russian Government countered that the right to respect for private and family life was interpreted by the Russian Federation on the basis of Article 12, which provided that the exercise of the right to marry and to found a family:

is governed by national law, and on the unequivocal position of the European Court of Human Rights that the right to marry only refers to a union between a man and a woman, which cannot be construed as inhibiting the rights of LGBT persons and consequently does not constitute discrimination and call for an increase of these rights.⁵

Further, it considered itself bound only by the provisions of the Convention itself, ‘and not by the decisions of the European Court of Human Rights in respect of other member states’.⁶ The Russian Government contended that because at the time of signing the Convention the Contracting Parties had not intended to grant two persons of the same sex the right to marry, such a right remained at the discretion of the individual state party. To change that position would require a new agreement—for example, a new Protocol to the Convention—that provided specifically for the right to same-sex marriage. Such an agreement could also include an obligation for the signatory states to provide for other forms of recognition of same-sex relationships.⁷ It called on the Court to adopt

3 *Fedotova and Others v Russia* [2021] ECHR 636.

4 *Fedotova and Others v Russia* [2023] ECHR 55 at para 103.

5 *Ibid* at para 48.

6 *Ibid*.

7 *Ibid* at para 111.

the same approach as it had in *Oliari*⁸ and to have regard to the attitudes in Russian society towards same-sex couples.⁹

Citing *Oliari* and *Orlandi*,¹⁰ the Grand Chamber said that it was evident from the Court's case-law that Article 8 had already been interpreted as requiring states parties to ensure legal recognition and protection for same-sex couples by putting in place a 'specific legal framework', although it also noted that Article 8 had not, to date, been interpreted as imposing a positive obligation to make *marriage* available to same-sex couples.¹¹

Having regard to the case-law 'as consolidated by a clear ongoing trend within the member states of the Council of Europe', the Grand Chamber rejected the Russian Government's "originalist" approach to interpreting the Convention and confirmed that, in accordance with their positive obligations under Article 8, member states were 'required to provide a legal framework allowing same-sex couples to be granted adequate recognition and protection of their relationship'.¹² As a result, their margin of appreciation was 'significantly reduced when it comes to affording same-sex couples the possibility of legal recognition and protection',¹³ although it did concede that they had 'a more extensive margin of appreciation in determining the exact nature of the legal regime to be made available'.¹⁴ Although there was a clear ongoing trend towards legal recognition and protection for same-sex couples, there was no consensus as to the form that such recognition should take, so it was above all 'for the Contracting States to decide on the measures necessary to secure the Convention rights to everyone within their "jurisdiction", and it is not for the Court itself to determine the legal regime to be accorded to same-sex couples'.¹⁵

Russia had not informed the Court of any intention to amend its domestic law to give same-sex couples official recognition and a legal regime offering protection; on the contrary, it had argued that the fact that it was impossible for same-sex couples to be granted legal recognition and protection 'was compatible with Article 8 of the Convention and was justified in order to safeguard what they claimed to be prevailing interests'.¹⁶ Further, the Grand Chamber noted that the protection of the traditional family based on the union between a man and a woman had recently been consolidated by the 2020 reform of the Russian Constitution; Russia differed markedly, therefore, from a substantial number of member states that had sought to amend their

8 *Oliari and Others v Italy* [2015] ECHR 716.

9 *Fedotova and Others v Russia* [2023] ECHR 55 at para 118.

10 *Orlandi and Others v Italy* [2017] ECHR 1153.

11 *Fedotova and Others v Russia* [2023] ECHR 55 at paras 164–165.

12 *Ibid* at para 178.

13 *Ibid* at para 187.

14 *Ibid* at para 188.

15 *Ibid* at para 189.

16 *Ibid* at para 194.

domestic law to give effective protection to the private and family life of same-sex partners.¹⁷

The Grand Chamber also rejected the assertion that giving legal recognition and protection to same-sex couples in a stable and committed relationship could harm the position of opposite-sex couples in marrying or founding a family ‘corresponding to their conception of that term’.¹⁸ More broadly, securing rights to same-sex couples did not of itself weaken the rights secured to other people or other couples, nor could the protection of the traditional family justify refusing them any form of legal recognition and protection.

In brief, the Grand Chamber concluded that Russia had overstepped its margin of appreciation and had failed to comply with its positive obligation to secure the applicants’ right to respect for their private and family life:¹⁹

1. It held unanimously that it had jurisdiction to deal with the applicants’ complaints in so far as they related to what had taken place before 16 September 2022.²⁰
2. By sixteen votes to one, it decided to strike out the applications of two of the applicants and examine the cases of the others.
3. By sixteen votes to one, it dismissed the Russian Federation’s preliminary objections.
4. By fourteen votes to three, it held that there had been a violation of Article 8.
5. By thirteen votes to four, it held that there was no need to examine separately the complaint under Article 14 taken in conjunction with Article 8.
6. By fifteen votes to two, it held that the finding of a violation was sufficient and just satisfaction for any non-pecuniary damage sustained by the applicants.
7. By sixteen votes to one, it dismissed the remainder of the applicants’ claims for just satisfaction.

COMMENT

The case has given rise to an interesting debate in the blogosphere. Writing in *Verfassungsblog*, Zuzana Vikarská has criticised the decision for creating a

¹⁷ Ibid at para 195.

¹⁸ Ibid at para 212.

¹⁹ Ibid at para 224.

