Case law of the European Court of Human Rights relating to discrimination on grounds of sexual orientation or gender identity - Second Edition

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Introduction [1]

Lesbian, Gay, Bisexual, Transgender and Intersex persons (LGBTI) persons are more exposed than others to human rights violations. They are often the victims of hostility and of various forms of discrimination and intolerance because of their sexual orientation or gender identity or expression, or sex characteristics. What makes them particularly vulnerable is that they frequently encounter prejudice due to the fact that they are people who differ from the majority and, by their very difference, challenge society's traditional reference points with regard to sex in the dual sense of gender (male or female) and sexual attraction (to men or women).

Some definitions

A brief clarification of the most commonly used terms in this area therefore seems necessary.

- **LGBTI** is an acronym which stands for Lesbian, Gay, Bisexual, Transgender and Intersex persons.The term "LGBTI" therefore denotes both a group of persons defined by their sexual orientation (lesbian, gay or bisexual), gender identity (Transgender) and sex characteristics (Intersex).

- **Sexual orientation** refers to the "LGB" component of the acronym LGBTI. "Sexual orientation is understood to refer to each person's capacity for profound attraction [(emotional, physical, sexual, psychological and/or other)] to, and intimate and sexual relations with, another person. It can be towards a same-sex person (homosexual), different-sex person (heterosexual), either female or male persons (bisexual) or irrespective of sex and/or gender (pansexual).

- **Lesbian** refers to a homosexual woman.

- **Gay** refers to a homosexual man.

- **Gender Identity** refers to the "T" component of the LGBTI acronym. Gender identity is understood to refer to each person's deeply felt internal and individual experience of gender, which may or may not correspond with the sex assigned at birth, including the personal sense of the body (which may involve, if freely chosen, modification of bodily appearance or function by medical, surgical or other means) and other expressions of gender, including dress, speech and mannerisms.

- **Transgender** is an umbrella expression referring to persons who have a gender identity different from predominant social expectations based on the person's sex assigned at birth.
- **Sex Characteristics** refers to the "I" component of the acronym LGBTI. Sex Characteristics are understood as the chromosomal, gonadal and anatomical features of a person, which include primary sex characteristics such as reproductive organs and genitalia and/or in chromosomal structures and hormones; and secondary sex characteristics such as muscle mass, hair distribution, breasts and/or structure.
- **Intersex** are persons born with biological sex characteristics that do not fit societal norms or medical definitions of what makes a person male or female. Sometimes a person's intersex status is detected at birth; sometimes it only becomes apparent later in life, notably during puberty. There are many forms of intersex; it is an umbrella spectrum or term, rather than a single category.

The determination of LGBT persons to combat certain prejudices and forms of discrimination against them has led them to take this battle to the lexical field too. This is why, for example, the terms "gay" and "lesbian" are tending in some cases to replace the term "homosexual", felt by some to be reductionist or inappropriate. The acronym LGBT reflects the determination of lesbian, gay, bisexual and transgender persons to fight together for recognition of their fundamental rights.

The titles and content of soft law texts adopted by the Council of Europe since the early 1980s reflect this dual trend towards a change of vocabulary and a grouping of rights. For instance, the Parliamentary Assembly adopted – in the 1980s – Recommendation 924 (1981) on discrimination against homosexuals and Recommendation 1117 (1989) on the condition of transsexuals, then – in the 2000s – Recommendation 1474 (2000) on the situation of lesbians and gays, and – in the 2010s – it has adopted Recommendation 1915 (2010) on discrimination on the basis of sexual orientation and gender identity, in which the expression LGBTI appears. The same trend is apparent in texts adopted by the Committee of Ministers over the same period,[2] the latest being 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.

It is important to stress that the terminology on these issues is not fixed and evolves very quickly. Nuances of meaning are sometimes introduced. The general tendency is to regard "transsexual" as being a narrower term than "transgender" which also includes transvestites and persons who may not want to define themselves either as man or woman.

The term "transgender" is tending in some cases to replace "transsexuality", felt by some to be reductionist, and especially "transsexualism", felt by some to be pejorative (in that it might wrongly imply that this is an "ideological" choice, as with many other words ending with that suffix).

[1] Up to date with the case law of the European Court of Human Rights relating sexual orientation or gender identity to January 2019.

[2] See Reply to Recommendation 1117 (1989) on the condition of transsexuals; Reply to Recommendation 1470 (2000) on the situation of gays and lesbians and their partners in respect to asylum and immigration; Reply to Recommendation 1474 (2000) on the situation of lesbians and gays; Reply to Recommendation 1635 (2003) on lesbians and gays in sport; Recommendation CM/Rec(2010)5 on measures to combat discrimination on grounds of sexual orientation or gender identity; Message to steering committees and other committees involved in intergovernmental co-operation at the Council of Europe on equal rights and dignity of lesbian, gay, bisexual and transgender persons.

For its part, the European Court of Human Rights uses a terminology which is not fixed but which, on the whole, remains traditional. For example, the word "transgender" appeared for the first and so far only time in a chamber judgment delivered at the end of 2012, but it seems to be used as a synonym for "transsexual".[3] Its status as a court called upon to settle concrete disputes relating to the application of essentially individual rights only allows it to use sparingly such an extensive and imprecise terminology as that of LGBT persons. Nevertheless, the use of the acronym LGBT tends to develop. In the Bayev and Others v. Russia judgment of 20 June 2017, for example, the Court refers to "LGBT activists" or "members of the LGBT community" and to "the defence of LGBT rights" or "LGBT issues" (§ 61 and § 67)

Sexual orientation, gender identity and international and European human rights law

The protection of LGBT persons by international human rights law is relatively recent.

The Council of Europe has adopted a series of texts to combat discrimination based on sexual orientation and, to a lesser extent, gender identity. It is important to mention first of all the 2010 Recommendation of the Committee of Ministers to member states on "measures to combat discrimination on grounds of sexual orientation or gender identity".[4] This recommendation followed on from a series of texts adopted mainly by the Parliamentary Assembly.[5]

The 1950 European Convention on Human Rights has played a central part in defining the rights enjoyed by lesbian, gay and transgender persons at European level. These rights have been identified by the European Court of Human Rights in its case law applying the Convention. The Court has played an essential pioneering role in this field at international and European level as it was instrumental in bringing about major legislative changes on certain issues related to sexual orientation, starting in 1981, and gender identity, starting in 1997.

Aims of the study

In this study we propose both to give an analytical presentation of the key aspects of this case law relating to sexual orientation and gender identity and to reproduce the relevant passages from the decisions and judgments delivered by the European Court of Human Rights in cases dealing with these issues.

It follows in the line of previous Council of Europe documents helping to "combat discrimination on grounds of sexual orientation or gender identity", to reproduce the wording of the 2010 Recommendation of the Committee of Ministers or that of various texts – recommendations, resolutions and reports – produced by the Parliamentary Assembly of the Council of Europe.

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[3] *Hamalainen v. Finland* chamber judgment, 13 November 2012, application no. 37359/09, §37.

[4] CM/Rec(2010)5.

[5] These include in particular the following recommendations of the Parliamentary Assembly to the Committee of Ministers: Recommendation 1915 (2010) of the Parliamentary Assembly on discrimination on the basis of sexual orientation and gender identity, Recommendation 924 (1981) of the Parliamentary Assembly on discrimination against homosexuals, Recommendation 1117 (1989) of the Parliamentary Assembly on the condition of transsexuals, Recommendation 1470 (2000) of the Parliamentary Assembly on the situation of gays and lesbians and their partners in respect of asylum and immigration in the member states of the Council of Europe, Recommendation 1474 (2000) of the Parliamentary Assembly on the situation of gays and lesbians in Council of Europe member states, and Recommendation 1635 (2003) of the Parliamentary Assembly on lesbians and gays in sport.

It is this continUity which jUstifies the stUdy's title. As in the above-mentioned docUments, the term "discrimination" mUst be understood in the ordinary, fairly broad sense of all the hUman rights violations sUffered by LGBT persons, and not in a narrow, legal technical sense which woUld refer only to violations based explicitly on the right not to be discriminated against. Everyone who is the victim of a violation of a freedom is at the same time discriminated against by comparison with those whose freedom has not been violated. That explains the title of this pUblication: *The case law of the EUropean CoUrt of HUman Rights relating to discriminationon groUnds of sexUal orientation or gender identity.*

In matters of detail, however, this stUdy will be very explicit as to the exact legal groUnds for finding a violation, or non–violation, of the Convention.

Structure of the study

It is divided into two parts.

Part One: What are the rights invoked and how are they respected? General principles

Part One proposes to discUss the groUnds for relying on the EUropean Convention on HUman Rights in matters relating to sexUal orientation and gender identity.

Presentation of the general principles for reviewing the applicability of the rights, article by article

More specifically, the aim will be to see which Convention rights have, in the cUrrent state of EUropean case law[9], been relied on in cases relating to sexUal orientation and gender identity: they can be divided into two main categories: rights guaranteeing a freedom and rights guaranteeing eqUality or non–discrimination.

The main featUre of this part of the stUdy is that it offers the reader an approach by legal groUnd: "right by right" (right to freedom of private life, right to freedom to demonstrate, right not to be sUbjected to discrimination etc), in other words "article by article" (Article 8, Article 11, Article 14 etc).

The idea at this stage is to present the general principles governing the review condUcted by the CoUrt when an applicant alleges a violation of a hUman right.

Two major qUestions invariably arise whatever the right at issUe. First, is the right relied on applicable or not? And secondly, if so, has the right relied on been infringed or not?

"Presentation of the general principles for reviewing conformity with a right

Another featUre of this part of the stUdy is therefore that it offers the reader a second approach based on the type of legal review: review of "applicability" and review of "conformity". In other words, it sets oUt, on the one hand, the general principles for reviewing the applicability of the rights concerned (first, protecting a freedom, then non–discrimination), and on the other, the general principles for reviewing conformity (in relation to freedom, then non–discrimination). In each instance, the implementation of these general principles in cases relating to sexUal orientation or gender identity is illUstrated by means of case law. The details of the cases (facts of the case and detailed solUtion reached by the CoUrt) will be dealt with in Part Two."

Part Two: What protection is offered by the Convention? Circumstantial solutions

Part Two will discUss the standard of protection Under the ECHR in matters relating to sexUal orientation and gender identity as it emerges from the jUdgments of the EUropean CoUrt of HUman Rights.

A theme-by-theme presentation

AlthoUgh they may have points of intersection, the issUes raised by sexUal orientation and gender identity are not exactly the same. The particUlar solUtions reached in these two fields will therefore be considered separately.

The main featUre of this part is that it offers the reader a theme-based approach, "theme by theme" or "field by field" (sexUal freedom, access to employment, jUstice, adoption, marriage etc). For each field, the leading jUdgment establishing the case law is specified, together with any possible case law applications deriving from it.

For each jUdgment, the principal facts of the case are set oUt and the relevant passages from the jUdgment as delivered by the CoUrt are reprodUced.

Presentation of common European legal rules, non-common legal rules

The level of protection offered by the Convention varies from one field to another. This variation depends mainly on whether the Convention grants Contracting States a narrow or a wide national margin of appreciation. The wider the margin, the more the CoUrt tends to consider the solUtion adopted as a matter of national discretion; the narrower it is, the less states are free to choose the solUtion they desire. In other words, some issUes meet with a standardised response at EUropean level (where a minimUm standard is set); others are left to the diversity of national solUtions (which may exceed or fall short of the Convention standard).

Another featUre of this part of the stUdy is therefore that it offers the reader a second approach based on the extent of the margin of appreciation granted to states in each field.

Part One

Grounds for relying on the ECHR in matters relating to sexual orientation and gender identity: general principles

The grounds for applicability of the European Convention on Human Rights in matters relating to sexual orientation and gender identity are of two main types: on the one hand, the rights safeguarding respect for a freedom, and on the other, the rights safeguarding respect for non-discrimination.

The fact is that an individual situation can always be viewed either from the angle of the freedom imperative or from that of the equality requirement. When the Court considers the case of a person prevented from fully exercising a freedom, it can nearly always examine the situationfrom two different perspectives, which can sometimes be combined: it can look at it in isolationin order to assess whether the restriction placed by the state on the freedom in question is in itself excessive and violates the freedom safeguarded by the Convention, independently of the situation of other individuals; or it can view the situation relative to other individual situationsin order to assess whether the state is creating a disparity in freedom which is comparatively unjustified and hence infringes the prohibition of discrimination also provided for under the Convention; or it can do both, because any arbitrary reduction of freedom vis-à-vis one indivi- dual constitutes at the same time a discriminatory reduction of freedom in relation to all the other individuals not subject to it. The European case law relating to sexual orientation and gender identity provides a perfect illustration of the possible choice between these two grounds of complaint.

Consequently, the logic governing the review conducted by the European Court of Human Rights from the angle of freedom, on the one hand, and from that of non-discrimination, on the other, is not exactly the same. The questions of applicability and conformity arise in different terms in either case. The general principles governing reliance on the grounds of freedom and non-discrimination will therefore be discussed successively in order to provide a clear unders- tanding of the links between them and how they apply specifically to the issues of sexual orientation and gender identity.

1

Reliance on the ground of freedom: Articles 6, 8, 10, 11, 13, 1P1… of the Conventions

We propose first of all to review the main freedoms relied on in cases relating to sexual orientation and gender identity. The aim is to outline the scope of each of the rights concerned and to consider more specifically the extent to which the freedoms set forth in the Convention are applicable to those questions.

Secondly, in order to ensure a clear understanding of the passages reproduced from judgments, we will describe in broad outline how, in general, the European Court of Human Rights reviews compliance with freedoms.[6]

Section 1. What are the main freedoms relied on?

In cases relating to sexual orientation and gender identity, the main freedom relied on by applicants is, first and foremost, Article 8 safeguarding the right to respect for private and family life and the home. Over time, the Court has come to approach these questions on the basis of other freedoms, and in particular the right to respect for property (Article 1 of Protocol N°. 1), the right to freedom of expression (Article 10), the right to freedom of assembly and association (Article 11), the right to a fair hearing (Article 6) and the right to an effective remedy (Article 13), and the right not to be subjected to torture or inhuman and degrading treatment (Article 3), etc[7]. The inventory proposed by this publication remains indicative.

§1 – Article 8: right to respect for private and family life

Article 8 of the Convention reads as follows:

"1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

[6] The specific solutions to questions relating to sexual orientation and gender identity will be addressed in Part Two.

[7] Article 5 guaranteeing the right to liberty and security may also be cited.[14] Peck v. United Kingdom, §57; Pretty v. United Kingdom, §61.

In order to define the scope of Article 8 it is necessary to consider successively the different concepts employed in this provision, and in particular those of private life, family life and the home."

A | Article 8: private life

There is no exhaustive definition of the notion of private life (*Niemietz v. Germany*, §29), but it is a broad concept.[8]

Since the Commission's decision of 18 May 1976 in the case of *X v. Iceland*,[9] it has generally been accepted that the right to respect for private life includes:

"the right to establish and to develop relationships with other human beings, especially in the emotional field for the development and fulfilment of one's own personality".

Private life includes, for example, the right to establish and develop relationships with other human beings and the outside world;[10] the physical and psychological or moral integrity of a person,[11] including medical treatment and psychiatric examinations[12] and mental health,[13] and aspects of an individual's physical and social identity (for example, the right to obtain information in order to discover one's origins and the identity of one's biological parents);[14] in connection with the seizure of documents needed to prove one's identity;[15] people's names;[16] a person's marital status as an integral part of his or her personal and social identity,[17] etc.

As regards more specifically cases on questions relating to sexual orientation and gender identity, the Court has held that the right to respect for private life includes a person's sexual life and that this is one of its most intimate aspects.

Private life and sexual orientation

***Kozak v. Poland*,**
2 March 2010, nº. 13102/02

As stated explicitly by the Court in the *Kozak v. Poland* case:

"Undoubtedly, sexual orientation, one of the most intimate parts of an individual's private life, is protected by Article 8 of the Convention."

In other words, the emotional and sexual relationship which unites a gay or lesbian couple falls unquestionably within the scope of respect for private life, as the Court has held in the following cases.[18]

[8] Peck v. United Kingdom, §57; Pretty v. United Kingdom, §61.

[9] D&R Nº. 5, p. 86

[10] Niemietz v. Germany, § 29

[11] X and Y v. Netherlands, § 22

[12] *Glass v. United Kingdom*, §70-72; Y.F. v. *Turkey*, §33, concerning a forced gynaecological examination; *Matter v. Slovakia*, §64; *Worwa v. Poland*, §80.

[13] Bensaid v. United Kingdom, § 47

[14] Mikulić v. Croatia, §53, and Odièvre v. France, §29.

[15] Smirnova v. Russia, §95-97[22] Peck v. United Kingdom, §57; Pretty v. United Kingdom, §61.

[16] Mentzen v. Latvia (dec.); Burghartz v. Switzerland, §24; Guillot v. France, §§21-22; Güzel Erdagöz v. Turkey, §43; Losonci Rose and Rose v. Switzerland, §26

[17] Dadouch v. Malta, § 48

[18] See also Laskey, Jaggard and Brown v. United Kingdom, § 36

***Antonio Mata Estevez v. Spain*,**
10 May 2001, nº. 56501/00, admissibility decision

In this case, the applicant lived together for over ten years with another man and they ran the household together, pooling their income and sharing expenditure.

"With regard to private life, the Court acknowledges that the applicant's emotional and sexual relationship related to his private life within the meaning of Article 8 § 1 of the Convention."

***Fernando dos Santos Couto v. Portugal*,**
21 September 2010, nº. 31874/07

In this case, the applicant received a suspended prison sentence of one year and six months for having committed two offences of homosexual acts with adolescents. Before ruling on the conformity of the applicant's conviction with the Convention, the Court commented on the question of the applicability of Article 8 in the following general terms [Unofficial translation]:

"32. The Court stresses from the outset that it is not in dispute that this case falls within the ambit of Article 8 of the Convention, concerning as it does a most intimate aspect of the applicant's private life. Article 14 is therefore applicable (*L. and V. v. Austria*, cited above, §36). It notes, however, that the parties are in disagreement regarding the existence of discriminatory treatment."

More broadly, the European Commission of Human Rights held that "established lesbian or homosexual relationships" fall primarily within the ambit of private life (decision of the Commission, 10 February 1990, *B. v. United Kingdom*, D&R N°. 64, p. 278).

***Dudgeon v. the United Kingdom*,**
22 October 1981, nº. 7525/76

In its famous *Dudgeon* judgment of 1981, the Court was called upon to review the legislation which made homosexual acts between consenting adults a criminal offence in Northern Ireland. The Court established the principle that, independently of any conviction, the penal prohibition of homosexuality was in itself an interference with the right to respect for private life.

"41. [...]the maintenance in force of the impugned legislation constitutes a continuing interference with the applicant's right to respect for his private life (which includes his sexual life) within the meaning of Article 8 par. 1 (art. 8-1). In the personal circumstances of the applicant, the very existence of this legislation continuously and directly affects his private life (see, mutatis mutandis, the Marckx judgment of 13 June 1979, Series A n°. 31, p. 13, par. 27): either he respects the law and refrains from engaging – even in private with consenting male partners – in prohibited sexual acts to which he is disposed by reason of his homosexual tendencies, or he commits such acts and thereby becomes liable to criminal prosecution."

The Court has applied the principle established in the *Dudgeon* judgment on several occasions, and in particular in the ***A.D.T.*** judgment, for example, which also concerned the case of a homosexual convicted for engaging in sexual relations with several men in a private context.

***A.D.T. v. the United Kingdom*,**
31 July 2000, nº. 35765/97

"23. The Court recalls that the mere existence of legislation prohibiting male homosexual conduct in private may continuously and directly affect a person's private life (see, as the most recent Court case-law, the *Modinos v. Cyprus* judgment of 22 April 1993, Series A n°. 259, p. 11, § 24). [...]"

The Court therefore considers any application submitted by a potential victim to be admissible, independently of any prosecution.

Private life and gender identity

***Schlumpf v. Switzerland*,**
8 January 2009, n°. 29002/06

In its *Schlumpf v. Switzerland* judgment of 8 January 2009, the Court summarised the general principles it has established in this field as follows [unofficial translation]:

"100. As the Court has had previous occasion to remark, the concept of 'private life' is a broad term not susceptible to exhaustive definition. It covers the physical and psychological integrity of a person (*X. and Y. v. the Netherlands*, judgment of 26 March 1985, Series A n°. 91, p. 11, §22), but can sometimes embrace aspects of an individual's physical and social identity (*Mikulić v. Croatia*, n°. 53176/99, §53, ECHR 2002-I). Elements such as, for example, gender identification, name, sexual orientation and sexual life fall within the personal sphere protected by Article 8 (*Dudgeon v. the United Kingdom*, 22 October 1981, Series A n°. 45, pp. 18–19, §41, *B. v. France*, 25 March 1992, Series A n°. 232-C, pp. 53-54, §63, *Burghartz*, cited above, p. 28, §24, *Laskey, Jaggard and Brown v. the United Kingdom*, 19 February 1997, *Reports* 1997-I, p. 131, §36, and *Smith and Grady v. the United Kingdom*, *n^os.* 33985/96 and 33986/96, §71, ECHR 1999-VI). As the Court has already noted [···], this provision also protects a right to personal development and the right to establish and develop relationships with other human beings and the outside world. Although no previous case has established as such any right to self–determination as being contained in Article 8 of the Convention, the Court considers that the notion of personal autonomy is an important principle under– lying the interpretation of its guarantees (*Pretty v. the United Kingdom*, n°. 2346/02, §61, ECHR 2002–III).

101. The very essence of the Convention being respect for human dignity and human freedom, the right of transsexuals to personal development and physical and moral security is guaranteed (*I. v. the United Kingdom* [GC], n°. 25680/94, §70, 11 July 2002, and *Christine Goodwin v. the United Kingdom* [GC], n°. 28957/95, §90, ECHR 2002-VI; see also, for cases concerning the situation of transsexuals, *Rees v. the United Kingdom*, judgment of 17 October 1986, Series A n°. 106, *Cossey v. the United Kingdom*, judgment of 27 September 1990, Series An°. 184, *Sheffield and Horsham v. the United Kingdom*, judgment of 30 July 1998, *Reports*1998-V, *Grant v. the United Kingdom*, n°. 32570/03, ECHR 2006-···, and, indirectly, X, Y and Z v. the United Kingdom, judgment of 22 April 1997, *Reports* 1997–II).

102. The Court reaffirms, moreover, that although the object of Article 8 is essentially that of protecting the individual against arbitrary interference by the public authorities, it does not merely compel the State to abstain from such interference: in addition to this primarily negative undertaking, there may be positive obligations inherent in effective respect for private or family life (*X and Y v. the Netherlands*, cited above, p. 11, §23, *Botta v. Italy*, 24 February 1998, *Reports* 1998-I, p. 422, §33, and *Mikulić*, cited above, §57).

103. The boundaries between the State's positive and negative obligations under Article 8 do not lend themselves to precise definition, but the principles applicable in the case of the former are comparable to those which are valid for the latter. In order to determine whether an obligation – positive or negative – exists, regard must be had to the fair balance which needs to be struck between the general interest and the interests of the individual; in both cases, the state enjoys a certain margin of appreciation (see, for example, *Keegan v. Ireland*,26 May 1994, Series A no 290, p. 19, §49, *B. v. France*, cited above, p. 47, §44, *Sheffield and Horsham*, cited above, p. 2026, §52, *Mikulić*, cited above, §57, and *Cossey*, cited above, p. 15, §37.).

104. With regard to the balancing of competing interests, the Court has underlined the particular importance of questions relating to one of the most intimate aspects of private life, namely a person's sexual definition (see, *mutatis mutandis*, for cases relating to homosexuals, *Dudgeon*, cited above, p. 21, §52, and *Smith and Grady*, cited above, §89)."

B | Article 8: family life

Generally, it is important to stress that the notion of family life is an autonomous concept:[19] the question of the existence or non-existence of "family life" is essentially a question of fact depending upon the real existence in practice of close personal ties.[20] The Court can thus take into account such factors as applicants living together, in the absence of any legal recognition of family life[21], or the length of the relationship. The notion of "family" under Article8 is not confined to relationships based on marriage, but may include other *de facto* "family ties" where parties are cohabiting without being married.[22] Even in the absence of cohabitation,there may be sufficient ties to constitute family life.[23]

As regards specifically LGBTI persons, it is recognised today that the right to respect for family life under Article 8 protects stable relationships between persons of the same sex or with a transgender person. This is a recent development which marks a significant change.

In addition, the right to respect for family life protects the parental relationship existing between a homosexual or transgender parent and any children. However, it does not guaranteethe right to found a family or the right to adopt.

The right to respect for family life protects stable same-sex relationships

The answer to the question of whether same-sex partners in a stable emotional and sexual relationship can claim to constitute "family life" within the meaning of Article 8 has evolved.

Schalk and Kopf v. Austria, *24 June 2010, n°. 30141/04*

It is henceforth established, following the 2010 Schalk and Kopf judgment, that the cohabitation of two persons of the same sex maintaining a stable relationship is no longer merely an aspect of their private life but also constitutes family life.

Examining the applicability of Article 14 taken in conjunction with Article 8, the Court sets out its current position as follows:

"87. The Court has dealt with a number of cases concerning discrimination on account of sexual orientation. Some were examined under Article 8 alone, namely cases concerning the prohibition under criminal law of homosexual relations between adults (see *Dudgeon v. the United Kingdom*, 22 October 1981, Series A n°. 45; *Norris v. Ireland*, 26 October 1988, Series A n°. 142;and *Modinos v. Cyprus*, 22 April 1993, Series A n°. 259) and the discharge of homosexuals from the armed forces (see *Smith and Grady v. the United Kingdom*, *n os.* 33985/96 and 33986/96, ECHR 1999 VI). Others were examined under Article 14 taken in conjunction with

[19] Marckx v. Belgium, §31.
[20] K. v. United Kingdom (dec).
[21] Johnston and Others v. Ireland, §56. [22]
Johnston and Others v. Ireland, §56. [23]
Kroon and Others v. Netherlands, §30.

Article 8. These included, inter alia, different age of consent under criminal law for homosexual relations (*L. and V. v. Austria*, *nos.* 39392/98 and 39829/98, ECHR 2003 I), the attribution of parental rights (*Salgueiro da Silva Mouta v. Portugal*, no. 33290/96, ECHR 1999 IX), permission to adopt a child (*Fretté v. France*, no. 36515/97, ECHR 2002-I, and *E.B. v. France*, cited above) and the right to succeed to the deceased partner's tenancy (*Karner*, cited above).

88. In the present case, the applicants have formulated their complaint under Article 14 taken in conjunction with Article 8. The Court finds it appropriate to follow this approach.

89. As the Court has consistently held, Article 14 complements the other substantive provisions of the Convention and its Protocols It has no independent existence since it has effect solely in relation to "the enjoyment of the rights and freedoms" safeguarded by those provisions. Although the application of Article 14 does not presuppose a breach of those provisions – and to this extent it is autonomous –, there can be no room for its application unless the facts at issue fall within the ambit of one or more of the latter (see, for instance, *E.B. v. France*, cited above, § 47; *Karner*, cited above, § 32; and *Petrovic v. Austria*, 27 March 1998, § 22, Reports 1998 II).

90. It is undisputed in the present case that the relationship of a same-sex couple like the applicants' falls within the notion of "private life" within the meaning of Article 8. However, in the light of the parties' comments the Court finds it appropriate to address the issue whether their relationship also constitutes "family life".

91. The Courts reiterates its established case-law in respect of different-sex couples, namely that the notion of family under this provision is not confined to marriage-based relationships and may encompass other de facto "family" ties where the parties are living together out of wedlock. A child born out of such a relationship is ipso jure part of that "family" unit from the moment and by the very fact of his birth (see *Elsholz v. Germany* [GC], no. 25735/94, § 43, ECHR 2000 VIII; *Keegan v. Ireland*, 26 May 1994, § 44, Series A no. 290; and also *Johnstonand Others v. Ireland*, 18 December 1986, § 56, Series A no. 112).

92. In contrast, the Court's case-law has only accepted that the emotional and sexual relationship of a same-sex couple constitutes "private life" but has not found that it constitutes "family life", even where a long-term relationship of cohabiting partners was at stake. In coming to that conclusion, the Court observed that despite the growing tendency in a number of European States towards the legal and judicial recognition of stable de facto partnerships between homosexuals, given the existence of little common ground between the Contracting States, this was an area in which they still enjoyed a wide margin of appreciation (see *Mata Estevez v. Spain* (dec.), no. 56501/00, ECHR 2001 VI, with further references). In the case of *Karner* (cited above, § 33), concerning the succession of a same-sex couples' surviving partner to the deceased's tenancy rights, which fell under the notion of "home", the Court explicitly left open the question whether the case also concerned the applicant's "private and family life".

93. The Court notes that since 2001, when the decision in *Mata Estevez* was given, a rapid evolution of social attitudes towards same-sex couples has taken place in many member States. Since then a considerable number of member States have afforded legal recognition to same-sex couples (see above, paragraphs 27-30). Certain provisions of EU law also reflect a growing tendency to include same-sex couples in the notion of "family" (see paragraph 26 above).

94. In view of this evolution the Court considers it artificial to maintain the view that, in contrast to a different-sex couple, a same-sex couple cannot enjoy "family life" for the purposes of Article 8. Consequently the relationship of the applicants, a cohabiting same-sex couple living in a stable de facto partnership, falls within the notion of "family life", just as the relationship of a different-sex couple in the same situation would.

95. The Court therefore concludes that the facts of the present case fall within the notion of "private life" as well as "family life" within the meaning of Article 8. Consequently, Article 14 taken in conjunction with Article 8 applies."

Aldeguer Tomás v. Spain,
14 June 2016, nº. 35214/09

The judgment delivered in the Aldeguer Tomás case in 2016 also demonstrates that the notion of family within the meaning of Article 8 is not limited to marriage-based relationships but may also encompass other de facto "family" ties where the parties are living together out of wedlock. The European court had no difficulty in finding that the applicant's relationship with his same-sex partner in an unmarried couple relationship for a dozen years until the latter died fell within the notion of "private life" and that of "family life". The legislation in force at the time did not allow them to get married, as the law legalising same-sex marriage in Spain entered into force three years after the death of the applicant's partner, so that the applicant was not granted a survivor's pension[24].

Vallianatos and Others v. Greece
7 November 2013, nos. 29381/09 and 32684/09

The *Vallianatos and Others v. Greece* judgment of 2013 provided an additional clarification, namely that the assessment of the stability of a relationship did not depend on the existence of cohabitation between the members of the couple.

"87. The Court notes, on the basis of the case file, that the applicants form stable same-sex couples. Furthermore, it is not disputed that their relationships fall within the notion of "private life" within the meaning of Article 8 of the Convention. The Court also points out that in its judgment in Schalk and Kopf (cited above, § 94), it considered that, in view of the rapid evolution in a considerable number of member States regarding the granting of legal recognition to same-sex couples, "it [would be] artificial to maintain the view that, in contrast to a different-sex couple, a same-sex couple could not enjoy 'family life' for the purposes of Article 8". Accordingly, the Court is of the view that the applicants' relationships in the present case fall within the notion of "private life" and that of "family life", just as would the relationships of different-sex couples in the same situation.It can see no basis for drawing the distinction requested by the Government between those applicants who live together and those who – for professional and social reasons – do not, since in the instant case the fact of not cohabiting does not deprive the couples concerned of the stability which brings them within the scope of family life within the meaning of Article 8."

Pajić v. Croatia
23 February 2016, nº. 68453/13

In the same vein, the Court recognised the existence of family life for a couple of two women who had been together for two years and who were not residing in the same country – one being a national of Bosnia and Herzegovina, the other of Croatia – and who, given the Croatian State's immigration policy, could only see each other on the occasion of regular trips made by the applicant (Ms PajiĆ) to Sisak in Croatia, where her partner (Ms D. B.) lived.

[24] On the other hand, the Court found that the Convention had not been violated in view of the particular context of marriage legislation in Spain and the transition from one legislation to another (see below).

"66. In the case at hand the Court notes that it is undisputed between the parties that the applicant has maintained a stable relationship with D.B. since October 2009. In particular, she regularly travels to Croatia and sometimes spends three months living together with D.B. in Sisak, as that is the only possibility open to her to maintain a relationship with D.B. due to the relevant immigration restrictions [...]. It should be also noted that they expressed a serious intention of living together in the same household in Croatia, and moreover starting a common business, in respect of which they instituted and duly pursued the relevant proceedings.

67. In these circumstances, the Court finds that the fact of not cohabiting with D.B. for the objectively induced reason related to the State's impugned immigration policy, does not deprive the applicant's relationship of the stability which brings her situation within the scope of family life within the meaning of Article 8 of the Convention.

68. The Court therefore concludes that the facts of the present case fall within the notion of "private life" as well as "family life" within the meaning of Article 8. Consequently, Article 14 taken in conjunction with Article 8 of the Convention applies."

***Taddeucci and McCall v. Italy*,**
30 June 2016, n°. 51362/09

The Court adopted the same solution in the *Taddeucci and McCall v. Italy* judgment, even thoughthe Italian law on family reunification had a restrictive interpretation of the concept of "family member" which, under that legislation, covered only married couples (and any children), excluding same-sex couples who did not have access to marriage in Italy. Notwithstanding, according to the Court, the bi-national same-sex couple formed by the two applicants did indeed have a "family life" within the meaning of Article 8 of the Convention, so that Article 14, in conjunction with this provision, was applicable to their situation (§ § 53-63).

The right to respect for family life protects pre-existing parental relationships

It is self-evident that if a person, whatever his or her sexual orientation or gender identity, is the father or mother of a child, Article 8 applies to that existing family life. This is the lesson to be drawn from the *Salgueiro da Silva Mouta* case.

***Salgueiro da Silva Mouta v. Portugal*,**
21 December 1999, n°. 33290/96

In this case, the Court stated that the decision by a court to withdraw a father's shared custody on the sole ground of his sexual orientation constituted interference with the right to respect for family life. In the words of the Court, such a decision...

"22 [...] constitutes an interference with the applicant's right to respect for his family life and thus attracts the application of Article 8. The Convention institutions have held that this provision applies to decisions awarding custody to one or other parent after divorce or separation (see the *Hoffmann v. Austria* judgment of 23 June 1993, Series A n°. 255-C, p. 58, § 29; see also *Irlen v. Germany*, application n°. 12246/86, Commission decision of 13 July 1987, *Decisions and Reports* 53, p. 225)."

The right to respect for family life protects the relationship between two same-sex partners and the child of one of them living together in the same household

In the cases *Gas et Dubois v. France* of 31 August 2010 (n°. 25951/07) and *X. and Others v. Austria* of 19 February 2013 (n°. 19010/07), the Court held that the notion of "family life" includes the relationship between two female partners and the child of one of them living together in the same household, whatever the circumstances of the child's birth, ie whether he or she was conceived by means of medically assisted procreation (*Gas et Dubois*) or was born outside marriage from a relationship with a father who recognised the child then left sole parental authority to the child's mother (*X. and Others v. Austria*).

***X. and Others v. Austria*,**
19 February 2013, n°. 19010/07

"95. [...] the Court found in its admissibility decision in *Gas and Dubois v. France* (n°. 25951/07, 31 August 2010) that the relationship between two women who were living together and had entered into a civil partnership, and the child conceived by one of them by means of assisted reproduction but being brought up by both of them, constituted "family life" within the meaning of Article 8 of the Convention.

96. The first and third applicants in the present case form a stable same sex couple. They have been cohabiting for many years and the second applicant shares their home. His mother and her partner care for him jointly. The Court therefore finds that the relationship between all three applicants amounts to "family life" within the meaning of Article 8 of the Convention."

The right to respect for family life protects a transgender person in his/her relationship with his/her partner and in the parental relationship with his/her partner's child

***X, Y and Z v. the United Kingdom*,**
22 April 1977, n°. 21830/93

In this judgment, which found no violation of Article 8 (right to respect for private and family life), the Court nevertheless recognised the existence of family life between X, a post-operative transgender man, Y, his partner, and Z, the child born to his partner (following artificial insemination by donor). The Court's position regarding the applicability of Article 8 in this case was as follows.

"36. The Court recalls that the notion of "family life" in Article 8 (art. 8) is not confined solely to families based on marriage and may encompass other de facto relationships (see the *Marckx v. Belgium* judgment of 13 June 1979, Series A n°. 31, p. 14, para. 31; the *Keegan v. Ireland* judgment of 26 May 1994, Series A n°. 290, p. 17, para. 44; and the *Kroon and Others v. the Netherlands* judgment of 27 October 1994, Series A n°. 297-C, pp. 55-56, para. 30). When deciding whether a relationship can be said to amount to "family life", a number of factors may be relevant, including whether the couple live together, the length of their relationship and whether they have demonstrated their commitment to each other by having children together or by any other means (see, for example, the above-mentioned *Kroon and Others* judgment, loc. cit.).

37. In the present case, the Court notes that X is a transsexual who has undergone gender reasignment surgery. He has lived with Y, to all appearances as her male partner, since 1979. The couple applied jointly for, and were granted, treatment by AID to allow Y to have a child. X was involved throughout that process and has acted as Z's "father" in every respect since the birth (see paragraphs 14–16 above). In these circumstances, the Court considers that de facto family ties link the three applicants.

It follows that Article 8 is applicable (art. 8)."

The right to respect for family life guarantees neither the right to found a family nor the right to adopt

It emerges from the case law that the right to respect for family life guarantees neither the right to found a family nor the right to adopt.[25]

E.B. v. France,
22 January 2008, n°. 43546/02

In this case the Court was asked to review the rejection of an application for authorisation to adopt a child by an unmarried woman who was in a stable relationship with another woman. On the specific question of whether or not this was covered by the right to respect for family life within the meaning of Article 8 taken alone, the Court summarised its position of principle with regard to adoption as follows:

"41. The Court, noting that the applicant based her application on Article 14 of the Convention, taken in conjunction with Article 8, reiterates at the outset that the provisions of Article 8 do not guarantee either the right to found a family or the right to adopt (see *Fretté*, cited above, § 32). Neither party contests this. The right to respect for "family life" does not safeguard the mere desire to found a family; it presupposes the existence of a family (see *Marckx v. Belgium*, judgment of 13 June 1979, Series A n°. 31, § 31), or at the very least the potential relationship between, for example, a child born out of wedlock and his or her natural father (see *Nylund v. Finland* (dec.), n°. 27110/95, ECHR 1999-VI), or the relationship that arises from a genuine marriage, even if family life has not yet been fully established (see *Abdulaziz, Cabales and Balkandali v. the United Kingdom,* judgment of 28 May 1985, Series A n°. 94, § 62), or the relationship that arises from a lawful and genuine adoption (see *Pini and Others v. Romania*, *n^os.* 78028/01 and 78030/01, § 148 , ECHR 2004-V).

42. Nor is a right to adopt provided for by domestic law or by other international instruments, such as the Convention on the Rights of the Child, adopted by the United Nations General Assembly on 20 November 1989, or the Hague Convention of 29 May 1993 on the Protection of Children and Co-operation in Respect of International Adoption (see paragraphs 30–31 above).

43. The Court has, however, previously held that the notion of "private life" within the meaning of Article 8 of the Convention is a broad concept which encompasses, inter alia, the right to establish and develop relationships with other human beings (see *Niemietz v. Germany*, judgment of 16 December 1992, Series A n°. 251-B, p. 33, § 29), the right to "personal development" (see *Bensaid v. the United Kingdom*, n°. 44599/98, § 47, ECHR 2001-I) or the right to self-determination as such (see *Pretty v. the United Kingdom*, n°. 2346/02, § 61, ECHR 2002-III). It encompasses

[25] It should be noted, however, that the Court has ruled in cases concerning heterosexual couples that the notion of "family life", like that of "private life", incorporates the right to respect for the decision of a couple to become genetic parents (Dickson v. United Kingdom, §66). The right of a couple to make use of medically assisted procreation accordingly comes within the ambit of Article 8, as an expression of private and family life (S.H. and Others v. Austria, §60).

elements such as names (see *Burghartz v. Switzerland*, judgment of 22 February 1994, SeriesA n°. 280-B, p. 28, § 24), gender identification, sexual orientation and sexual life, which fall withinthe personal sphere protected by Article 8 (see, for example, *Dudgeon v. the United Kingdom*,judgment of 22 October 1981, Series A n°. 45, pp. 18–19, § 41, and *Laskey, Jaggard and Brown v. the United Kingdom*, judgment of 19 February 1997, Reports of Judgments and Decisions 1997–I, p. 131, § 36), and the right to respect for both the decisions to have and not to have a child (see *Evans v. the United Kingdom* [GC], n°. 6339/05, § 71, ECHR 2007-...).

44. Admittedly, in the instant case the proceedings in question do not concern the adoption of a child as such, but an application for authorisation to adopt one subsequently. The case therefore raises the issue of the procedure for obtaining authorisation to adopt rather than adoption itself. However, the parties do not contest that in practice authorisation is a precondition for adopting a child.

45. It should also be noted that the applicant claimed to have been discriminated against on the ground of her avowed homosexuality, resulting in a violation of the provisions of Article 14 of the Convention taken in conjunction with Article 8.

46. The Court is not therefore called upon to rule whether the right to adopt, having regard, inter alia, to developments in the legislation in Europe and the fact that the Convention is a living instrument which must be interpreted in the light of present–day conditions (see, in particular, *Johnston and Others v. Ireland*, judgment of 18 December 1986, Series A n°. 112, pp. 24–25, § 53), should or should not fall within the ambit of Article 8 of the Convention taken alone."

C | Article 8: the home

Generally, "home" is also an autonomous concept and must be understood in a broad sense given that the corresponding term in the French version of Article 8, "*domicile*", has wider connotations.[26] This notion depends on the factual circumstances, and in particular the existence of sufficient and continuous links with a specific place.[27] It is not confined to legally established residences,[28] and an applicant does not necessarily have to own the "home" for the purposes of Article 8.

With regard specifically to sexual orientation and gender identity, cases brought before the Court have concerned the question of the right to succeed to a tenancy following the death of one of the members of a same–sex couple.

Kozak v. Poland,
2 March 2010, n°. 13102/02

In another, very similar case, the Court applied Article 8 on the dual ground of respect for private life and the home. Hence, the refusal to recognise the right of one of the partners of a same–sex couple to succeed to a tenancy following his partner's death concerns both his private life and his home.

"83. The Court notes that the applicant's complaint relates to the interpretation and application in his case of the legal term "*de facto* marital cohabitation" by the Polish courts in a manner resulting in a difference of treatment between heterosexual and homosexual couples in respect of succession to a tenancy after the death of a partner. Undoubtedly, sexual orientation,

[26] Niemietz v. Germany, §30.