²⁰ The Russian Federation ceased to be a member of the Council of Europe as from 16 March 2022. The court, sitting in plenary session on 21 and 22 March 2022 in accordance with Rule 20 §1 of the Rules of Court, declared that it remained competent ‘to deal with applications directed against the Russian Federation in relation to acts or omissions capable of constituting a violation of the Convention provided that they occurred until 16 September 2022’: <https://echr.coe.int/Documents/Resolution_ECHR_cessation_membership_Russia_CoE_ENG.pdf>, accessed 8 February 2023.

‘new right’ and for being ‘the most political ruling ever’.²¹ She suggests that the judgments in *Oliari* and *Orlandi* have been misconstrued as obliging member states to give legal recognition to same-sex couples under Article 8 and contends that ‘that happened only in *Fedotova*’.²²

Eduardo Gill-Pedro, on the other hand, is not convinced by Vikarská’s conclusion that a new right has been created, and while he agrees with her that the decision is of great political importance, he believes that it was the correct one to make.²³ He concurs with an earlier comment by Dmitri Bartenev on the first-instance judgment that *Fedotova* ‘should be viewed as the logical development of well-established principles’ even though, unlike *Oliari* and *Orlandi*, it is ‘the first judgment against a Member State which has fiercely opposed the very concept of the legal recognition of civil unions between same-sex couples’.²⁴

On *EJIL: Talk!*, Giulio Fedele suggests that the right to marry under Article 12 was ‘the elephant in the room’, given that the complaint under that Article had been rejected at the first-instance proceedings as manifestly ill-founded.²⁵ He wonders how that position could have been justified in light of the judgment in *Schalk and Kopf*,²⁶ in which the Court held that it ‘would no longer consider that the right to marry enshrined in Article 12 must in all circumstances be limited to marriage between two persons of the opposite sex’²⁷ – although in fairness, it should be noted that in the same paragraph the Court did go on to say that ‘the question whether or not to allow same-sex marriage is left to regulation by the national law of the Contracting State’.

On balance, I am inclined to agree with Gill-Pedro and Fidele. My understanding of *Orlandi* and *Oliari* is that they made it clear that contracting states had to provide some form of proper legal recognition for those who wished to enter same-sex unions: not necessarily ‘marriage’, but at least some mechanism that established a recognised legal relationship. It should also be noted that at paragraph 51 the Grand Chamber in *Fedotova* cited Resolution

21 Vikarská Z, ‘The many troubles of the Fedotova judgment’ (*Verfassungsblog*, 24 January 2023) <<https://verfassungsblog.de/the-many-troubles-of-the-fedotova-judgment/>>, accessed 8 February 2023.

22 She also wonders – as do I – why a Russian judge was still sitting in the Grand Chamber on 27 April 2022 when Russia had ceased to be a member of the Council of Europe on 16 March. It was that issue that gave rise to the dissenting opinion of Judge Poláčková, the judge in respect of Slovakia.

23 Gill-Pedro E, ‘No New Rights in Fedotova’ (*Verfassungsblog*, 27 January 2023), <<https://verfassungsblog.de/no-new-rights-in-fedotova/>>, accessed 8 February 2023.

24 Bartenev D, ‘Will Russia Yield to the ECtHR?’ (*Verfassungsblog*, 16 July 2021), <<https://verfassungsblog.de/will-russia-yield-to-the-ecthr/>>, accessed 8 February 2023.

25 Fidele G, ‘Milestone or missed opportunity? The ECtHR Grand Chamber judgment in *Fedotova v Russia* on the legal recognition of same-sex couples’ (*EJIL: Talk!*, 31 January 2023), <<https://www.ejiltalk.org/milestone-or-missed-opportunity-the-ecthr-grand-chamber-judgment-in-fedotova-v-russia-on-the-legal-recognition-of-same-sex-couples/>>, accessed 8 February 2023.

26 *Schalk and Kopf v Austria* [2010] ECHR 1996.

27 *Ibid* at para 61.

2239 (2018) of the Parliamentary Assembly which, *inter alia*, calls on member states ‘to ensure that same-sex partners have available to them a specific legal framework providing for the recognition and protection of their unions’.²⁸

While I take Vikarská’s point that ‘Instead of the *European consensus* required in previous cases, in *Fedotova* the Court settled for a lower threshold of a *clear ongoing trend* observed in slightly less than two-thirds of the contracting States’, I am far from convinced by her suggestion that Russia’s lack of interest in implementing the Court’s judgments ‘poses a risk to the Court’s legitimacy’. This is for two reasons.

First, the primary function of the courts is to judge the causes before them “without fear or favour, affection or ill-will”. Their role is to declare the law as it affects the parties and to come to a judgment on the facts of the case—whether their ruling is likely to generate strenuous opposition or whether they are pushing at an open door—and I question whether they should be influenced in so doing by possible issues about enforcement. If the Grand Chamber had been concerned about enforcement, would it, for example, have handed down the ruling that it did in *Hirst*,²⁹ knowing how bitterly opposed both the United Kingdom Government and the Official Opposition were to granting votes to prisoners?

Secondly, by the time the appeal came before the Grand Chamber, the Russian Federation was no longer a member of the Council of Europe, so what practical purpose would have been served by attempting to accommodate Russian political sensibilities?

And on issues of human rights, should courts attempt to accommodate political sensibilities in any event?

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28 Parliamentary Assembly of the Council of Europe, Resolution 2239 (2018), ‘Private and family life: achieving equality regardless of sexual orientation’, <<https://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=25166>>, accessed 8 February 2023.

29 *Hirst v United Kingdom* (no. 2) [2005] ECHR 681.