[27] Prokopovich v. Russia, §36; Gillow v. United Kingdom, §46; McKay-Kopecka v. Poland (dec).

[28] Buckley v. United Kingdom, §54; Prokopovich v. Russia, §36.

one of most intimate parts of an individUal's private life, is protected by Article 8 of the Convention (see *Smith and Grady v. the United Kingdom nos.* 33985/96 and 33986/96, §§ 71 and 89, ECHR 1999-VI; *S.L. v. AUstria* n°. 45330/99, § 37, ECHR 2003-I; and *Salgueiro da Silva MoUta v. PortUgal* n°. 33290/96, §§ 23 and 28, ECHR 1999-IX).

84. FUrthermore, leaving aside the qUestion whether the applicant, as he maintained, lived in the flat Upon T.B.'s death or, as the Government argued, at that time resided elsewhere (see paragraphs 11–13 above), it is Uncontested that he was registered by the authorities as a permanent resident of that flat from at least May 1989 and lived there when the sUccession proceedings were pending (see paragraphs 6, 23 and 38). Accordingly, the facts of the case also relate to the right to respect for his "home" within the meaning of Article 8 (see *Karner*, cited above, § 33).

85. In view of the foregoing, the CoUrt holds that Article 14 of the Convention applies in the present case and rejects the Government's objection on compatibility *ratione materiae*.

It conseqUently declares the complaint admissible."

§2 – Article 1 of Protocol No 1: the right to protection of property

Article 1 of Protocol No 1 to the Convention reads as follows:

"Every natUral or legal person is entitled to the peacefUl enjoyment of his possessions. No one shall be deprived of his possessions except in the pUblic interest and sUbject to the conditions provided for by law and by the general principles of international law.

The preceding provisions shall not, however, in any way impair the right of a State to enforce sUch laws as it deems necessary to control the use of property in accordance with the general interest or to secUre the payment of taxes or other contribUtions or penalties."

The object of this Convention provision is to safeguard the right to property. The notion of "possessions" is broadly construed. Traditionally it protects the ownership of tangible assets, both movable and immovable, bUt also a whole range of property or pecUniary rights: it covers,for instance, intangible assets sUch as intellectUal property rights, rights attached to shares or the carrying on of a commercial activity, etc, claims, sUch as, for example, a contractUal claim established by an arbitral award or even a potential claim which can be legitimately expected to be realised, sUch as, for example, a claim for damages. It is important to note that contribUtory social benefits (contribUtory in the sense that they are provided more or less directly in exchange for the payment of a contribUtion) fall within the scope of Article 1 of Protocol No 1 (and conseqUently also that of Article 14 taken in conjUnction with it) and that non-contribUtory social benefits (based on the principle of collective solidarity) fall within the scope of Article 14 taken in conjUnction with Article 1 of Protocol No 1 (they are not protected Under the right taken alone).

In matters relating to the qUestion of sexUal orientation, certain financial issUes have been addressed from the angle of Article 14 taken in conjUnction with Article 1 of Protocol No 1, sUch as, for example, in the *J. M. v. United Kingdom* case of 28 September 2010, the payment of child maintenance or in Aldeguer Tomás v. Spain of 14 JUne 2016, the payment of a sUrvivor's pension.

J. M. v. the United Kingdom,
28 September 2010, n°. 37060/06

In this case the CoUrt declared itself competent to review the United Kingdom legislation on the maintenance payable where a coUple with children separate: the legislation reqUired the non-resident parent to pay child maintenance to the parent with care as a contribUtion to the cost of the

children's upbringing and allowed the non-resident parent to apply for a reduction in the amount payable when he or she had formed a new relationship – whether or not this involved marriage – but only if he or she was living with a person of the opposite sex and not, as in the case in point, with a person of the same sex.

The domestic court disputed that the legal obligation on the non-resident parent to pay maintenance to the parent with care fell within the ambit of Article 1 of Protocol No 1. The Court did not share this view and held this provision to be applicable: in excluding the facts of the case from the scope of Article 1 of Protocol No 1 when required to adjudicate on a complaint of discrimination, the domestic court had given an unduly narrow interpretation of this provision. The Court also pointed out that, in the area of social benefits, a claim may fall within the ambit of Article 1 of Protocol N°. 1[29] so as to attract the protection of Article 14 of the Convention even in the absence of any deprivation of, or other interference with, the existing possessions of the applicant. Its reasoning was as follows:

"46. [...] As is apparent from the case-law of the Court, in particular in the context of entitlement to social security benefits, a claim may fall within the ambit of Article 1 of Protocol N°. 135 so as to attract the protection of Article 14 of the Convention even in the absence of any deprivation of, or other interference with, the existing possessions of the applicant (see, for example, Stec and Others v. the United Kingdom (dec.) [GC], *n os.* 65731/01 and 65900/01, § 39, ECHR 2005-X; Carson and Others [GC], n°. 42184/05, § 63, ECHR 2010-).

47. As the applicant noted in her submissions to the Court, child maintenance payments were at issue in the Commission's decision in the Burrows case. The applicant in that case complained, inter alia, under Article 1 of Protocol N°. 1 taken alone and in conjunction with Article 14. Regarding the former, the Commission observed that the second sentence of that provisions was "primarily concerned with formal expropriation of assets for a public purpose, and not with the regulation of rights between persons under private law unless the State lays hands – or authorises a third party to lay hands – on a particular piece of property for a purpose which is to serve the public interest". It therefore doubted that there had been a deprivation of property. However, in light of the State's active role in the process, and the fact that Mr Burrows' former wife was required to seek child support from him or lose her entitlement to social security benefits, it assumed that there had been an interferencewith the applicant's right to peaceful enjoyment of his possessions. In that regard, the Commission observed that the legislation in question was a practical expression of a policy relating to the economic responsibilities of parents who did not have custody of theirchildren and compelled an absent parent to pay money to the parent with such custody. It was an example of legislation governing private law relations between individuals, which determined the effects of these relations with respect to property and in some cases, compelleda person to surrender a possession to another. The Commission went on to declare inadmissiblethe complaint of a violation of Article 1 of Protocol N°. 1 read on its own, on the groundsthat the interference with the applicant's possessions was not disproportionate to the legitimateaim served.

[29] It took the view that this provision was primarily concerned with the expropriation of assets for a public purpose and not with the enforcement of a personal obligation of the absent parent, and that it would have been artificial to view child support payments as a deprivation of the absent parent's possessions. For more information: Frédéric EDEL, The prohibition of discrimination under the European Convention on Human Rights, Council of Europe Publishing, Collection "Human rights files", N°. 22, 2010 (ISBN 978-92-871-6817-7), p. 16-38. https://book.coe.int/eur/en/human-rights-files/4478-the-prohibition-of-discrimination-under-the-european-convention-on-human-rights-human-rights-files-no-22.html

As to the applicant's complaint of discrimination on the ground of his status as a separated parent, the Commission examined the complaint, accepting that it fell within the ambit of Article 1 of Protocol N°. 1, but ultimately rejected it as disclosing no discriminatory treatment. The Court sees no reason to adopt a different approach to the applicability of Article 14 in the present case.

48. Moreover, the Court has also had occasion to consider another aspect of the United Kingdom's child maintenance system, in the case of P.M. v. the United Kingdom, n°. 6638/03, 19 July 2005. At issue in that case was the tax allowance available under domestic tax legislation at that time that was granted to separated and divorced persons with maintenance liabilities. The Government accepted that the situation fell within the ambit of Article 1 of Protocol N°. 1. While no issue of taxation arises here, the Court considers that the sums which the applicant paid out of her own financial resources towards the upkeep of her children are to be considered as "contributions" within the meaning of the second paragraph of Article 1, payment of which was required by the relevant legislative provisions and enforced through the medium of the CSA (see, mutatis mutandis, Darby v. Sweden, 23 October 1990, § 30, Series A n°. 187, and Van Raalte v. the Netherlands, 21 February 1997, § § 34–35, Reports of Judgments and Decisions 1997 I).

49. The Court therefore finds that the situation falls within the ambit of this provision and that Article 14 is applicable."

The Court deemed it unnecessary to consider whether the case also came within the ambit of Article 8 of the Convention.

Aldeguer Tomás v. Spain,
14 June 2016, n°. 35214/09

In the *Aldeguer Tomás v. Spain* case of 14 June 2016, the dispute referred to the European Court of Human Rights concerned the refusal of the Spanish social security authorities to pay a survivor's pension to the surviving member of an unmarried same-sex couple, since the law legalising same-sex marriage in Spain was only implemented three years after the partner's death. The applicability of Article 14 in conjunction with Article 1 of Additional Protocol N°. 1 was not disputed (§ 78)[30]. The applicability of Article 14 in the area of social benefits has become a classic case law since the judgments in *Gaygusuz* [31], *Wessels-Bergervoet* [32], *Willis* [33], *Koua Poirrez* [34], *Stec and Others*[35].

§3 –Article 10: the right to freedom of expression

Article 10 of the Convention reads as follows:

"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.

[30] However, the Court did not find the violation of Article 14 in conjunction with Article 1 of Additional Protocol N°. 1 (as well as with Article 8), in view of the specific context of previous marriage legislation and the margin of appreciation to determine the pace of legislative reforms in the field of legal recognition of same-sex couples and the specific status to be conferred on them: see § § 79–91.

[31] Gaygusuz v. Austria, 16 September 1996, § 41

[32] Wessels-Bergervoet v. the Netherlands, 4 June 2002.

[33] Willis v. the United Kingdom, 11 June 2002.

[34] Koua Poirrez v. France, 30 September 2003, § § 36–42; the Court explicitly considered that a non-contributory social benefit fell within the scope of Article 14 taken in conjunction with Article 1 of Protocol N°. 1.

[35] Stec and Others v. the United Kingdom, 12 April 2006, § 53.

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 the rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

Article 10 of the Convention guarantees everyone the opportunity to have and express an opinion, be it a minority or even a shocking one. In its *Handyside v. the United Kingdom* landmark judgment of 7 December 1976 (distribution of small red books intended for primary school pupils, one tenth of which had sex education content), the European Court of Human Rights stated that freedom of expression constituted "one of the essential foundations of (a democratic society), one of the basic conditions for its progress and each individual's self-fulfilment", §49). The European Court considered that freedom of information was applicable not only to the ideas regarded as "inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the Stateor any sector of the population". The Court also stated that "democracy thrives on freedomof expression" (*United Communist Party of Turkey and Others v. Turkey*, 30 Jan. 1998, § 57).

According to the Court, "Article 10 [...] does [not] distinguish between the various forms of expression" (*Müller and Others v. Switzerland*, 24 May 1988, § 27). The freedom of expression guaranteed by Article 10 concerns all types of expression: whatever the nature of the information – political, cultural, economic, professional, commercial, artistic – as long as it is made public through a material medium. For the European Court, Article 10 includes freedom of political expression, freedom of artistic expression (*Müller and Others*, cited above, § 27), but also commercial speech (*Markt intern. Verlag v. Germany*, 20 November 1989, § 26) because "no distinction is made in [the Convention] according to whether the type of aim pursued is profit-making or not" (*Casado Coca v. Spain*, 28 March 1994, § 35 ; *Jacubowski v. Germany*,23 June 1994, § 25).

The freedom of expression guaranteed by Article 10 concerns not only the content of information and ideas (the information content), but also the free flow of information media (speech, writing, sounds, images). Article 10 protects in particular the freedom of the press, which applies to any natural or legal person (including press companies).

The *Bayev and Others v. Russia* judgment of 20 June 2017 shows that Article 10 explicitly protects expressions relating to sexual orientation.

Bayev and Others v. Russia,
20 June 2017, nos. 67667/09, 44092/12 and 56717/12

In this case, the applicants, who were gay rights activists, were sentenced to administrative fines for having organised a demonstration against a law prohibiting the promotion of homosexuality among minors. The legislation in question had been adopted first at regional level and then at federal level. Before the European Court and in the light of Article 10, the applicants complained about the ban on any public statement on sexual minorities' identity, rights and social status. The Court examined, in particular, this ban on public statements relating to the identity, rights and social situation of sexual minorities in the light of Article 10 of the Convention protecting freedom of expression. The Court considered that the central issue in this case was the very existence of a legislative prohibition on promotion of homosexuality or non-traditional sexual relations among minors. In the Court's opinion, it should be noted that this prohibition would probably have prevented activities in which the applicants might have wished to engage, in particular the defence of the LGBTI rights, even before any administrative measures were taken against them. The chilling

effect of a legislative provision or policy may in itself constitUte an interference with freedom of expression. However, since the legislative provisions complained of were actUally enforced against the applicants in the context of administrative proceedings, the CoUrt was not reqUired to establish whether their general impact on the lives of the persons concerned constitUted in itself interference.

§4 – Article 11: the right to freedom of assembly and association

Article 11 of the Convention reads as follows:

"1. Everyone has the right to freedom of peacefUl assembly and to freedom of association with others, inclUding the right to form and to join trade unions for the protection of his interests.

2. No restrictions shall be placed on the exercise of these rights other than sUch as are prescribed by law and are necessary in a democratic society in the interests of national secUrity or pUblic safety, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others. This Article shall not prevent the imposition of lawfUl restrictions on the exercise of these rights by members of the armed forces, of the police or of the administration of the State."

In the *Rassemblement jUrassien v. Switzerland* case of 10 October 1989 (application n°. 8191/78, D & R N°. 17, p. 105, §3), the Commission noted that:

> "… The right of peacefUl assembly stated in this article is a fUndamental right in a democratic society and, like the right to freedom of expression, is one of the foUndations of sUch a society (Handyside case, jUdgment of 7 December 1976, series A, para. 49). As sUch this right covers both private meetings and meetings in pUblic thoroUghfares."

In its decision of 16 JUly 1980 in the case of *Christians against Racism and Fascism v. United King-dom* (application n°. 8840/78, D & R No 21, p. 162, §4), the Commission made the following point:

> "The freedom of peacefUl assembly covers not only static meetings, bUt also pUblic processions. It is moreover a freedom capable of being exercised not only by the individUal participants of sUch demonstration, bUt also by those organising it, inclUding a corporate body sUch as the applicant association."

To draw pUblic attention to the discrimination sUffered by LGBTI persons and call for greater tolerance towards them, LGBTI hUman rights defenders regularly organise demonstrations in major cities. These "pride parades" – gay pride, lesbian and gay pride or LGBTI pride – have givenrise to a body of case law protecting LGBTI persons Under Article 11.

Bączkowski and others v. Poland,
3 May 2007, n°. 1543/06

Alekseyev v. Russia,
21 October 2010, n^{os}. 4916/07, 25924/08 and 14599/09,

Identoba and Others v. Georgia,
12 May 2015, n°. 73235/12

Provided these demonstrations are peacefUl, the applicability of Article 11 is not in doUbt, as in the cases of *Bączkowski and Others v. Poland* of 3 May 2007 and *Alekseyev v. RUssia* of 21 October2010 or Identoba and Others v. Georgia of 12 May 2015 (see below). What emerges from these casesis that Article 11 UnqUestionably protects the right of LGBTI persons to openly proclaim their sexUal orientation or gender identity by participating in demonstrations, in the same way as any other person.

It should be noted that inaction by the state may constitute interference with the exercise of the right to freedom of association: this is the case where it allows a demonstration to take place and therefore abstains from any interference, but takes no appropriate measures against any acts of violence which might be committed by opponents of the demonstrators, as in the case of Identoba and Others v. Georgia of 12 May 2015 (see below).

§5 – Articles 6 and 13: the right to a fair hearing and the right to an effective remedy

The freedoms set forth in Articles 6 and 13 are of a specific kind in that they correspond to procedural rights and are characteristic of the rights enjoyed by an individual in a state governed by the rule of law.

A | Article 6: the right to a fair hearing

Article 6 of the Convention safeguards the right to a fair hearing. It reads as follows:

"1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interests of morals, public orderor national security in a democratic society, where the interests of juveniles or the protectionof the private life of the parties so require, or to the extent strictly necessary in the opinion ofthe court in special circumstances where publicity would prejudice the interests of justice.

2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.

3. Everyone charged with a criminal offence has the following minimum rights: (a) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him; (b) to have adequate time and facilities for the preparation of his defence; (c) to defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require; (d) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him; (e) to have the free assistance of an interpreter if he cannot understand or speak the language used in court."

In substance – although the Court itself refrains from presenting the situation in this way – Article 6 is currently seen as a principle which can be applied to all judicial proceedings, with the exception of certain matters which are excluded from its scope by case law, since it is impossible to class them as either civil or criminal matters.

Civil matters are construed very broadly. They include "all proceedings the result of which is decisive for private rights and obligations"[36]. They embrace everything which continental law designates as private law, irrespective of the character of the legislation governing the matter – civil, commercial, administrative law etc. – and of the authority invested with jurisdiction in the matter – civil or criminal court[37], administrative tribunal[38], constitutional court[39], professional

[36] HKönig v. Germany, 28 June 1978, §90.

[37] Perez v. France, 12 February 2004, § § 57–75 (in connection with the lodging of a civil-party complaint during the criminal investigation).

[38] Ringeisen v. Austria, 16 July 1971, §94.

[39] Ruiz-Mateos v. Spain, 23 June 1993, §§57-60.

tribunal[40], or even a non-judicial administrative body[41]. Civil proceedings thus comprise disputes relating to: civil status[42], family law[43], private property[44], etc. The matters excluded from the ambit of Article 6 are proceedings involving sovereign state powers or rights and obligations of a political nature; but they are tending gradually to shrink. Broadly speaking, the matters in question are (non-criminal) tax cases, cases relating to immigration control measures, cases relating to political representation, both national and local, and cases relating to certain public employees participating in the exercise of public authority and the safeguarding of the state's general interests, and only as regards recruitment, career advancement and the termination of employment. In general, the criterion for defining the limits of the scope of Article 6 is whether or not the applicant's action has pecuniary implications[45]. If so, the proceedings in question are considered a civil matter.

Like "civil" cases, the concept of "criminal" cases has been endowed with an autonomous European meaning regardless of how it is defined in the domestic law of member states; it has been construed broadly, thanks to essentially substantive definition by the European Court. The classification in domestic law is a preliminary criterion which in some cases may be enough for it to be concluded that a criminal charge is being determined; however, the domestic definition is only a partial indication. The truly relevant criteria for determining whether a case is criminal are, on the one hand, the nature of the offence – that is, the contravention of a general rule whose purpose is both deterrent and punitive – and/or, on the other hand, the seriousness of the penalty incurred. Deprivation of liberty (or an extension of that deprivation) is obviously a pointer to the criminal nature of an offence[46], as are large fines and the punitive or deterrent effect of a penalty[47]. The nature of the body ordering the penalty is of no consequence; the European Court has extended the criminal sphere to encompass administrative penalties, including disciplinary and tax penalties. Ultimately, proceedings which do not fall within the ambit of Article 6 under its criminal head are few and far between.

As may be seen from a reading of Article 6, it contains a whole series of guarantees. These have been defined in more detail by case law, which has significantly enriched their content. Very broadly speaking, Article 6 essentially guarantees the right of access to a court, the right to obtain a judicial decision, the right to respect for the principle of equality of arms and the adversarial principle, and the rights to an independent and impartial tribunal, a public hearing, expeditious proceedings and the execution of judicial decisions; this article also offers guarantees for the accused, and in particular the right to presumption of innocence and the rights of the defence.

In matters relating to LGBTI persons, the procedural guarantees which the Court has had occasion to employ concern mainly the right to proper examination of submissions, arguments and evidence adduced relating to transgender person's gender identity (*Van Kück v Germany*, 12 June 2003) and the right to a public hearing on the question of gender reassignment (*Schlumpf v. Switzerland*,8 January 2009)[48].

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[40] König v. Germany, 28 June 1978, §90; Le Compte, Van Leuven and De Mayere v. Belgium, 23 June 1981, §§41-51.

[41] Body so classified under national law. For example: Rolf Gustafson v. Sweden, 1 July 1997, §§35-42.

[42] For example: H v. United Kingdom, 8 July 1987; Rasmussen v. Denmark, 28 November 1984.

[43] For example: Keegan v. Ireland, 26 May 1994, §57.

[44] For example: Sporrong and Lönnroth v. Sweden, 23 September 1982, §§79-83.

[45] One typical example being Editions Périscope v. France, 26 March 1992, §40.

[46] Engel and Others v. Netherlands, 8 June 1976, §82; Campbell and Fell, 28 June 1984, §73.

[47] For example, A.P., M.P. and T.P. v. Switzerland, 9 August 1997.

[48] In the area of homosexuality, the Fretté v. France judgment of 26 February 2002 found a violation of Article 6 pursuant to the Krees v. France case law, but the violation concerned a point unrelated to the question of the applicant's homosexuality, namely the failure to communicate the reporting judge's report.

The implementation of these two guarantees in cases relating to transgender issues enables the European Court of Human Rights to counter certain prejudices which national judges may have on this matter.

***Van Kück v. Germany*,**
12 June 2003, application n°. 35968/97

In her application, Ms van Kück criticised the decisions by the German courts rejecting her claims for reimbursement of the cost of the gender reassignment treatment she had undergone and the judicial proceedings which had led to those decisions. In particular, she alleged a violation of her right to a fair hearing within the meaning of Article 6 § 1.

The Court held that Article 6 was applicable to the manner in which the German courts had examined the submissions, arguments and evidence adduced in relation to the applicant's gender identity. The Court considered that it was justified in conducting a review on this point when judicial proceedings as a whole appeared arbitrary.

This ground for review by the Court is quite broad in scope.

The general approach adopted by the Court is summarised as follows:

"46. The Court reiterates that it is in the first place for the national authorities, and notably the courts, to interpret domestic law and that it will not substitute its own interpretation for theirs in the absence of arbitrariness (see, mutatis mutandis, Ravnsborg v. Sweden, judgment of 23 March 1994, Series A n°. 283-B, pp. 29-30, § 33; Bulut v. Austria, judgment of 22 February 1996, Reports of Judgments and Decisions 1996-II, pp. 355-56, § 29; and Tejedor García v. Spain, judgment of 16 December 1997, Reports 1997-VIII, p. 2796, § 31).

47. Moreover, it is for the national courts to assess the evidence they have obtained and the relevance of any evidence that a party wishes to have produced. The Court has nevertheless to ascertain whether the proceedings considered as a whole were fair as required by Article 6 § 1 (see Mantovanelli v. France, judgment of 18 March 1997, Reports 1997-II, pp. 436-37, § 34, and Elsholz v. Germany [GC], n°. 25735/94, § 66, ECHR 2000-VIII).

48. In particular, Article 6 § 1 places the "tribunal" under a duty to conduct a proper examination of the submissions, arguments and evidence adduced by the parties, without prejudice to its assessment of whether they are relevant to its decision (see Van de Hurk v. the Netherlands, judgment of 19 April 1994, Series A n°. 288, p. 19, § 59).

49. As to the issue of transsexualism, the Court observes that, in the context of its case-law on the legal status of transsexuals, it has had regard, inter alia, to developments in medical and scientific thought."

In the Court's opinion, the German courts should have requested further details from a medical expert and should not have taken the view that the decision to undergo gender reassignment was made without due consideration. It considered that the proceedings as a whole did not satisfy the requirements of fairness (see below).

B | Article 13: the right to an effective remedy (and other related articles)

Article 13 of the Convention safeguards the right to an effective remedy. It reads as follows:

"Everyone whose rights and freedoms as set [...] in this Convention are violated shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity."

The right to an effective remedy is a complementary right which has no independent existence. It can be relied on in conjUnction with another right protected by the Convention. For the pUrpose of interpreting Article 13, the following general principles shoUld be taken into accoUnt: any person with a plausible claim to have been the victim of a violation of the rights recognised in the Convention mUst have access to a remedy before a national coUrt in order to have his or her case decided and, if appropriate, obtain redress; the authority mentioned in Article 13 does not have to be a jUdicial body, bUt, if it is not, its powers and the guarantees it offers are taken into accoUnt in assessing the effectiveness of the remedy exercised before it; the totality of the remedies available under domestic law may meet the reqUirements of Article 13 even if none of them taken separately satisfies them; Article 13 does not reqUire the existence of a remedy allowing the laws of a Contracting Party to be criticised before a national authority as being contrary in themselves to the Convention or eqUivalent national legal provisions. Being intended to guarantee a remedy before a national authority to anyone whose rights Under the Convention have been violated, Article 13 is applicable even in the absence of any violation of those rights. It is sUfficient to be able to make an arguable case for the violation of a right. Case law reqUires the remedies available under domestic law to be effective.

The right to an effective remedy guaranteed by Article 13 sometimes overlaps with other eqUivalent guarantees, and particUlarly that of Article 6 § 1, which has been interpreted as granting a right of access to the coUrts to anyone wishing to have access to them for the determination of his or her civil rights or obligations. In deciding cases relating to sexUal orientation and gender identity, the CoUrt has relied more on Article 13 taken in conjUnction with Article 8 (eg in the *Smith and Grady*[49] case) or Article 11 (eg in the *Baczkowsi and Others v. Poland* and *Alekseyev v. RUssia*[50]cases) than on Article 6 § 1. Article 6 § 1 has been applied more to the qUestions of the right to proper examination of sUbmissions, arguments and evidence or the pUblic natUre of hearings in cases concerning gender identity (eg in the *Kück v Germany* and *SchlUmpf v. Switzerland*cases[51]), than to the qUestion of access to a coUrt, which it also guarantees.

Article 13 is also closely related to Articles 34 and 35 § 1 of the Convention.

Article 35 § 1 reqUires any applicant intending to bring his or her case before the EUropean CoUrt of HUman Rights to first exhaust domestic remedies. Article 34 restricts access to the CoUrt in StrasboUrg to persons claiming to be victims of a violation of the Convention.

Article 34 reads as follows:

> "The CoUrt may receive applications from any person, non-governmental organisation or groUp of individUals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the Protocols thereto. The High Contracting Parties Undertake not to hinder in any way the effective exercise of this right."

Article 35 § 1 of the Convention is worded as follows:

"The CoUrt may only deal with the matter after all domestic remedies have been exhausted, according to the generally recognised rules of international law, and within a period of six months from the date on which the final decision was taken.".

Two cases concerning victims of discrimination on the basis of sexUal orientation in AUstria illUstrate these close links between, on the one hand, the reqUirement in Article 13 to provide the victims of violations of the Convention with an effective domestic remedy to redress those violations, and on

[49] See below

[50] See below

[28] See below.

the other, the provisions of Articles 34 and 35 requiring such victims wishing to bring proceedings at European level to exercise that domestic remedy only if the redress it offers is actually effective.

In the *Wolfmeyer v. Austria* judgment of 26 May 2005 and the H.G. and G.B. *v. Austria* judgmentof 2 June 2005, the applicants had been convicted for engaging in relations with adolescents of the same sex and then acquitted following an amendment to Article 209 of the Austrian CriminalCode (following the Court's finding of a violation of the Convention in the *S.L. v. Austria*[52] case). Arguing that these acquittals by the Austrian Constitutional Court were accompanied neither by any formal recognition of the violation of the Convention, nor by satisfactory compensation for the damage sustained, nor by sufficient reimbursement of the applicants' costs and expenses, the Court therefore held, in both these 2005 cases, that the redress for the violation was not effective and that the applicants retained the status of victims of a violation of the Convention. They therefore had grounds for complaining to the European supervisory bodies, particularly in view of the admissibility condition laid down in Articles 34 and 35 § 1 of the Convention.

H.G. and G.B. v. Austria,
2 June 2005, nos. 11084/02 and 15306/02

In the *H.G. and G.B. v. Austria* case of 2 June 2005, the Court applied the general principles inferred from Article 35, which are as follows:

"19. The Court recalls that the purpose of Article 35 is to afford the Contracting States the opportunity of preventing or putting right the violations alleged against them before those allegations are submitted to the Convention institutions. Thus the complaint intended to be made subsequently to the Court must first have been made – at least in substance – to the appropriate domestic bodies, and in compliance with the formal requirements and time-limits laid down in domestic law. However, the only remedies which Article 35 of the Convention requires to be exhausted are those that relate to the breaches alleged and at the same time are available and sufficient. The existence of such remedies must be sufficiently certain not only in theory but also in practice, failing which they will lack the requisite accessibility and effectiveness; it falls to the respondent State to establish that these various conditions are satisfied. Moreover, the application of this rule must make due allowance for the context. Accordingly, it has recognised that Article 35 must be applied with some degree of flexibility and without excessive formalism. It has further recognised that the rule of exhaustion of domestic remedies is neither absolute nor capable of being applied automatically; in reviewing whether the rule has been observed, it is essential to have regard to the particular circumstances of the individual case (*Henaf v. France*, no. 65436/01, 27 November 2003, §§ 30-32 with further references).".

Wolfmeyer v. Austria,
26 May 2005, no. 5263/03

In the *Wolfmeyer v. Austria* case of 26 May 2005, the Court applied the general principles inferred from Article 34, which are as follows:

"28. The Court reiterates that a decision or measure favourable to the applicant is not in principle sufficient to deprive him of his status as victim unless the national authorities have acknowledged, either expressly or in substance, and then afforded redress for, the breach of the Convention (see, for instance, *Dalban v. Romania* [GC], no. 28114/95, § 43, ECHR 1999 VI).

29. It is true that Article 209 of the Criminal Code was repealed by the Constitutional Court and the applicant was subsequently acquitted. However, in the case of *S.L. v. Austria*, concerning an

[29] See below.

applicant who had never been prosecUted Under Article 209 bUt was, on accoUnt of his sexUal orientation, directly affected by the maintenance in force of that provision, the CoUrt has already noted that the ConstitUtional CoUrt's jUdgment has not acknowledged let alone afforded redress for the alleged breach of the Convention (n°. 45330/99, § 35, ECHR 2003 I (extracts).

30. Indeed the ConstitUtional CoUrt did not rely on the argument of alleged discrimination of homosexUal as compared to heterosexUal or lesbian relationships, bUt rather on the lack of coherence and objective jUstification of the provision in other respects. The Government did not contest this. Instead they argue that the applicant's acqUittal and the sUbseqUent costs order contain at least an implicit acknowledgement of the breach of the Convention.

31. The CoUrt does not share this view. It observes that neither the applicant's acqUittal nor the sUbseqUent costs order contains any statement acknowledging at least in sUbstance the violation of the applicant's right not to being discriminated against in the sphere of his private life on accoUnt of his sexUal orientation. Even if they did, the CoUrt finds that neither of them provided adeqUate redress as reqUired by its case law.

32. In this connection it is crucial for the CoUrt's consideration that in the present case the mainte-nance in force of Article 209 of the Criminal Code in itself violated the Convention (*S.L. v. AUstria*, cited above, § 45) and, conseqUently, the condUct of criminal proceedings Under this provision.

33. The applicant had to stand trial and was convicted by the first instance coUrt. In sUch circUmstances, it is inconceivable how an acqUittal withoUt any compensation for damages and accompanied by the reimbUrsement of a minor part of the necessary defence costs coUld have provided adeqUate redress (see, *mUtatis mUtandis*, *Dalban*, [...], § 44). This is all the moreso as the CoUrt itself has awarded sUbstantial amoUnts of compensation for non-pecUniary damage in comparable cases, having particUlar regard to the fact that the trial dUring which details of the applicants' most intimate private life were laid open to the pUblic, had to be considered as a profoUndly destabilising event in the applicants' lives (*L. and V. v. AUstria*, *nos.* 39392/98 and 39829/98, § 60, ECHR 2003 I).

34. In conclUsion, the CoUrt finds that the applicant's acqUittal which did not acknowledge the alleged breach of the Convention and was not accompanied by adeqUate redress did not remove the applicant's statUs as a victim within the meaning of Article 34 of the Convention."

§ 6 – Article 3: the right the right not to be subjected to torture or inhuman or degrading treatment

Article 3 reads as follows:

"No one shall be sUbjected to tortUre or to inhUman or degrading treatment or pUnishment."

This imperative brooks no exception or restriction. The case law of the EUropean CoUrt of HUman Rights places on the national authorities an obligation of a prohibitive natUre to refrain from inflicting ill-treatment on individUals coming under their jUrisdiction, and also a fUrther obligation, this time of a positive natUre, to protect everyone against the danger of violation of his or her physical integrity.

According to the case law of the CoUrt, in order to come within the scope of Article 3, the ill-treatment in qUestion mUst be of a minimUm level of gravity. Appraisal of sUch minimUm level is intrinsically relative, and depends on all the elements of the case, incl Uding the dUration of the ill-treatment and of its physical and mental effects, as well as, in some cases, the victim's sex, age and state of health. EUropean case law specifies that while regard mUst be had to the qUestion whether the aim of the ill-treatment was to hUmiliate or belittle the victim, the absence of sUch an aim cannot definitively exclUde a finding of violation of Article 3.

This prohibition was first applied to the situation of homosexual persons in situations of detention. The physical and mental integrity of persons deprived of their liberty, whether in police custody or prison, is particularly fragile, especially if they are homosexual, because of the hostility directed against them, as witness the judgment delivered in the case of *X v. Turkey* of 9 October 2012.

***X v. Turkey*,**
9 October 2012, n°. 24626/09

"39. In connection with the general principles governing the right of prisoners to conditions of detention consonant with human dignity, the Court refers to the judgments in the cases of *Mouisel v. France* (n°. 67263/01, §§ 37 to 40, ECHR 2002-IX) and *Renolde v. France* (n°. 5608/05, §§ 119-120, 16 October 2008). It recalls that Article 3 of the Convention re- quires the state to ensure that a person is detained in conditions which are compatible withrespect for his human dignity, that the manner and method of the execution of the measuredo not subject him to distress or hardship of an intensity exceeding the inevitable levelof suffering inherent in detention and that, with due regard to the practical demands of imprisonment, his health and well-being are adequately secured (*Kudła v. Poland* [GC],n°. 30210/96, §§ 92-94, ECHR 2000-XI)."

***Identoba and Others v. Georgia*,**
12 May 2015, n°. 73235/12

The Court also applied Article 3 in conjunction with Article 8 in the case of *Identoba and Others v. Georgia* of 12 May 2015, which concerned the Georgian State's failure to protect demons-trators from homophobic violence and to conduct an effective investigation into the ill-treatment they had suffered. To establish that the assaulted demonstrators had experienced "feelings of fear, anguish and insecurity" and that the minimum threshold of severity had been reached, the Court not only carried out an accurate inventory of all the material, verbal and physical violence they had suffered during the events, but also referred, more broadly, to the precarious position of LGBTI persons in the respondent State at the time of the events and to various reports showing the widespread negative attitudes against them in some parts of Georgian society (see below).

This *Identoba and Others v. Georgia* judgment also gave the Court the opportunity to clarifythat a non-governmental organisation (NGO) – in this case the Identoba association which organised the demonstration – did not hold the right not to be subjected to torture or inhuman or degrading treatment and could therefore not be considered – either directly or indirectly – as a victim withinthe meaning of Article 34 of the Convention. In other words, only natural persons are entitledto complain about the violation of Article 3, either in isolation or in conjunction with Article 14(see the judgment, § 44-46).

Section 2. How is respect for freedoms reviewed?

In the philosophy of human rights, each freedom may be regarded as a sphere of individual autonomy in which individuals enjoy self-determination and act in accordance with their own goals. Individual freedoms are thus conceived as a "sacrosanct" area which, as a matter of principle, the state may not enter. In society, however, few freedoms are absolute or unlimited and all freedoms have limits or limitations. For this reason, any intrusion by the public authoritiesin this "sanctuary" must be regarded as an infringement which must remain the exception, be strictly defined and be the least serious possible.

Under these circumstances, the logic governing the protection of freedoms in a human rights protection system such as that of the European Convention on Human Rights involves two processes, which, put simply, are as follows.

When an applicant seeks to assert a freedom set forth in the Convention, the Court invariably begins by considering whether or not the situation in which the complainant finds him or herself corresponds to a situation bringing into play the right relied on, whether or not the action taken corresponds to an action covered by the freedom relied on, and whether or not the state has hindered its exercise. In other words, the Court considers whether or not the facts under consideration fall within the ambit of a freedom and whether or not the state has interfered with and restricted its exercise. In the judgments of the Court, the section dealing with these matters is sometimes entitled: "*Whether there was an interference*".

Secondly, the Court will consider whether or not that restriction is justified. Articles 8 to 11 of the Convention express this logic in a characteristic way because they specify in a second paragraph that the permitted restrictions must be "necessary in a democratic society" to safeguard certain precisely enumerated values, which, broadly speaking, relate to questions of public order. In other words, when the state interferes in the individual's sphere of freedom, its interference must be "prescribed by law", pursue a "legitimate aim", and not be disproportionate in relation to the public interest goal motivating the intrusion; the latter must serve that goal only and do so in the least damaging way possible to the individual's freedom. In the judgments of the Court, the section dealing with these matters is sometimes entitled: "*Whether the interferencewas justified*".

2

Reliance on the ground of non-discrimination: Article 14 of the Convention and Article 1 of Protocol N°.12[53]

Along with the right to respect for private and family life and the home, the right to non-discrimination is no doubt the most relied upon right in cases relating to sexual orientation. The European Convention on Human Rights, which was signed under the auspices of the Council of Europe on 4 November 1950 and came into force on 3 September 1953, prohibits discrimination by way of two provisions: Article 14 of the Convention itself and Article 1 of Protocol N°. 12 thereto, which was signed on 26 June 2000 and came into force on 1 April 2005. They read as follows:

Article 14 of the Convention:

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

Article 1 of Protocol N°.12 to the Convention:

"1. The enjoyment of any right set forth by law shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.

2. No one shall be discriminated against by any public authority on any ground such as those mentioned in paragraph 1."

Whereas the Convention with its Article 14 has been ratified by all the Council of Europe member states, Protocol N°. 12 with its Article 1 has only been ratified by some of them[54].

Under the terms of Article 14, the obligation of non-discrimination applies substantively to the enjoyment of any right provided for under the Convention (equality before the text of the Convention). Under the terms of Article 1 of Protocol N°. 12, the obligation of non-discrimination applies substantively to the enjoyment of any right provided for by law in the broad sense (equality before the law). In other words: Article 14 prohibits discrimination in the enjoyment

[53] On this subject: see for more information: Frédéric EDEL, The prohibition of discrimination under the European Convention on Human Rights, Council of Europe Publishing, "Human rights files" series, N°. 22, 2010 (ISBN 978-92-871-6817-7), https://book.coe.int/eur/en/human-rights-files/4478-the-prohibition-of-discrimination-under-the-european-convention-on-human-rights-human-rights-files-no-22.html

[54] As of 1 April 2016, Protocol N°. 12 was in force (and therefore applicable) in respect of the following states: Albania, Andorra, Armenia, Bosnia and Herzegovina, Croatia, Cyprus, Finland, the former Yugoslav Republic of Macedonia, Georgia, Luxembourg, Malta, Montenegro, the Netherlands, Romania, San Marino, Serbia, Slovenia, Spain and Ukraine. All these States have signed and ratified Protocol N°. 12.

of any right provided for by law which has an impact on the rights recognised by the Convention (special prohibition of discrimination); Article 1 of Protocol N°. 12 prohibits discrimination in the enjoyment of any right provided for by any kind of law, whether or not it has an impact on the rights recognised by the Convention (general prohibition of discrimination)[55].

The content of the prohibition of discrimination is the same, depending on whether it derives from Article 14 of the Convention or from Article 1 of Protocol N°. 12. As the Grand Chamber stated in its *Sejdic and Finci v. Bosnia and Herzegovina* judgment of 22 December 2009: "the notions of discrimination prohibited by Article 14 and by Article 1 of Protocol N°. 12 are to be interpreted in the same manner"[56]. Thus, the only aspect which distinguishes Article 14 from Article 1 of Protocol N°. 12 is its scope ratione materiae.

It has been established since the *Belgian Linguistic Case* of 23 July 1968 that the list of categorisation criteria set out in Article 14 *in fine* is not exhaustive; it is therefore purely illustrative. In other words, the prohibition of discrimination is not limited to the specified cases. The Commission, then the Court, very soon pointed out that the categories enumerated in Article 14 are mentioned "by way of example" and that "the words 'on any ground such as' in the text show that the list is in no way exhaustive"[57].

Salgueiro da Silva Mouta v. Portugal,
21 December 1999, application n°. 33290/96

The Salgueiro da Silva Mouta v. Portugal judgment, the first in which the Court dealt with an issue relating to sexual orientation from the angle of Article 14, states that:

"28 … ["sexual orientation" is a] a concept which is undoubtedly covered by Article 14 of the Convention. The Court reiterates in that connection that the list set out in that provision is illustrative and not exhaustive, as is shown by the words "any ground such as" (in French "*notamment*") (see the *Engel and Others* v. the Netherlands judgment of 8 June 1976, Series An°. 22, pp. 30–31, § 72)."

P.V. v. Spain,
30 November 2010, n°. *35159/09*

The same applies to the criterion of gender identity, or, as the Court has also put it, "sexual dysphoria" or "gender dysphoria". The Court has dealt with several cases of this type from the angle of respect for Article 14 (taken in conjunction with Article 8): for example, the judgments delivered in the cases of *Sheffield and Horsham v. United Kingdom* [58] or *P.V. v. Spain*. In the latter case, which raised the issue of a restriction on a transgender person's access to her six-year-old son, the Court explicitly asserted the applicability of Article 14 in matters relatingto gender identity, as follows [unofficial translation]:

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[55] For an exhaustive account of European case law relating to non-discrimination, see: Edel (Frédéric), The prohibition of discrimination under the European Convention on Human Rights, Human Rights Files N°. 22, 2010 (ISBN 978-92-871-6817-7), 2007, 160 pages.

[56] Sejdic and Finci v. Bosnia and Herzegovina, 22 December 2009, § 56. "Notwithstanding the difference in scope between those two provisions, the meaning of this term in Article 1 of Protocol N°. 12 was intended to be identical to that in Article 14 [...] The Court does not therefore see any reason to depart from the settled interpretation of "discrimination" noted above [under Article 14] in applying the same term under Article 1 of Protocol N°. 12" (§ 55).

[57] EComHR, Belgian Linguistic Case, cited above, Series B, vol. I, p. 441. "The list set out in that provision is illustrative and not exhaustive, as is shown by the words "any ground such as" (in French "notamment")"; Engel and Others, 8 June 1976, §72. "The list of prohibited grounds of discrimination as set out in Article 14 is not exhaustive"; James and Others, 21 February 1986, §74.

[58] Sheffield and Horsham v. United Kingdom, 30 July 1998, applications n°s. 31-32/1997/815-816/1018-1019, §71-77.

"30. In the instant case, the Court notes however that what is involved is a question not of sexual orientation, but of gender dysphoria. It considers, however, that transsexuality is a notion which is undoubtedly covered by Article 14 of the Convention. The Court recalls in this connection that the list set out in that provision is illustrative and not exhaustive, as is shown by the words 'any ground such as' ('*notamment*' in French) (*Engel and Others v. Netherlands*, 8 June 1976, §72, Series A n°. 22).

31. The question which arises in this case is whether the decision to restrict the access arrangements as initially decided was determined by the applicant's transsexuality, thus implying treatment which could be considered discriminatory in that it stemmed from her sexual dysphoria."

This finding of the applicability of Article 14 in matters relating to sexual orientation and gender identity naturally applies also to Article 1 of Protocol N°. 12.

We propose to consider first of all the applicability of the right to non-discrimination as guaranteed by the European Convention on Human Rights in matters relating to sexual orientationand gender identity. We will combine a schematic presentation of the general principles defining thescope of the two main provisions guaranteeing the right to non-discrimination with specific examplesof judgments in which this right was found to be applicable in cases relating to sexual orientationand gender identity, in order to provide a clear understanding of the links between the general principles and their specific application in cases relating to sexual orientation and gender identity.

Out of the same concern for a proper understanding of the quoted excerpts, we will then describe in broad outline how the European Court of Human Rights usually goes about reviewing respect for the non-discrimination rule and give examples from cases relating to sexual orientation and gender identity[59].

Section 1. In what fields can the right to non-discrimination be relied on?

As was just mentioned, Article 14 of the Convention and Article 1 of Protocol N°. 12 differ solely in terms of their respective scopese.

§1 – The scope of Article 14 of the Convention

Since the famous *Belgian Linguistic Case* referred to above, Article 14 has been said to have both an ancillary and an autonomous dimension. Hence, in connection with the prohibition set forth in Article 14, the Court has stated:

"While it is true that this guarantee has no independent existence in the sense that under the terms of Article 14 it relates solely to 'rights and freedoms set forth in the Convention', a measure which in itself is in conformity with the requirements of the Article enshrining the right or freedom in question may however infringe this article when read in conjunction with Article 14 for the reason that it is of a discriminatory nature."[60]

It adds, in words which have become famous:

"It is as though the latter formed an integral part of each of the articles laying down rights and freedoms.[61]"

[59] The specific solutions to issues relating to sexual orientation and gender identity will be addressed later, in Part Two.

[60] Belgian Linguistic Case, Series A, p. 33. For an example relating to homosexuality, see Karner v. Austria judgment of 24 July 2003, §32.

[61] Belgian Linguistic Case, Series A, p. 33.

Indeed, according to Article 14, "[t]he enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground…". Consequently, the scope of the prohibition set forth in Article 14 does not cover the exercise of any right or freedom without distinction, but only those which fall within the ambit of the European Convention on Human Rights. The practical upshot of this is that Article 14 is never applicable in isolation. It is always applicable "in conjunction with" another Convention article setting forth a right or freedom. The scope of the prohibition of discrimination is therefore always the scope of Article 14 "taken in conjunction with" another Convention article formulating a right or a freedom (14+8, 14+10, 14+1P1, etc). Put simply, Article 14 places an obligation on member states to guarantee equal freedom to all persons under their jurisdiction. The Court is therefore faced with two main questions, both of which concern the general problem of the respective positions of supervision of respect for a freedom (as set forth in the Convention) and that of respect for equality (as set forth in the Convention): one is of a procedural nature, the other of a substantive nature.

The first point, of a purely procedural nature, concerns the link between these two grounds of complaint, particularly in terms of the order in which claims are examined.

- *Applicability/Conformity* – It has been clear to the Convention's supervisory body almost from the start that review of applicability and review of conformity are two separate issues. Article 14 is applicable whether or not a violation is found of the freedom taken alone. Indeed, following the Commission's report of 24 June 1965 in the *Belgian Linguistic Case*, it rapidly became clear that the applicability of Article 14 is in no way subject to the finding which may be reached following a review of conformity with the primary article. As noted by the Commission and the Court in this case:

"…although Article 14 is not at all applicable to rights and freedoms not guaranteed by the Convention […], its applicability 'is not limited to cases in which there is an accompanying violation of another article"[62].

- *Applicability in isolation/Applicability in conjunction with another article* – It also became obvious quite early on that the review of the applicability of a freedom and the review of the applicability of equality in the exercise of a freedom are two reviews which can be carried out separately. In actual fact, the Court has used both these possibilities in cases relating to sexual orientation, as it notes itself in the *Schalk and Kopf v. Austria* judgment:

Schalk and Kopf v. Austria,
24 June 2010, n°. 30141/04

"87 The Court has dealt with a number of cases concerning discrimination on account of sexual orientation. Some were examined under Article 8 alone, namely cases concerning the prohibition under criminal law of homosexual relations between adults (see *Dudgeon v. United Kingdom*,22 October 1981, Series A n°. 45; *Norris v. Ireland*, 26 October 1988, Series A n°. 142; and *Mo-dinos v. Cyprus*, 22 April 1993, Series A n°. 259) and the discharge of homosexuals from thearmed forces (see *Smith and Grady v. United Kingdom*, n°s. 33985/96 and 33986/96, ECHR 1999 VI). Others were examined under Article 14 taken in conjunction with Article 8. These included, inter alia, different age of consent under criminal law for homosexual relations(*L. and V. v. Austria*, n°s. 39392/98 and 39829/98, ECHR 2003 I), the attribution of parental rights (*Salgueiro da Silva Mouta v. Portugal*, n°. 33290/96, ECHR 1999 IX), permission to adopt a child (*Fretté v. France*, n°. 36515/97, ECHR 2002-I, and *E.B. v. France*, cited above) and the right to succeed to the deceased partner's tenancy (Karner, cited above)."

[62] EComHR, Opinion of 24 June 1965; quoted in ECtHR, Belgian Linguistic Case, cited above, Series A, p. 27–28.

The second point concerns the substantive definition of the scope of the prohibition of discrimination set forth in Article 14 taken together with another Convention article. The substantive scope of the principle of non-discrimination set forth in Article 14 of the European Convention on Human Rights can be described in two stages. First: the prohibition of discrimination concerns the enjoyment of rights formally guaranteed by the Convention. Second: the prohibition of discrimination concerns the enjoyment of rights "additional" to rights formally guaranteed by the Convention. These are the two aspects which now warrant consideration.

A | The applicability of Article 14 to all the rights safeguarded by the Convention

If the state restricts a freedom guaranteed by the European Convention on Human Rights, Article 14 will apply without question. The Kozak v. Poland judgment of 2 March 2010 illustrates this logic.

***Kozak v. Poland*,**
2 March 2010, n°. 13102/02

"84 [...] Accordingly, the facts of the case [...] relate to the right to respect for his "home" within the meaning of Article 8.

85. In view of the foregoing, the Court holds that Article 14 of the Convention applies in the present case."

If a freedom set forth in the Convention is interpreted broadly by the Court, Article 14 will obviously apply to its newly widened scope. These two possibilities account for a large number of cases declared admissible under Article 14. They coincide with the most straightforward, uncontroversial situation, ie where the facts of the case clearly fall within the ambit of the Convention in that they correspond to a formally guaranteed right. The scope of Article 14 depends on the scope of the article in conjunction with which it is relied on: if the latter is generously interpreted, in such a way as to extend its scope, this automatically benefits Article 14 on a subsidiary basis. This applies, for example, to the broad interpretation of Article 1 of Protocol N°. 1, which has made it possible to bring an increasingly large number of cases within its ambit.

In such circumstances, the Court can always, in theory, look at an individual situation from two angles: it can look at it in isolation in order to assess whether the restriction placed by the state on the freedom in question is in itself excessive and violates the freedom safeguarded by the Convention, independently of the situation of other individuals; or it can view the situation relative to other individual situations in order to assess whether the state is creating a disparity in freedom which is comparatively unjustified and hence infringes the prohibition of discrimination also provided for under the Convention; or it can do both, because any arbitrary reduction of freedom vis-à-vis one individual constitutes at the same time a discriminatory reduction of freedom in relation to all the other individuals not subject to it.

The Court quite often begins by examining the cases which are referred to it from the angle of the freedom considered in isolation and does not always deem it appropriate to go on to reviewit from the angle of non-discrimination if it has already found a violation of that freedom.

As the Court pointed out in the *Airey* judgment of 9 October 1979 (§ 13) and then reaffirmed in the *DUdgeon* judgment of 22 October 1981:

"67 Where a substantive Article of the Convention has been invoked both on its own and together with Article 14 (art. 14) and a separate breach has been found of the substantive Article, it is not generally necessary for the Court also to examine the case under Article 14 (art. 14), though the position is otherwise if a clear inequality of treatment in the enjoyment of the right in question is a fundamental aspect of the case."

In fact, it is frequently the case that the Court initially finds a violation of the Convention under an article protecting a freedom and then deems it unnecessary to examine the case also from the angle of Article 14 taken in conjunction with that freedom. This was its position, for example, in this same Dudgeon judgment and in the Lustig-Prean and Beckett v. United Kingdom judgment of 27 September 1999. After finding that the sanctions taken against homosexuals in the British armed forces violated Article 8 taken alone, it deemed it superfluous to examine the same facts under Article 14 taken in conjunction with Article 8.

"108. The Court considers that, in the circumstances of the present case, the applicants' complaints that they were discriminated against on grounds of their sexual orientation by reason of the existence and application of the policy of the Ministry of Defence, amounts in effect to the same complaint, albeit seen from a different angle, that the Court has already considered in relation to Article 8 of the Convention (see the Dudgeon judgment cited above, pp. 25-26, § § 64-70).

109. Accordingly, the Court considers that the applicants' complaints under Article 14 in conjunction with Article 8 do not give rise to any separate issue."

***Sheffield and Horsham v. the United Kingdom*,**
30 July 1998, nos. 31-32/1997/815-816/1018-1019

This case raised the issue of legal recognition of the new gender identity of the applicants, two transgender women. After examining the facts of the case from the perspective of the right to respect for private life (see below), the Court continued its review from the angle of Article 14 taken in conjunction with Article 8[63].

B | applicability of Article 14 to rights "additional" to the Convention

The Court has also had occasion to hold that Article 14 is applicable to rights which, taken alone, are not recognised by a Convention provision, but which, viewed comparatively, affect a person in a similar situation to that of a person enjoying a recognised right. The scope of a right in isolation is not the same as that resulting from its combination with Article 14 because of the idea of comparison (inherent in the idea of non-discrimination) which the latter provision introduces, and which enables the Court to reach legal interests which, taken in isolation, would not have been regarded as covered, but which, from a comparative perspective, are[64].

This explains why, where Article 14 is concerned, the Court uses fairly unusual terminology to describe the scope of a provision: the legal interest to which the imperative of non-discrimination applies must "fall under", be "linked to"[65], "fall within the sphere of" or not "fall completely outside

[63] Sheffield and Horsham v. United Kingdom, 30 July 1998, applications nos. 31-32/1997/815-816/1018-1019, §71-77.

[64] In the famous Belgian Linguistic Case, the Commission attempted to explain to what extent Article 14 is independent. As summarised in the judgment delivered by the Court in this case, the Commission's argument warrants attention: in the Commission's opinion: "Article 14 'is of particular importance in relation to those clauses' which 'do not precisely define the rights' which they enshrine, but 'leave States a certain margin of appreciation with regard to the fulfilment of their obligation', 'authorise restrictions on, or exceptions to the rights guaranteed' or 'up to a point leave it to the States to choose the appro- priate means to guarantee a right'. It concerns 'the means or the extent, of the enjoyment of rights and freedoms already stated elsewhere'. 'Different measures taken by a State in respect of different parts of its territory or population' may therefore, even if compatible with the article which safeguards the right, entail a failure to comply with the requirements of the Convention 'if the State's conduct is judged from the point of view of Article 14'" (Belgian Linguistic Case, cited above, Series A n°. 5, p.28; see also Series B, §400, p. 306).

[65] Schmidt and Dahlström v. Sweden, 6 February 1976, §39.

the ambit of"[66] the text which is combined with Article 14, and must cover rights which it sometimes describes as "additional".

In fact, this expression was used in a case raising an issue of discrimination on grounds of sexual orientation.

E. B. v. France,
22 January 2008, n°. 43546/02

The *E.B. v. France* judgment of 22 January 2008 summed up the position as follows:

"48 [...] The prohibition of discrimination enshrined in Article 14 thus extends beyond the enjoyment of the rights and freedoms which the Convention and the Protocols thereto require each State to guarantee. It applies also to those additional rights, falling within the general scope of any Convention Article, for which the State has voluntarily decided to provide[67]".

This applies, for example, to social benefits as a whole, and especially those based on solidarity. Taken in isolation, they fall outside the scope of Article 1 of Protocol N°. 1, but viewed comparatively they fall within the scope of Article 14 taken in conjunction with that article, as emerges from the *Gaygusuz* case law[68], followed by the *Wessels-Bergervoet* [69], *Willis* [70], *Koua Poirrez* [71] and *Stecand Others v. United Kingdom* [72] judgments.

In matters relating to sexual orientation, some financial issues have been addressed from the angle of Article 14 taken in conjunction with Article 1 of Protocol N°. 1 (*J. M. v. United Kingdom*,28 September 2010, application n°. 37060/06); others from the angle of Article 14 taken in conjunction with Article 8. The Court has declared itself competent to consider the question of discrimination in connection with succession to a tenancy (*Karner v. Austria*) and a contractual extension of sickness and accident insurance coverage (*P. B. and J. S. v. Austria*).

P.B. and J.S. v. Austria,
22 July 2010, n°. 18984/02

The Court employed this reasoning in a fairly characteristic way in, for example, the *P. B. and J. S. v. Austria* judgment. This case concerned the refusal to grant the applicant an extension of his partner's sickness and accident insurance coverage on the ground that this possibility offered by the civil servants insurance company applied only to different-sex couples and not to same-sex couples. The decision as to whether the question of entitlement to an extension of sickness and accident insurance coverage fell within the scope of Article 14 taken in conjunction with Article 8 was reached on the basis of the following reasoning:

"25. The Court points out at the outset that the provision of Article 8 of the Convention does not guarantee as such a right to have the benefits deriving from a specific social security insurance scheme extend to a co habiting partner (see *Stec and Others v. the United Kingdom* [GC],n°. 65731/01, § 53, ECHR 2006 VI).

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[66] Van der Mussele v. Belgium, 23 November 1983, §43.

[67] E. B. v. France, 22 January 2008, § 48.

[68] Gaygusuz v. Austria, 16 September 1996, §41: emergency assistance granted to persons no longer entitled to unemployment benefit.

[69] Wessels-Bergervoet v. Netherlands, 4 June 2002.

[70] Willis v. United Kingdom, 11 June 2002.

[71] Koua Poirrez v. France, 30 September 2003, §§36-42; the Court held explicitly that a non-contributory social benefit falls within the scope of Article 14 taken in conjunction with Article 1 of Protocol N°. 1.

[72] Stec and Others v. United Kingdom, 12 April 2006, §53.

26. It is undisputed in the present case that the relationship of a same-sex couple like the applicants' falls within the notion of "private life" within the meaning of Article 8. However, in the light of the parties' comments the Court finds it appropriate to address the issue whether their relationship also constitutes "family life".

27. The Courts reiterates its established case-law in respect of different sex couples, namely that the notion of family under this provision is not confined to marriage-based relationshipsand may encompass other *de facto* "family" ties where the parties are living together outof wedlock. A child born out of such a relationship is *ipso jure* part of that "family" unit fromthe moment and by the very fact of his birth (see *Elsholz v. Germany* [GC], n°. 25735/94, § 43, ECHR 2000-VIII; *Keegan v. Ireland*, 26 May 1994, § 44, Series A n°. 290; and also *Johnston and Others v. Ireland*, 18 December 1986, § 56, Series A n°. 112).

28. In contrast, the Court's case-law has only accepted that the emotional and sexual relationship of a same-sex couple constitutes "private life" but has not found that it constitutes "family life", even where a long term relationship of cohabiting partners was at stake. In coming to that conclusion, the Court observed that despite the growing tendency in a number of European States towards the legal and judicial recognition of stable *de facto* partnerships between homosexuals, given the existence of little common ground between the Contracting States, this was an area in which they still enjoyed a wide margin of appreciation (see *Mata Estevez v. Spain* (dec.), n°. 56501/00, ECHR 2001-VI, with further references). In the case of *Karner* (cited above, § 33), concerning the succession of a same sex couples' surviving partner to the deceased's tenancy rights, which fell under the notion of "home", the Court explicitly left open the question whether the case also concerned the applicant's "private and family life".

29. The Court notes that since 2001, when the decision in *Mata Estevez* was given, a rapid evolutionof social attitudes towards same-sex couples has taken place in many member States. Since then a considerable number of member States have afforded legal recognition to same-sex couples (see above, paragraphs 27-30). Certain provisions of EU law also reflect a growing tendency to include same-sex couples in the notion of "family" (see paragraph 26 above).

30. In view of this evolution the Court considers it artificial to maintain the view that, in contrast to a different-sex couple, a same-sex couple cannot enjoy "family life" for the purposes of Article 8. Consequently the relationship of the applicants, a cohabiting same-sex couple living in a stable *de facto* partnership, falls within the notion of "family life", just as the relationship of a different-sex couple in the same situation would.

31. With regard to Article 14, which was relied on in the present case, the Court reiterates that it only complements the other substantive provisions of the Convention and the Protocols thereto. It has no independent existence because it has effect solely in relation to "the enjoyment of the rights and freedoms" safeguarded by those provisions (see, among many other authorities, *Sahin v. Germany* [GC], n°. 30943/96, § 85, ECHR 2003 VIII). The application of Article 14 does not necessarily presuppose the violation of one of the substantive rights protected by the Convention. It is necessary but also sufficient for the facts of the case to fall "within the ambit" of one or more of the Articles of the Convention (see *Petrovic v. Austria*, 27 March 1998, § 22, *Reports of Judgments* and Decisions 1998 II).

32. The prohibition of discrimination enshrined in Article 14 thus extends beyond the enjoyment of the rights and freedoms which the Convention and the Protocols thereto require each State to guarantee. It also applies to those additional rights, falling within the general scope of any Convention Article, for which the State has voluntarily decided to provide. This principle is well entrenched in the Court's case-law (see *E.B. v France* [GC], n°. 43546/02, § 48, ECHR 2008... with further references).

33. The present case concerns the possibility to extend accident and sickness insUrance cover undera statUtory insUrance scheme to cohabiting partners, a possibility which the legal provisions impUgned by the applicants recognise under certain conditions. Moreover, the possibility to extend insUrance cover, in the CoUrt's view, has to be qUalified as a measUre intended to improve the principally insUred person's private and family sitUation. The CoUrt therefore considers that the extension of insUrance cover at issUe falls within the ambit of Article 8.

34. ConseqUently, the State, which has gone beyond its obligations Under Article 8 in creating sUch a right – a possibility open to it Under Article 53 of the Convention – cannot, in the application of that right, take discriminatory measUres within the meaning of Article 14 (see, *mUtatis mUtandis*, *E.B. v. France*, cited above, §49).

35. Because the applicants complain that they are victims of a difference in treatment which allegedly lacks objective and reasonable jUstification as reqUired by Article 14 of the Convention, that provision, taken in conjUnction with Article 8, is applicable."

It will be noted that, in this case, the CoUrt applied Article 14 to legislation governing private-law relations, as responsibility for the impUgned distinction lay with a private person (the insUrance company). The principle of non-discrimination thUs has an indirect horizontal effect, between private persons (insUrance company and insUred). The same happened when the CoUrt foUnd against the AUstrian legislation governing sUccession to a tenancy in the event of the tenant's death (*Karner v. AUstria*) because it did not prevent a private landlord from discriminating on groUnds of sexUal orientation.

§ 2 – The scope of Article 1 of Protocol Nº. 12

As noted in the explanatory report to Protocol N°. 12, "Article 1 of the Protocol encompasses, bUt is wider in scope than the protection offered by Article 14 of the Convention"[73]. "There is thUs an overlap between the two provisions"[74], bUt "[it] affords a scope of protection which extends beyond the 'enjoyment of the rights and freedoms set forth in [the] Convention'"[75], as confirmed by the EUropean CoUrt of HUman Rights in its first jUdgment applying Article 1 of Protocol N°. 12[76]. Under these conditions the qUestion of whether or not the action of a state interferes with one of the freedoms proclaimed in the EUropean Convention on HUman Rights is no longer relevant. Because it is not limited to the freedoms set forth in the Convention, "Article 1 of Protocol N°. 12 extends the scope of protection to 'any right set forth by law'. It thUs introdUces a general prohibition of discrimination"[77]. That does not mean, however, that it is Unlimited.To sUm Up, it might be said of this Article 1 that it covers all acts of pUblic authorities, bUt that it covers in principle *only* acts of pUblic authorities.

A | The applicability of Article 1 of Protocol Nº. 12 to all acts of public authorities

Article 1 of Protocol N°. 12 is intended to apply to all acts of pUblic authorities which affect private individUals. This conclUsion is based first of all on an interpretation which takes into accoUnt the text of Protocol N°. 12, information contained in the *travaux préparatoires* and the explanatory report (the latter reflecting to a great extent the former), and recent case law.

[73] Explanatory report to Protocol N°. 12 to the Convention for the Protection of HUman Rights and FUndamental Freedoms, §33.

[74] Ibid.

[75] Ibid., §21.

[76] Grand Chamber, Sejdic and Finci v. Bosnia-Herzegovina, 22 December 2009, § 53.

[77] Ibid., §53.

The explanatory report to Protocol N°. 12 contains a list enUmerating the different possibilities covered by the scope of Article 1[78]. Clearly, in the light of this enUmeration, the principle of eqUality established by Protocol N°. 12 refers to all actions of the state towards private persons, in whatever form: whether the action of the state is intended to grant rights to individUals[79] or sUbject them to obligations,[80] whether it coincides with a legislative act[81] or an administrative decision[82], whether it takes place in the context of a non–discretionary power[83] or a discretionary power[84], whether it corresponds to a written decision of the administration or an act by one of its employees[85], whether it relates to a general rule or an individUal rule, whether it derives from an international obligation[86] or whether it is set in the context of a unilateral and no doUbt also contractUal relationship.

B | Is Article 1 of Protocol Nº. 12 applicable only to acts of public authorities?

One important qUestion is that of a possible "horizontal effect" of Protocol N°. 12. The qUestion is whether the Protocol extends the obligation of non–discrimination to which pUblic authorities are sUbject to certain acts of private persons. Are private authorities, which, by way of private law, are in the legal position of distribUting rights or obligations in respect of private persons, also sUbject to this reqUirement? In other words, does the right to eqUality of treatment Under Protocol N°. 12 directly or indirectly cover relations between private individUals?

The answer given to this first qUestion by the text of Protocol N°. 12, its explanatory report and its *travaux préparatoires* is particUlarly ambiguoUs. The following points shoUld be noted.

From a textUal standpoint, the possibility of interpreting this instrument as introdUcing positive obligations seems at first sight to be ruled oUt. The second paragraph of Article 1 of Protocol N°. 12 specifies that discrimination "by any pUblic authority" is prohibited; this stipUlation follows that of the first paragraph according to which the rights covered are rights "set forth by law". This woUld seem to imply a contrario that Protocol N°. 12 is not intended to apply to private ineqUalities.

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[78] "In particUlar, the additional scope of protection Under Article 1 concerns cases where a person is discriminated against: i. in the enjoyment of any right specifically granted to an individUal Under national law; ii. in the enjoyment of a right which may be inferred from a clear obligation of a pUblic authority Under national law, that is, where a pUblic authority is Under an obligation Under national law to behave in a particUlar manner; iii. by a pUblic authority in the exercise of discretionary power (for example, granting certain sUbsidies); iv. by any other act or omission by a pUblic authority (for example, the behavioUr of law enforcement officers when controlling a riot)". (explanatory report, § 22). The explanatory report adds immediately: "In this respect, it was considered Unnecessary to specify which of these foUr elements are covered by the first paragraph of Article 1 and which by the second. The two paragraphs are complementary and their combined effect is that all foUr elements are covered by Article 1. It shoUld also be borne in mind that the distinctions between the respective categories i–iv are not clear–cUt and that domestic legal systems may have different approaches as to which case comes Under which category" (ibid., § 23).

[79] This corresponds to possibility i of the list in § 22 of the explanatory report (see footnote 66 above).

[80] For example, in the context of Article 14: Zarb Adami v. Malta jUdgment of 20 JUne 2006 (violation of Article 14 in conjUnction with Article 4).

[81] The idea that the principle of eqUality applies to the law in the sense of legislation enacted by parliament is so obvioUs that it is hardly discUssed in the travaux préparatoires. On the other hand, it is clear from the drafting history that there was doUbt aboUt whether the word "law" inclUded other decisions by the pUblic authorities: see CDDH (97) 41 addendUm, §§31-34, p. 12-13, and especially DH-DEV (98) 3, §23, p. 6-7.

[82] As confirmed by § 30 of the explanatory memorandUm.

[83] As shown by point ii of the list in § 22 of the explanatory report (see footnote 66 above).

[84] As proved by point iii of the list in § 22 of the explanatory report (see footnote 66 above).

[85] As mentioned in point iv of the list in § 22 of the explanatory report (see footnote 66 above).

[86] Sejdic and Finci v. Bosnia and Herzegovina, 22 December 2009, §30.

Paradoxically, however, consideration of recent case law based on Article 14[87] and a reading of the *travaux préparatoires*[88] of Protocol N°. 12 and the explanatory report thereto contradict this initial finding. On the one hand, the explanatory report states inter alia that "such positive obligations cannot be excluded altogether."[89] On the other, recent case law relating to sexual orientation under Article 14 has already had occasion to apply the prohibition of discrimination on grounds of sexual orientation in relations between private persons where the Court censures a piece of legislation on the ground that it allows discrimination to occur between private persons. This was the case, for example, when it found against the Austrian legislation on the extension of sickness and accident insurance (*P. B. and J. S. v. Austria*) and that relating to succession to a tenancy following a tenant's death (*Karner v. Austria*), which established distinctions between different-sex and same-sex couples.

Section 2. How is respect for non-discrimination reviewed?

It should be clarified, first of all, that the general principles which the Court puts in place to test whether a distinction (discrimination) complained of by an applicant respects, or not, the right to non-discrimination, and second, the particular distinction (discrimination) of the same test based on sexual orientation and gender identity.

§ 1 – Monitoring respect for non-discrimination: general

The principle of non-discrimination contained in the European Convention on Human Rights mainly imposes an obligation that prohibits or doesn't allow a state to introduce any discrimi- nation when it claims to act on the legal status of individuals (so-called prohibitive or negative obligation). More recently, and in the further alternative, it has been interpreted as generatingan obligation to act to prevent, deter or punish discrimination (so-called positive obligation), in particular with regard to power relations between individuals. While the first obligation sanctionsa certain mode of action by the state, the second one condemns the state's inaction. The first one is, so to speak, an "obligation not to do": it is an obligation that impacts on the modalitiesof public action and requires it to respect equality. The second one is in a way "an obligation to do": it is an obligation of public action aimed at achieving greater, more effective equality.

A | A prohibitive obligation: not introducing discrimination

With regard to principles, two or three judgments were crucial in defining the content of the non-discrimination obligation. These decisions, which were all rendered by the most autho- ritative formation of the European Court, are as follows.

The definition of the principle of obligation of non-discrimination in the *Belgian Linguistic Case*

This was, first of all, the very first judgment in which Article 14 of the Convention was invoked before the European Court: the famous *Belgian Linguistic Case* judgment of 23 July 1968; this leading judgment laid the foundations for interpreting the obligation of the right to non-discri- mination guaranteed by the European Convention on Human Rights. Here, the Court defines the content of the obligation laid down in Article 14 and how compliance is to be assessed.

[87] Pla and Puncerneau, 13 July 2004; Nachova and Others v. Bulgaria, 6 July 2005; Opuz v. Turkey, 9 June 2009: see below.

[88] Illustrative of this ambiguity: DH-DEV(99)5, § § 26-27 and CDDH(97)41, addendum, p. 15.

[89] § 24.

Apart from a few minor differences, most of the judgments relating to non-discrimination have merely been a more or less comprehensive repetition of the principles laid down in the *Belgian Linguistic Case* of 23 July 1968. They have since been reaffirmed in all the decisions relating to Article 14, for example in the *L. and V.* judgment of 9 January 2003.

***L. and V. v. Austria*,**
9 January 2003, nos. 39392/98 and 39829/98

"44. According to the Court's established case-law, a difference in treatment is discriminatory for the purposes of Article 14 if it "has no objective and reasonable justification", that is if it does not pursue a "legitimate aim" or if there is not a "reasonable relationship of proportionality between the means employed and the aim sought to be realised". However, the Contracting States enjoy a certain margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a different treatment (see *Karlheinz Schmidt v. Germany*, judg-ment of 18 July 1994, Series A n°. 291 B, pp. 32 33, § 24; *Salgueiro da Silva Mouta v. Portugal*, n°. 33290/96, § 29, ECHR 1999-IX; and *Fretté v. France*, n°. 36515/97, §§ 34 and 40, ECHR 2002-I)."

The definition of the principle of obligation of non-discrimination in the judgments of *Thlimmenos v. Greece* and *D.H. v. Czech Republic*

Then came the judgment in the important *Thlimmenos v. Greece* case of 6 April 2000; this second decision did not modify the definition resulting from the *Belgian Linguistic Case*, it complementedit and gave it an additional dimension. The originality of this judgment lies in the fact that the principleof non-discrimination now enables to question the validity of identical treatment and, if necessary,to sanction the state for failing to establish a difference in treatment. As the European Court stated in its *Thlimmenos v. Greece* judgment:

"The Court has so far considered that the right under Article 14 not to be discriminated against in the enjoyment of the rights guaranteed under the Convention is violated when States treat differently persons in analogous situations without providing an objective and reasonable justification [...] However, the Court considers that this is not the only facet of the prohibition of discrimination in Article 14. The right not to be discriminated against in the enjoyment of the rights guaranteed under the Convention is also violated when States without an objective and reasonable justification fail to treat differently persons whose situations are significantly different"[90].

The contribution of the *Thlimmenos* case lies in the fact that from now on, not only different treatment must meet the requirement of objective and reasonable justification, but also uniform treatment. In short, a treatment in accordance with the principle of equality is always a treatment which is based on objective and reasonable justification; it is always a treatment which, with regard to the aim pursued, relies on objective data and respects a reasonable relationship of proportionality, as was stated in the inaugural *Belgian Linguistic Case*. But from the *Thlimmenos* judgment, it isno longer just the distinctive treatment that is subject to such requirements, but also the identical treatment. In other words, discrimination is constituted both when there is different treatment of significantly similar situations[91] and when there is identical treatment of significantly dissimilar situations. That is, non-discrimination is respected, both when there is identical treatment of significantly similar situations and when there is a (reasonable) difference in treatment of significantly dissimilar situations. Accordingly, pursuant to the *Thlimmenos* case law, a state may be reproachedby the Court for not having established a difference in treatment.

[90] Grand Chamber, *Thlimmenos*, 6 April 2000, § 44. For an example of confirmation of the *Thlimmenos judgment: Coster v. the United Kingdom*, 18 January 2001, § 141 (this non-violation decision is essentially a reminder of the principles defined on 6 April 2000).

[91] And also, to be absolutely accurate and to consider all hypotheses, when the state applies a disproportionate or unreasonable difference of treatment to individuals placed in dissimilar situations.

However, this request for difference in treatment is never required for itself, but only because, from another point of view, it indirectly makes it possible to avoid a discriminatory difference in treatment, that is, to avoid indirect discrimination (by restoring, indirectly, an identical treatment). In this respect, the *Thlimmenos v. Greece* judgment of 6 April 2000 forms a very particular hypothesis of indirect discrimination[92].

But the leading judgment by which the European Court explicitly set out the guidelines for reviewing the prohibition of indirect discrimination was the *D. H. and Others v. Czech Republic* judgment of13 November 2007[93]. This was the third major judgment on discrimination. The position adopted by the European Court in the *D. H. and Others* judgment was summarised as follows in the *Taddeucci and McCall v. Italy* judgment of 30 June 2016.

Taddeucci and McCall v. Italy,
30 June 2016, n°. 51362/09

"81 [...] the Court has already accepted in previous cases that where a general policy or measure has disproportionately prejudicial effects on a particular group, it is not excluded that this may be considered as discriminatory notwithstanding that it is not specifically aimed or directed at that group and there is no discriminatory intent. Such a situation may amount to "indirect discrimination". This is only the case, however, if such policy or measure has no "objective and reasonable" justification (see, among other authorities, *Baio v. Denmark* [GC],n°. 38590/10, § 91, 26 May 2016; *S.A.S. v. France* [GC], n°. 43835/11, § 161, ECHR 2014 (extracts); *D.H. and Others v. the Czech Republic* [GC], n°. 57325/00, § 184, ECHR 2007-IV; and *Hugh Jordan v. the United Kingdom*, n°. 24746/94, § 154, 4 May 2001)."

The contribution of the *D.H. and Others* case was thus to explicitly prohibit indirect discrimination.In this *D.H. and Others v. Czech Republic* case, a legal distinction, based on objective criteria, effectively led to another distinction, which had no objective basis (i.e. ethnic origin). In short, one (explicit) distinction concealed another (implicit) and discriminatory one.

In the end, indirect discrimination can be the result of an identical treatment (*Thlimmenos* judgment) or a differential treatment (*D.H. and Others* judgment).

Pursuant to the case law resulting from the *D.H. and Others* judgment, the Court is entitled to sanction a distinctive treatment which – from one point of view, that of the aim pursued by a legislative or statutory measure – is based on an objective criterion that overlaps or induces – in an indirect way actually, that means from another point of view – another distinction which is not based on an objective criterion, and is therefore discriminatory.

Pursuant to the case law resulting from the *Thlimmenos* judgment, the Court is entitled to sanction an identical treatment which – from one point of view, that of the aim pursued by a legislative or statutory measure – induces – in an indirect way actually, that means from another point of view – a distinction which is not based on an objective criterion, and is therefore disproportionate.

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[92] The *Thlimmenos* judgment illustrates what can be called a complex hypothesis of indirect discrimination; for further explanations: Frédéric EDEL, *The prohibition of discrimination Under the European Conventionon Human Rights*, Council of Europe Publishing, "Human rights files" series, n°. 22, 2010 (ISBN 978-92-871-6817-7), https://book.coe.int/eur/en/human-rights-files/4478-the-prohibition-of-discrimination- under-the-european-convention-on-human-rights-human-rights-files-no-22.html

[93] Although there are earlier judgments in which the Court has already reviewed, without explicitly stating it, this type of discrimination (such as, for example, in Abdulaziz, Cabales and Balkandali v. the United Kingdom judgment of 28 May 1985).

In both cases, legislation that appears to be neutral has disproportionate detrimental effects on a person or a group of persons. In both cases, this is indirect discrimination.

The European Court of Human Rights first used this concept in the field of non-discrimination based on sexual orientation in the aforementioned *Taddeucci and McCall* v. Italy judgment (for more details, see below). From now on, a general policy or measure, which, even if it does not specifically target LGBTI persons, has disproportionate detrimental effects on them, may, where relevant,be regarded as indirect discrimination in violation of the European Convention on Human Rights.

B | Positive obligations: combating certain forms of discrimination

From the mid-2000s on, the Court transposed into the context of Article 14 the theory of positive obligations that it had also developed.

A positive obligation is an obligation arising under a right guaranteed by the Convention which aims to require the state to take a complementary measure or act designed to make that right effective or more efficient. This importation of the notion of positive obligation into Article 14 of the Convention (and therefore also into Article 1 of Protocol N°. 12) entails a radical change in the nature of the scope of the equality clause and the content of the obligation it imposes. In addition to the traditional "prohibitive" (or "negative") dimension determining the "objective and reasonable" nature of the acts from public authorities, there is now a "positive" dimension requiring the state to take legislative, statutory or other measures aimed at achieving greater, more effective equality. In addition to the obligation weighing on the modalities of public action, there is now an obligation of public action.

While the Court imposes many positive obligations on states to protect LGBTI persons, most of these obligations result from the interpretation of the articles of the Convention that guarantee freedom.

Regarding LGBTI persons, the notion of positive obligation has only recently been deduced from one of the provisions of the Convention that guarantees equality. Indeed, following the *Identoba and Others* v. Georgia judgment of 12 May 2015, the Court derived from Article 14 of the Conventiona positive obligation to combat discriminatory violence against gay and lesbian persons[94].

Identoba and Others v. Georgia, *n°. 73235/12*

It follows from the combination of Article 14 with Article 3 that member states are subject, on the one hand, to a substantive positive obligation to adequately protect LGBTI demonstrators against violence by counter-demonstrators and, on the other hand, to a procedural positive obligation to conduct an effective investigation into the possible existence of homophobic motivations leading to violence if there are presumptions that may suggest it.

From now on, LGBTI people cannot only rely on the theory of positive obligations on the ground of provisions guaranteeing freedom but also on those guaranteeing equality.

§ 1 – Monitoring respect for non-discrimination on grounds of sexual orientation and gender identity

As the case law currently stands, the principle of non-discrimination has been applied mainly for the benefit of gay and lesbian people and very little for transgender persons.

[94] There is no doubt that this transposition of the theory of positive obligations is also valid in the context of Article 1 of Protocol N°. 12.

A | Testing for discrimination based on gender identity

The principle of non-discrimination has not been applied in any significant way with regard to gender identity. When it has been, it was only superficially. Examples include the following cases.

Hämäläinen v. Finland, *16 July 2014, no. 37359/09*

This case concerned the refusal to already married transgender persons to have their gender reassignment legally recognised. After examining the facts of the case from the perspective of Article 8 of the European Convention on Human Rights (right to respect for private and family life) and finding no violation of Article 8 taken in isolation, the Court continued its review under Article 14 (prohibition of discrimination) in conjunction with Articles 8 and 12 (right to marry): but it considered that the situation of the applicant, who was a transsexual person, and that of non-transsexuals "were not sufficiently similar to be compared with each other". Accordingly, the Court did not pursue its review any further and held that there was no violation of Article 14in conjunction with Articles 8 and 12 (see the judgment, § 98 to 113).

The European Court applied here a requirement that has been established in its case law since 1975, which is that the Court shall carry out the monitoring of respect for the prohibition of discrimination guaranteed by Article 14 only in the case of persons placed "in similar situations"[95]; in its view, "for a claim of violation of this Article to succeed, it has therefore to be established, inter alia, that the situation of the alleged victim can be considered similar to that of persons who have been better treated"[96]. This requirement for analogy is not, strictly speaking, a substantive condition arising from the very definition of non-discrimination, but it constitutes a procedural condition affecting the relevance of the complaint. It meets a processual need and is a means of procedural economy. In doing so, the Court sometimes avoids going into the detailsof the monitoring it is entitled to carry out. In this case, the Court could very well have reviewedthe justifications for the distinction at issue between transsexuals on the one hand and cissexuals on the other.

P.V. v. Spain, *30 November 2010, no. 35159/09*

In this *P.V. v. Spain* judgment of 30 November 2010, the Court examined the facts of the case from the angle of Article 14; it however reached the conclusion that the difference of treatment complained of by the transgender applicant was not actually based on her gender identity, or at least not directly. This case concerned a transgender woman who, before her gender reassignment, had had a son in 1998 with her wife. They separated in 2002. The Spanish courts had restricted access to her son on the ground that her emotional instability following the gender reassignment was likely to perturb the son, then aged 6. The applicant complained that the restrictions placed on access constituted discrimination based on her gender identity.

The Court held that, in the case in point, the criterion justifying the restrictions was not the applicant's gender identity as such but her emotional instability following the gender reassignment. The Court found no violation of Article 8 taken in conjunction with Article 14. It took the view that this was a justified difference of treatment (based on a psychological criterion), and not unjustified discrimination (based on the applicant's gender identity). It argued as follows [unofficial translation]:

[95] *Marckx v. Belgium*, cited above, § 32; Fredin v. Sweden, cited above, § 60.
[96] *Ibid*

"26. The Court recalls that in the enjoyment of the rights and freedoms guaranteed by the Convention, Article 14 prohibits different treatment, without an objective and reasonable justification, of persons in similar situations (see *Hoffmann v. Austria*, 23 June 1993, §31, Series A n°. 255-C, and *Salgueiro da Silva Mouta v. Portugal*, n°. 33290/96, §26, ECHR 1999-IX).

27. What has to be determined is whether the applicant can complain of such a difference of treatment and, if so, whether it is justified.

28. The Court observes that the applicant's transsexuality is at the origin of the proceedings initiated by her ex-wife to modify the measures ordered in the separation judgment. The latter filed her application because of the sex change treatment which the applicant had begun. In all the judicial decisions given during the proceedings there are references to the appellant's transsexuality. Moreover, the Court agrees that the Spanish courts ordered different access arrangements when they became aware of the applicant's sexual dysphoria. It notes that the new access arrangements were less favourable to the applicant than those initially agreed by the spouses in the separation contract confirmed by the separation judgment.

29. According to the Court's case law, a distinction is discriminatory within the meaning of Article 14 if it lacks objective and reasonable justification, that is, if it does not pursue a legitimate aim or if there is not a 'reasonable relationship of proportionality between the means employed and the aim sought to be realised' (see, inter alia, *Karlheinz Schmidt v. Germany*, 18 July 1994, §24, Series A n°. 291-B, *Salgueiro da Silva Mouta v. Portugal*, cited above, §29, and *Fretté v. France*, n°. 36515/97, §39, ECHR 2002-I). When sexual orientation is involved, there must be particularly serious and compelling reasons to justify a difference of treatment in the case of rights falling within the ambit of Article 8 (see, *mutatis mutandis*, *Smith and Grady v. United Kingdom*, n^os^. 33985/96 and 33986/96, §89, ECHR 1999-VI, and *E. B. v. France* [GC], n°. 435467/02, §91, ECHR 2008-…).

30. In the instant case, the Court notes however that what is involved is a question not of sexual orientation, but of gender dysphoria. It considers, however, that transsexuality is a notion which is undoubtedly covered by Article 14 of the Convention. The Court recalls in this connection that the list set out in that provision is illustrative and not exhaustive, as is shownby the words 'any ground such as' ('*notamment*' in French) (*Engel and Others v. Netherlands*, 8 June 1976, §72, Series A n°. 22).

31. The question which arises in this case is whether the decision to restrict the access arrangements as initially decided was determined by the applicant's transsexuality, thus implying treatment which could be considered discriminatory in that it stemmed from her sexual dysphoria.

32. The Court notes that the Spanish courts stressed in their decisions that the applicant's transsexuality was not the reason for the restrictions placed on the initial access arrangements. They took into consideration the situation of emotional instability found in the applicant by the psychological expert and the risk of passing on that instability to the child, thus upsetting his psychological balance. The Constitutional Court even specified that the mere existence of an emotional disorder in the applicant was not sufficient to justify the restrictions on access. It stressed that the decisive ground for restricting access was the existence of a definite risk of impairing the child's psychological integrity and the development of his personality, given his age and stage of development.

33. Regarding the applicant's emotional instability, the Court notes that it was established by a psychologist in an expert report drawn up at the request of the court of first instance. The applicant underwent the psychological evaluation voluntarily, as noted by the *Audiencia Provincial*in the appeal proceedings, and did not object at the time to the fact that the psychologist was not a specialist in clinical psychology. The Court further notes that the applicant hadthe opportunity to challenge the expert report at the public hearing and that, during the appeal proceedings, she proposed a new expert report which was examined by the *Audiencia Provincial*.

34. The Court further observes that the court of first instance did not deprive the applicant of the exercise of parental authority and did not suspend her right of access, as the mother had requested. In line with the recommendations of the psychological expert, who thought it appropriate to maintain contact between the child and his father, it adopted a system of controlled access in a special centre, which was ordered to report to it every two months so that it could monitor developments. Under these progressive access arrangements, the applicant was initially allowed to see her son for three hours every other Saturday at the centre under professional supervision.

35. Access was subsequently extended, as noted by the Constitutional Court in its judgment. In February 2006, following a request by the applicant, the court of first instance increased the length of the fortnightly access visits to five hours, as suggested by the staff of the centre. In November 2006, supervised access was increased to two days, every other Saturday and every other Sunday, from 11.30 am to 8 pm and from 11.30 am to 7 pm, respectively.

36. In the Court's view, the reasons given for the judicial decisions suggest that the applicant's transsexuality was not the decisive factor in the decision to modify the initial access arrangements. It was the child's best interests which took priority. The Court noted in this connection the difference between the facts of this case and those of the previously mentioned *Salgueiroda Silva Mouta* case, in which the applicant's sexual orientation was decisive in the decision to deprive him of parental authority. In the instant case, in view of the cyclical emotional instability found in the applicant, the Spanish courts gave precedence to the child's interests, adopting more restrictive access arrangements to enable him to gradually become accustomedto his father's sex change. This conclusion is borne out by the fact that the access arrangements were extended whereas the applicant's sexual condition remained the same.

37. In the light of the foregoing, the Court considers that the restrictions placed on the access arrangements were not the result of discrimination based on the applicant's transsexuality. Accordingly, there has been no violation of Article 8 of the Convention taken in conjunction with Article 14."

Consequently, it is crucial for an applicant to succeed in proving that the distinction complained of is based on the criterion of gender identity or that of sexual orientation.

B | Testing for discrimination based on sexual orientation

The Court has pointed out that when a distinction is based on sexual orientation, scrutiny tends to be very strict and the national margin of appreciation tends to shrink correspondingly, as stated, for example, in the *L. and V. v. Austria* judgment of 9 January 2003.

"45. [...]Just like differences based on sex (see *Karlheinz Schmidt*, cited above, *ibid.*, and *Petrovic v. Austria*, judgment of 27 March 1998, *Reports of Judgments and Decisions* 1998–II, p. 587, § 37), differences based on sexual orientation require particularly serious reasons by way of justification (see *Smith and Grady*, cited above, § 90)."

The Court's position was also summarised in the following judgment.

Taddeucci and McCall v. Italy, 30 30 June 2016, nº. 51362/09

"89. The Court reiterates that sexual orientation is a concept covered by Article 14. It has repeatedly held that, just like differences based on sex, differences based on sexual orientation require particularly serious reasons by way of justification or, as is sometimes said, "particularly convincing and weighty reasons" (see *X and Others v. Austria*, cited above, § 99; see, for example, *Smith and Grady v. the United Kingdom*, nºs. 33985/96 and 33986/96, § 90, ECHR 1999-VI;

Lustig-Prean and Beckett v. the United Kingdom, nos. 31417/96 and 32377/96, § 82, 27 September 1999; *L. and V. v. Austria*, nos. 39392/98 and 39829/98, § 45, ECHR 2003-I; *E.B. v. France*, cited above, § 91; *Karner*, cited above § 37; and *Vallianatos and Others*, cited above, § 77), particularly where rights falling within the scope of Article 8 are concerned. Differences based solely on considerations of sexual orientation are unacceptable under the Convention (see *Salgueiro da Silva Mouta v. Portugal*, n°. 33290/96, § 36, ECHR 1999-IX; *E.B. v. France,* cited above, § § 93 and 96; and *X and Others v. Austria*, cited above, § 99)."

The implications as to the margin of appreciation left to the state were clearly set out in the following judgment, for example.

***Alekseyev v. Russia*,**
21 October 2010, nos. 4916/07, 25924/08 and 14599/09

"108. The Court reiterates that sexual orientation is a concept covered by Article 14 (see, among other cases, *Kozak v. Poland*, n°. 13102/02, 2 March 2010). Furthermore, when the distinction in question operates in this intimate and vulnerable sphere of an individual's private life, particularly weighty reasons need to be advanced before the Court to justify the measure complained of. Where a difference of treatment is based on sex or sexual orientation the margin of appreciation afforded to the State is narrow, and in such situations the principle of proportionality does not merely require the measure chosen to be suitable in general for realising the aim sought; it must also be shown that it was necessary in the circumstances. Indeed, if the reasons advanced for a difference in treatment were based solely on the applicant's sexual orientation, this would amount to discrimination under the Convention (*ibid*, § 92)."

However, this question of the degree of strictness of the Court's review and the extent of the discretion left to the state to introduce distinctions based on sexual orientation also depends on other factors. As stated regularly by the Court, for example in the *Fretté v. France* judgment:

"40. However, the Contracting States enjoy a certain margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a different treatment in law. The scope of the margin of appreciation will vary according to the circumstances, the subject matter and the background; in this respect, one of the relevant factors may be the existence or non-existence of common ground between the laws of the Contracting States (see, among other authorities, *Petrovic*, cited above, pp. 587-88, § 38, and *Rasmussen v. Denmark*, judgment of 28 November 1984, Series A n°. 87, p. 15, § 40)."

Hence, the state tends to be allowed a greater margin of appreciation in some areas, as pointed out by the Court in, for example, the Gas and Dubois v. France judgment [unofficial translation]:

"60. Furthermore, the margin of appreciation enjoyed by states in assessing whether and to what extent differences between otherwise similar situations justify differences of treatment is usually wide when it comes to general measures of economic or social strategy (see, for example, Schalk and Kopf, cited above, §97)."

On the other hand, the state's margin tends to be reduced in other areas, eg where privacy is at stake.

A factor which seems even more decisive than the particular area under consideration is the presence or absence of a common denominator in the Contracting Parties' legal systems in matters relating to sexual orientation[97].

[97] See below.

Part Two

The standard of protection under the ECHR in matters relating to sexual orientation and gender identity: specific solutions

The Court varies the supervision which it exercises by granting the state a greater or lesser degree of latitude, depending on various factors. In the *Rasmussen* judgment the Court thus stated that "[t]he scope of the margin of appreciation will vary according to the circumstances, the subject-matter and its background" or according to "the existence or non-existence of common ground between the laws of the Contracting States"[98].

According to those various factors, the state's margin of appreciation tends to be either restricted and be accompanied by enhanced scrutiny on the part of the European Court, or to be wider, resulting in reduced scrutiny on the part of the Court.

In cases relating to sexual orientation and gender identity, the Court claims to attach importance to the presence or absence of a common denominator in the legislation of the member states. In principle, a convergence in national laws helps to reduce states' discretion[99]; and, conversely, a divergence in national legislative choices helps to increase it[100].

It is important, however, to stress the very relative nature of the role played by these different elements. On the one hand, within the same case different criteria may be present, some of which tend to increase the strictness of review, others to reduce it. On the other, the criterion ofthe similarity or dissimilarity of national solutions is also subject to a certain degree of relativity.

Whereas, in the famous Dudgeon case, the Court's argument of a consensus among European states in favour of decriminalising homosexual relations played a decisive role in the judgment against the United Kingdom for its repressive legislation against homosexuality, in the equally famous Goodwin case, the Court's argument concerning the differing views on transgender identity did not stop it from censuring the United Kingdom for refusing to legally recognise a transgender person's preferred gender.

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[98] Rasmussen v. Denmark, 28 November 1984, §40.

[99] *Marckx v. Belgium*, 13 June 1979, §52; *L. and V. v. Austria*, 9 January 2003, §50; *Unal Tekeli v.Turkey*, 16 November 2004, §62.

[100] Rasmussen v. Denmark, 28 November 1984, §41; Petrovic v. Austria, 27 March 1998, §§38-43; Sheffield and Horsham v. the United Kingdom, 30 July 2008, §57-58.

Generally speaking, however, in the majority of cases the criterion of the similarity or dissimilarity of the solUtions adopted by EUropean states on qUestions relating to LGBTI persons seems to have a considerable inflUence on the natUre of the CoUrt's review.

This concern ties in with the opinion expressed by the CoUrt in an opinion given in 1978[101] and regularly restated since then, particUlarly in cases relating to sexUal orientation and gender identity, according to which "the Convention is a living instrument which mUst be interpreted in the light of present-day conditions"[102].

EUropean case law thUs reflects changing views on sexUal orientation and gender identity. Some aspects are left to the diversity of national approaches while others are sUbject to EUropean harmonisation in accordance with the CoUrt's case law.

What, then, are the fields in which the CoUrt sets a minimUm EUropean standard and what are those in which it does not?

We will therefore consider, field by field, the standard or level of protection offered by the EUropean Convention on HUman Rights, first to lesbians and gays, then to transgender persons.

[101] Tyrer v. United Kingdom, 25 April 1978.

[102] E. B. v. France, 22 JanUary 2008, §92.

1

The standard of protection afforded to lesbians and gays

As we have already noted, interpretation of the Convention evolves over time. Generally speaking, although there is nothing systematic about this, the extension of the protection afforded to lesbians and gays under the European Convention on Human Rights corresponds to areas of European consensus in which the national margin of appreciation is limited.

Conversely, in the fields in which the Court notes differences of opinion between states, it tends to maintain a wider national margin of appreciation.

Chapter 1. Fields governed by common European legal rules

Prior to the *Dudgeon v. United Kingdom* judgment of 22 October 1981, the position of the European Commission of Human Rights was initially very restrictive with regard to homosexuals alleginga violation of the Convention. Applicants relied chiefly on Articles 8 and 14. In all the cases relating to homosexuality between 1955 and 1980 the application was dismissed. During that period the interpretation of the Convention given by the Commission did not preclude Contracting States from making homosexuality an offence: the Commission considered that, in a democratic society, the right to respect for private life could be subject to interference by the authorities in order to protect health or morality[103].

Starting from the mid-1970's, homosexuality between consenting adults was decriminalised by some countries such as Germany and the United Kingdom. The Commission justified the interferences which still occurred at the time, particularly in those two countries, by the need to protect the rights of minors[104]. Furthermore, the age of consent required for relations with persons of the same sex could differ from that required for relations with the opposite sex[105].

The European Court of Human Rights was responsible for the first major advance in European protection of homosexuals when, in 1981, in a judgment which has since become famous, *Dudgeon v. United Kingdom*, it held that the legislation criminalising homosexual acts between consenting adults in Northern Ireland was contrary to Article 8. This first breakthrough was followed by the adoption of a single age of sexual consent regardless of sexual orientation.

[103] The first decision to this effect: Decision of the Commission, application n°. 104/55, Yearbook, Vol. I, p. 228–229.

[104] Decision of the Commission, application n°. 5935/72, 30 September 1975, Unpublished.

[105] Decision of the Commission, application n°. 7215/75, 7 July 1967, Unpublished.

The second advance was the granting of protection to lesbians and gays outside the purely private sphere, namely in the employment field, when, in 1999, the European Court of Human Rights found against the United Kingdom legislation under which persons could be excluded from the armed forces solely on the grounds of their sexual orientation. In two judgments of 27 September 1999, *Smith and Grady* and *Lustig-Prean and Beckett v. United Kingdom*, the Court departed from the case law on this question established by the Commission, which had adopted an understanding attitude towards the continued exclusion of gays and lesbians from the armed forces[106].

This was followed, starting in 2000, by a constant extension of the protection afforded to lesbians and gays, in access to housing, employment, justice, services, the right to express themselves, demonstrate, the exercise of family life, and the protection of homosexuals from physical and verbal abuse.

Section 1. Sexual freedom

The European Convention on Human Rights protects the freedom of homosexual relations practised in private between consenting adults.

§ 1 – The right to sexual freedom: non-criminalisation of homosexual relations

The European Convention on Human Rights protects the freedom of homosexual relations in couples or in groups.

A | The ban on criminalising homosexual relations between consenting adults

The principle established by the *Dudgeon* judgment

***Dudgeon v. United Kingdom*,**
22 October 1981, n°. 7525/76

This was the first case in which the Commission and the Court took a stance against the existence of laws making homosexuality a criminal offence. In the *Dudgeon v. United Kingdom* judgment, the Court held that the continued existence of legislation prohibiting homosexual acts in private between consenting adults constituted a permanent interference in the exercise of the applicant's right to respect for his private life (which included his sexual life) even if the law in question no longer gave rise to prosecutions. By this judgment, it confirmed the position of the old European Commission on Human Rights, which, in its report on the *Sutherland v. United Kingdom* case, had said that, even if there was no prosecution or threat of prosecution, the mere existence of the legislation had constant direct repercussions on the applicant's private life.

Principal facts

At the time, the United Kingdom criminal legislation relating to homosexuality was, in broad outline, as follows.

In Northern Ireland, under the 1861 Offences against the Person Act and the 1885 Criminal Law Amendment Act, buggery and acts of gross indecency committed in public or in private were punishable respectively with maximum sentences of life imprisonment and ten years' imprisonment.

[106] Decision of the Commission, B. v. United Kingdom, application n°. 9237/81, 12 October 1983, Vol. 34, p. 68-77.

Subject to certain exceptions concerning mental patients, members of the armed forces and merchant seamen, homosexual acts committed in private between two consenting males aged 21 or over were no longer criminal offences in England and Wales following the 1967 Sexual Offences Act and in Scotland following the 1980 Criminal Justice Act.

In July 1978, the UK government had published a proposal for a draft Order, the effect of which would have been to bring Northern Ireland law on the matter broadly into line with that of England and Wales. After consulting the population, however, the government announced in 1979 that it did not intend to pursue the proposed reform.

The applicant, Jeffrey Dudgeon, a British citizen aged 35, was a shipping clerk resident in Belfast. He was a homosexual and, for some time, he and others had been conducting a campaign aimed at reforming the Northern Ireland law on homosexuality. In January 1976, the police went to his home to execute a warrant under the Misuse of Drugs Act 1971. After seizing correspondence and a diary describing homosexual activities, the police asked him to accompany them to a police station, where they questioned him for several hours about his sex life. The police investigation file was sent to the Director of Public Prosecutions, but the applicant was informed in February 1977 that he would not be prosecuted and his papers were returned to him with annotations.

Jeffrey Dudgeon lodged an application with the Commission on 22 May 1976. He argued mainly that the Northern Ireland criminal law prohibiting homosexual acts performed in private by consenting male adults constituted an unjustified interference with his right to respect for his private life, guaranteed by Article 8 of the Convention.

Decision of the Court

The Court found a violation of Article 8 for the following reasons:

"37. The applicant complained that under the law in force in Northern Ireland he is liable to criminal prosecution on account of his homosexual conduct [...]. He further complained that, following the search of his house in January 1976, he was questioned by the police about certain homosexual activities and that personal papers belonging to him were seized during the search and not returned until more than a year later.

He alleged that, in breach of Article 8 (art. 8) of the Convention, he has thereby suffered, and continues to suffer, an unjustified interference with his right to respect for his private life [...].

41. [...] The maintenance in force of the impugned legislation constitutes a continuing interference with the applicant's right to respect for his private life (which includes his sexual life) within the meaning of Article 8 par. 1 (art. 8-1). In the personal circumstances of the applicant, the very existence of this legislation continuously and directly affects his private life (see, mutatis mutandis, the *Marckx* judgment of 13 June 1979, Series A n°. 31, p. 13, par. 27): either he respects the law and refrains from engaging – even in private with consenting male partners – in prohibited sexual acts to which he is disposed by reason of his homosexual tendencies, or he commits such acts and thereby becomes liable to criminal prosecution.

It cannot be said that the law in question is a dead letter in this sphere [...].

Moreover, the police investigation in January 1976 was, in relation to the legislation in question, a specific measure of implementation – albeit short of actual prosecution – which directly affected the applicant in the enjoyment of his right to respect for his private life (see paragraph 33 above). As such, it showed that the threat hanging over him was real [...].

43. An interference with the exercise of an Article 8 (art. 8) right will not be compatible with paragraph 2 (art. 8-2) unless it is "in accordance with the law", has an aim or aims that is or are legitimate under that paragraph and is "necessary in a democratic society"

for the aforesaid aim or aims (see, mUtatis, mUtandis, the *YoUng, James and Webster* jUdgment of 13 AUgust 1981, Series A n°. 44, p. 24, par. 59).

44. It has not been contested that the first of these three conditions was met [···].

45. It next falls to be determined whether the interference is aimed at "the protection of morals" or "the protection of the rights and freedoms of others", the two pUrposes relied on by the Government.

46. The 1861 and 1885 Acts were passed in order to enforce the then prevailing conception of sexUal morality. Originally they applied to England and Wales, to all Ireland, then Unpartitioned, and also, in the case of the 1885 Act, to Scotland (see paragraph 16 above). In recent years the scope of the legislation has been restricted in England and Wales (with the 1967 Act) and sUbseqUently in Scotland (with the 1980 Act): with certain exceptions it is no longer a criminal offence for two consenting males over 21 years of age to commit homosexUal acts in private (see paragraphs 17 and 18 above). In Northern Ireland, in contrast, the law has remained Unchanged. The decision annoUnced in JUly 1979 to take no fUrther action in relation to the proposal to amend the existing law was, the CoUrt accepts, prompted by what the United Kingdom Government jUdged to be the strength of feeling in Northern Ireland against the proposed change, and in particUlar the strength of the view that it woUld be serioUsly damaging to the moral fabric of Northern Irish society (see paragraphs 25 and 26 above). This being so, the general aim pUrsUed by the legislation remains the protection of morals in the sense of moral standards obtaining in Northern Ireland [···].

48. [···] [In the eyes of the CoUrt] the cardinal issUe arising under Article 8 (art. 8) in this case is to what extent, if at all, the maintenance in force of the legislation is "necessary in a democratic society" for these aims.

49. There can be no denial that some degree of regulation of male homosexUal condUct, as indeedof other forms of sexUal condUct, by means of the criminal law can be jUstified as "necessaryin a democratic society". The overall fUnction served by the criminal law in this field is, [···]"to preserve pUblic order and decency [and] to protect the citizen from what is offensive or injUrioUs". FUrthermore, this necessity for some degree of control may even extend to consensUal acts committed in private, notably where there is call [···] "to provide sUfficient safeguards against exploitation and corruption of others, particUlarly those who are specially vUlnerable because they are yoUng, weak in body or mind, inexperienced, or in a state of special physical, official or economic dependence". In practice there is legislation on the matter in all the member States of the CoUncil of EUrope, bUt what distinguishes the law in Northern Ireland from that existing in the great majority of the member States is that it prohibits generally gross indecency between males and bUggery whatever the circUmstances. It being accepted that some form of legislation is "necessary" to protect particUlar sections of society as well as the moral ethos of society as a whole, the qUestion in the present case is whether the contested provisions of the law of Northern Ireland and their enforcement remain within the boUnds of what, in a democratic society, may be regarded as necessary in order to accomplish those aims.

50. A nUmber of principles relevant to the assessment of the "necessity", "in a democratic society", of a measUre taken in fUrtherance of an aim that is legitimate under the Convention have been stated by the CoUrt in previoUs jUdgments.

51. Firstly, "necessary" in this context does not have the flexibility of sUch expressions as "UsefUl", "reasonable", or "desirable", bUt implies the existence of a "pressing social need" for the interference in qUestion (see the above-mentioned *Handyside* jUdgment, p. 22, par. 48).

52. In the second place, it is for the national authorities to make the initial assessment of the pressing social need in each case; accordingly, a margin of appreciation is left to them (ibid). However, their decision remains sUbject to review by the CoUrt (ibid., p. 23, par. 49).

    As was illUstrated by the *SUnday Times* jUdgment, the scope of the margin of appreciation is not identical in respect of each of the aims jUstifying restrictions on a right (p. 36, par. 59). The Government inferred from the *Handyside* jUdgment that the margin of appreciation will be more extensive where the protection of morals is in issUe. It is an indispUtable fact, as the CoUrt stated in the *Handyside* jUdgment, that "the view taken ... of the reqUirements of morals varies from timeto time and from place to place, especially in oUr era," and that "by reason of their direct and continUOUs contact with the vital forces of their coUntries, State authorities are in principle in a better position than the international jUdge to give an opinion on the exact content of those reqUirements" (p. 22, par. 48).

    However, not only the natUre of the aim of the restriction bUt also the natUre of the activities involved will affect the scope of the margin of appreciation. The present case concerns a most intimate aspect of private life. Accordingly, there mUst exist particUlarly serioUs reasonsbefore interferences on the part of the pUblic authorities can be legitimate for the pUrposes of paragraph 2 of Article 8 (art. 8–2).

53. Finally, in Article 8 (art. 8) as in several other Articles of the Convention, the notion of "necessity" is linked to that of a "democratic society". According to the CoUrt's case-law, a restriction on a Convention right cannot be regarded as "necessary in a democratic society" – two hallmarks of which are tolerance and broadmindedness – Unless, amongst other things, it is proportionateto the legitimate aim pUrsUed (see the above-mentioned *Handyside* jUdgment, p. 23, par. 49,and the above-mentioned *YoUng, James and Webster* jUdgment, p. 25, par. 63).

54. The CoUrt's task is to determine on the basis of the aforesaid principles whether the reasons pUrporting to jUstify the "interference" in qUestion are relevant and sUfficient Under Article 8 par. 2 (art. 8–2) (see the above-mentioned *Handyside* jUdgment, pp. 23–24, par. 50). The CoUrtis not concerned with making any valUe-jUdgment as to the morality of homosexUal relations between adUlt males. [···]

59. [···] Notwithstanding the margin of appreciation left to the national authorities, it is for the CoUrt to make the final evalUation as to whether the reasons it has foUnd to be relevant were sUfficient in the circUmstances, in particUlar whether the interference complained of was proportionate to the social need claimed for it (see paragraph 53 above).

60. The Government right affected by the impUgned legislation protects an essentially private manifestation of the hUman personality (see paragraph 52, third sUb-paragraph, above).

    As compared with the era when that legislation was enacted, there is now a better unders-tanding, and in conseqUence an increased tolerance, of homosexUal behavioUr to the extent that in the great majority of the member States of the CoUncil of EUrope it is no longer consi-dered to be necessary or appropriate to treat homosexUal practices of the kind now in qUestion as in themselves a matter to which the sanctions of the criminal law shoUld be applied; the CoUrt cannot overlook the marked changes which have occUrred in this regard in the domestic law of the member States (see, mUtatis mUtandis, the above-mentioned *Marckx* jUdgment, p. 19, par. 41, and the *Tyrer* jUdgment of 25 April 1978, Series A n°. 26, pp. 15–16, par. 31). In Northern Ireland itself, the authorities have refrained in recent years from enforcing the law in respect of private homosexUal acts between consenting males over the age of 21 years capable of valid consent (see paragraph 30 above). No evidence has been addUced to show that this has been injUrioUs to moral standards in Northern Ireland or that there has been any pUblic demand for stricter enforcement of the law.

It cannot be maintained in these circumstances that there is a "pressing social need" to make such acts criminal offences, there being no sufficient justification provided by the risk of harm to vulnerable sections of society requiring protection or by the effects on the public. On the issue of proportionality, the Court considers that such justifications as there are for retaining the law in force unamended are outweighed by the detrimental effects which the very existence of the legislative provisions in question can have on the life of a person of homosexual orientation like the applicant. Although members of the public who regard homosexuality as immoral may be shocked, offended or disturbed by the commission by others of private homosexual acts, this cannot on its own warrant the application of penal sanctions when it is consenting adults alone who are involved.

61. Accordingly, the reasons given by the Government, although relevant, are not sufficient to justify the maintenance in force of the impugned legislation in so far as it has the general effect of criminalising private homosexual relations between adult males capable of valid consent. In particular, the moral attitudes towards male homosexuality in Northern Ireland and the concern that any relaxation in the law would tend to erode existing moral standards cannot, without more, warrant interfering with the applicant's private life to such an extent. "Decriminalisation" does not imply approval, and a fear that some sectors of the population might draw misguided conclusions in this respect from reform of the legislation does not afford a good ground for maintaining it in force with all its unjustifiable features.

    To sum up, the restriction imposed on Mr Dudgeon under Northern Ireland law, by reason of its breadth and absolute character, is, quite apart from the severity of the possible penalties provided for, disproportionate to the aims sought to be achieved.

62. In the opinion of the Commission, the interference complained of by the applicant can, in so far as he is prevented from having sexual relations with young males under 21 years of age, be justified as necessary for the protection of the rights of others (see especially paragraphs 105 and 116 of the report). This conclusion was accepted and adopted by the Government, but disputed by the applicant who submitted that the age of consent for male homosexual relations should be the same as that for heterosexual and female homosexual relations that is, 17 years under current Northern Ireland law (see paragraph 15 above).

    The Court has already acknowledged the legitimate necessity in a democratic society for some degree of control over homosexual conduct notably in order to provide safeguards against the exploitation and corruption of those who are specially vulnerable by reason, for example, of their youth (see paragraph 49 above). However, it falls in the first instance to the national authorities to decide on the appropriate safeguards of this kind required for the defence of morals in their society and, in particular, to fix the age under which young people should have the protection of the criminal law (see paragraph 52 above).

63. Mr Dudgeon has suffered and continues to suffer an unjustified interference with his right to respect for his private life. There is accordingly a breach of Article 8 (art. 8)."

Case law applications

Norris v. Ireland, *26 October 1988, application nº. 10581/83*

In the *Norris v. Ireland* judgment, the Court stated even more emphatically than in the *Dudgeon* judgment that the interference with the right guaranteed in Article 8 arose from the mere existence of legislation punishing homosexual relations, regardless of whether or not it was actually enforced. Consequently, an individual homosexual applicant did not have to have been prosecuted or convicted in order to lodge a complaint with the Court against repressive legislation of this kind.

It was sufficient to be a potential or possible victim to satisfy the conditions of admissibility for an individual application, and in particular the requirement for the applicant to have been the victim of a violation of a guaranteed right (under the present Article 34, formerly Article 25).

In the *Norris v. Ireland* judgment, male homosexual relations were a criminal offence under the legislation then in force. The applicant, a homosexual, complained about this legislation, which, in his view, interfered unduly with his right to respect for his private life, and in particular his sexual life. The fact that the legislation complained of had not been enforced against the applicant was not an obstacle to the admissibility of his complaint.

"31.[…] Article 25 (art. 25) of the Convention entitles individuals to contend that a law violates their rights by itself, in the absence of an individual measure of implementation, if they run the risk of being directly affected by it (see the *Johnston and Others* judgment of 18 December 1986, Series A n°.112, p.21, para. 42, and the *Marckx* judgment, previously cited, Series A n°. 31, p. 13, para. 27).

32. In the Court's view, Mr Norris is in substantially the same position as the applicant in the *Dudgeon case*, which concerned identical legislation then in force in Northern Ireland. As was held in that case, "either [he] respects the law and refrains from engaging – even in private and with consenting male partners – in prohibited sexual acts to which he is disposed by reason of his homosexual tendencies, or he commits such acts and thereby becomes liable to criminal prosecution" (Series A n°. 45, p. 18, para. 41).

33. Admittedly, it appears that there have been no prosecutions under the Irish legislation in question during the relevant period except where minors were involved or the acts were committed in public or without consent. It may be inferred from this that, at the present time, the risk of prosecution in the applicant's case is minimal. However, there is no stated policy on the part of the prosecuting authorities not to enforce the law in this respect. A law which remains on the statute book, even though it is not enforced in a particular class of cases for a considerable time, may be applied again in such cases at any time, if for example there is a change of policy. The applicant can therefore be said to "run the risk of being directly affected" by the legislation in question. This conclusion is further supported by the High Court's judgment of 10 October 1980, in which Mr Justice McWilliam, on the witnesses' evidence, found, inter alia, that "One of the effects of criminal sanctions against homosexual acts is to reinforce the misapprehension and general prejudice of the public and increase the anxiety and guilt feelings of homosexuals leading, on occasions, to depression and the serious consequences which can follow from that unfortunate disease.

34. On the basis of the foregoing considerations, the Court finds that the applicant can claim to be the victim of a violation of the Convention within the meaning of Article 25 para. 1 (art. 25–1) thereof."

In substance, the Court considered in the Norris case that it could not be maintained that there was a "pressing social need" to make homosexual acts a criminal offence in Northern Ireland. It also found a violation of Article 8 in similar terms to those of the Dudgeon case.

Modinos v. Cyprus (n°. 15070/89), 22.04.1993

The applicant, a homosexual involved in a relationship with another adult male, the President of the "Liberation Movement of Homosexuals in Cyprus", stated that he suffered great strain, apprehension and fear of prosecution by reason of the legal provisions criminalising certain homosexual acts.

According to the Court, the existence of this legislation continuously and directly affected the applicant's private life. Having regard to the above-mentioned judgments of the Court, the Cypriot authorities did not attempt to argue that the impugned legislation answered a "pressing social need". Violation of Article 8.

B | The ban on criminalising group or filmed homosexual relations

A.D.T. v. the United Kingdom,
31 July 2000 (nº. 35765/97)

Principal facts

The applicant, a homosexual, was arrested following a search of his home during which the police seized various items, including photographs and videotapes. He admitted that the videotapes included footage of himself and up to four adult males engaging in oral sex and mutual masturbation at his home. He was charged with gross indecency under Article 13 of the 1956 Sexual Offences Act (the decriminalisation of sexual acts committed in private between consenting adult males did not apply where more than two men were involved). The applicant was sentenced and conditionally discharged for two years. An order was made for the confiscation and destruction of the seized material.

Decision of the Court

The Court found a violation of Article 8. The main points in its argument were as follows: "23. The Court recalls that the mere existence of legislation prohibiting male homosexual conduct in private may continuously and directly affect a person's private life (see, as the most recent Court case-law, the *Modinos v. Cyprus* judgment of 22 April 1993, Series A nº. 259, p. 11, § 24). [...]

25. [...] In that case, the sole element in the present case which could give rise to any doubt about whether the applicants' private lives were involved is the video-recording of the activities. No evidence has been put before the Court to indicate that there was any actual likelihood of the contents of the tapes being rendered public, deliberately or inadvertently. In particular, the applicant's conviction related not to any offence involving the making or distribution of the tapes, but solely to the acts themselves. The Court finds it most unlikely that the applicant, who had gone to some lengths not to reveal his sexual orientation, and who has repeated his desire for anonymity before the Court, would knowingly be involved in any such publication.

26. The Court thus considers that the applicant has been the victim of an interference with his right to respect for his private life both as regards the existence of legislation prohibiting consensual sexual acts between more than two men in private and as regards the conviction for grossindecency. [...]

34. There are differences between those decided cases and the present application. The principal point of distinction is that in the present case the sexual activities involved more than two men, and that the applicant was convicted for gross indecency as more than two men had been present. [...]

36. [...] [The Court] will consider the compatibility of the legislation in the present case with the Convention in the light of the circumstances of the case, that is, that the applicant wished to be able to engage, in private, in non-violent sexual activities with up to four other men.

37. The Court can agree with the Government that, at some point, sexual activities can be carried out in such a manner that State interference may be justified, either as not amounting to an interference with the right to respect for private life, or as being justified for the protection, for example, of health or morals. The facts of the present case, however, do not indicate any such circumstances. The applicant was involved in sexual activities with a restricted number of friends in circumstances in which it was most unlikely that others would become aware of what was going on. It is true that the activities were recorded on videotape, but the Court notes that the applicant was prosecuted for the activities themselves, and not for the

recording, or for any risk of it entering the public domain. The activities were therefore genuinely "private", and the approach of the Court must be to adopt the same narrow margin of appreciation as it found applicable in other cases involving intimate aspects of private life (as, for example, in the *Dudgeon* judgment cited above, p. 21, § 52).

38. Given the narrow margin of appreciation afforded to the national authorities in the case, the absence of any public-health considerations and the purely private nature of the behaviour in the present case, the Court finds that the reasons submitted for the maintenance in force of legislation criminalising homosexual acts between men in private, and a fortiori the prosecution and conviction in the present case, are not sufficient to justify the legislation and the prosecution.

39. There has therefore been a violation of Article 8 of the Convention."

§ 1 – The right to equal sexual freedom: the same age of sexual majority for homosexual and heterosexual relations

The European Convention on Human Rights guarantees equal sexual freedom. More specifically, it requires that the age of sexual majority should be the same for homosexual and heterosexual relations.

The principle established by the *L. and V.* judgment

The leading decision here is the *L. and V. v. Austria* judgment of 9 January 2003[107], which subsequently gave rise to a series of judgments against Austria[108].

***L. and V. v. Austria*, *9 January 2003*,**
n°. 39392/98 and 39829/98
***and S. L. v. Austria*,**
9 January 2003, n°. 45330/99

At the time of the facts, the age of consent for sexual relations between adults and adolescents differed according to whether heterosexual relations or male homosexual relations were involved: whereas homosexual acts between adult males and consenting male adolescents aged 14–18 constituted a criminal offence, heterosexual acts between adults and consenting adolescents in the same age bracket did not.

In the case in point, the applicants, *L. and V.*, were convicted under Article 209 of the Austrian Criminal Code of having had homosexual relations with young men aged 14–18.

The Court held that this legislation violated Article 14 of the Convention taken in conjunction with Article 8. The main points in its argument were as follows:

"34. The applicants complained of the maintenance in force of Article 209 of the Criminal Code, which criminalises homosexual acts of adult men with consenting adolescents between the ages of 14 and 18, and of their convictions under that provision. [···] They alleged that their right to respect for their private life had been violated and that the contested provision was discriminatory, as heterosexual or lesbian relations between adults and adolescents in the same age bracket were not punishable. [···]

49. What is decisive is whether there was an objective and reasonable justification why young men in the 14 to 18 age bracket needed protection against sexual relationships with adult men, while young women in the same age bracket did not need such protection against relationswith either adult men or women. In this connection the Court reiterates that the scope of

[107] L. and V. v. Austria, 9 January 2003, §§34-55; S. L. v. Austria, 9 January 2003, §37.

[108] Also: Woditschka and Wilfling v. Austria, 21 October 2004; Ladner v. Austria, 3 February 2005; R. H. v. Austria, 19 January 2006.

the margin of appreciation left to the Contracting State will vary according to the circumstances, the subject matter and the background; in this respect, one of the relevant factors may be the existence or non-existence of common ground between the laws of the Contracting States (see, for instance, *Petrovic*, cited above, § 38, and *Fretté*, cited above, § 40).

50. In the present case the applicants pointed out, and this has not been contested by the Government, that there is an ever growing European consensus to apply equal ages of consent for heterosexual, lesbian and homosexual relations. Similarly, the Commission observed in *Sutherland* (cited above) that "equality of treatment in respect of the age of consent is now recognised by the great majority of member States of the Council of Europe" (*loc. cit.*, § 59).

51. The Government relied on the Constitutional Court's judgment of 3 October 1989, which had considered Article 209 of the Criminal Code necessary to avoid "a dangerous strain ... be[ing] placed by homosexual experiences upon the sexual development of young males". However, this approach has been outdated by the 1995 parliamentary debate ona possible repeal of that provision. As was rightly pointed out by the applicants, the vast majority of experts who gave evidence in Parliament clearly expressed themselves in favour of an equal age of consent, finding in particular that sexual orientation was in most cases established before the age of puberty and that the theory that male adolescents were "recruited" into homosexuality had thus been disproved. Notwithstanding its knowledge of these changes in the scientific approach to the issue, Parliament decided in November 1996, that is, shortly before the applicants' convictions, in January and February 1997 respectively, to keep Article 209 on the statute book.

52. To the extent that Article 209 of the Criminal Code embodied a predisposed bias on the part of a heterosexual majority against a homosexual minority, these negative attitudes cannot of themselves be considered by the Court to amount to sufficient justification for the differential treatment any more than similar negative attitudes towards those of a different race, origin or colour (see *Smith and Grady,* cited above, § 97).

53. In conclusion, the Court finds that the Government have not offered convincing and weighty reasons justifying the maintenance in force of Article 209 of the Criminal Code and, consequently, the applicants' convictions under this provision.

54. Accordingly, there has been a violation of Article 14 of the Convention taken in conjunction with Article 8."

Case law applications

This *L. and V. v. Austria* case law – a single age, regardless of sexual orientation, up to whicha state may criminalise sexual relations between adults and adolescents – has also been applied in a case concerning the United Kingdom. Above and beyond the question of age, a case concerning Portugal raised the question of the requirements to be met for such relations to be considered a criminal offence, which should be the same regardless of sexual orientation.

B. B. v. the United Kingdom,
10 February 2004, n°. 53760/00

British criminal legislation was similarly censured in the *B. B. v. United Kingdom* judgment of 10 February 2004 on the ground that it set the minimum legal age for homosexual relations at 18 whereas it was only 16 for heterosexual relations[109].

[109]B. B. v. United Kingdom, 10 February 2004, §§23-25. This judgment confirmed the Commission's Sutherland v. United Kingdom case law contained in its report of 1 July 1997 (which, in contrast to the present case, gave rise to a friendly settlement on 27 March 2001).

Fernando dos Santos Couto v. Portugal,
21 September 2010, n°. 31874/07

The lesson of the *Fernando dos Santos Couto v. Portugal* judgment is as follows: provided the criminalisation requirements for sexual relations between adults and adolescents are the same for both heterosexual and homosexual relations, Article 14 taken in conjunction with Article 8is complied with.

Consequently, the sentencing of the applicant to a suspended prison sentence of one year and six months for having engaged in sexual activities with an adolescent aged 14 did not violate Article 14 taken in conjunction with Article 8 since the domestic courts had applied criminalisation requirements which were identical to "those which would have been applied if the sexual activities in question had taken place with adolescent girls".

Here, the Court focused more on judicial practice relating to such cases than on the letter of the law, because the legislative text[110] referred to by the domestic courts punished sexual activities with male adolescents more severely when they were of a homosexual nature (by the mere fact of engaging in them) than when they were of a heterosexual nature (only where advantage was taken of the adolescent's inexperience). This attitude on the part of the Court contrasts with the general tendency to consider that, in this area of people's lives, the mere existence of legislation introducing discrimination based on sexual orientation is sufficient to be regarded as continuous and direct interference with the right guaranteed, independently of any specific damage.

Wolfmeyer v. Austria,
26 May 2005;
H. G. and G. B. v. Austria,
2 June 2005

In these cases, the applicants had been convicted under Article 209 of the Austrian Criminal Code for having engaged in homosexual relations with adolescents, then had been acquitted following a change in the law, but this acquittal was accompanied neither by any formal recognition of the breach of the Convention, nor by satisfactory compensation for the damage sustained, nor by sufficient reimbursement of costs and expenses incurred in the proceedings. Victim status thus being retained[111], the Court found that there had been a violation of Article 14 taken in conjunction with Article 8 owing to the maintenance in force of Article 209 and the conduct of criminal proceedings against the applicant on that basis.

Section 2. Protection against different forms of violence

It is unfortunately not uncommon for lesbians and gays to suffer acts of violence of a "homophobic" nature. The Convention offers LGBTI persons protection against physical and mental violence on the one hand, and against verbal violence on the other.

[110] Article 175 of the Portuguese Criminal Code. Since 2007, however, following a constitutional Court decision of 10 May 2005 finding Article 175 to be discriminatory, the Criminal Code has provided for a single criminal offence irrespective of the nature of the sexual relations – heterosexual or homosexual.

[111] On this point, see below.

§ 1 – Protection against physical and mental violence

The case law protecting LGBTI persons from physical and mental violence is essentially based on Article 3 of the Convention. Article 3 has been interpreted to mean that the state must respect both an obligation (of a prohibitory nature) to refrain from committing acts of torture or inhuman or degrading treatment and an obligation (of a positive nature) to take appropriate measures to prevent any violence of this kind and to investigate and punish its perpetrators when it has occurred.

As the case law stands, these acts of violence against LGBTI persons take place in prison or in other situations of deprivation of liberty (where their vulnerability is increased) and during street demonstrations (where their exposure is increased).

A | Protection of inmates against detention under conditions contrary to human dignity

A.D.T. v. the United Kingdom,
9 October 2012, nº. 24626/09

Main facts

The applicant is a Turkish national who was born in 1989 and resides in İzmir (Turkey). The applicant was given two sentences, once being an almost ten-year prison sentence for various offences such as forgery, deception, credit-card fraud and misrepresentation in official documents. In 2008, the applicant was remanded in pre-trial detention in Buca remand prison in İzmir. The applicant, a homosexual, was initially placed in a shared cell with heterosexual prisoners. He then asked the prison administration for a transfer, as a safety measure, to a shared cell with homosexual prisoners. He reported that he had been subjected to acts of intimidation and bullying by his co-detainees. The applicant was immediately moved to an individual cell. According to the applicant, his 7-m² cell, which was fitted with a bed and toilets but no washbasin, was very dirty and poorly lit. He claimed that this type of cell was normally used for solitary confinement as a disciplinary measure or for inmates accused of paedophilia or rape. The applicant was deprived of any contact with other inmates and social activity. He had no access to outdoor exercise and was allowed out only to see his lawyer or to attend hearings. After a number of requests made unsuccessfully to the Public Prosecutor's office and the post-sentencing judge, in which he complained about these conditions, the applicant was ultimately transferred to the psychiatric hospital for an assessment of his mental state. He was diagnosed with depression and remained for about one month in hospital before returning to prison. Another homosexual detainee was placed in the same cell as the applicant for about three months. During that period they filed a complaint against a warder for homophobic conduct, insults and blows. The applicant was subsequently deprived again of any contact with other inmates and he withdrew his complaint. This situation ended on 26 February2010, when the applicant was transferred to Eskişehir remand prison and placed with three otherinmates in a standard cell where they enjoyed the rights usually granted to convicted prisoners.

Relying in particular on Article 3 of the Convention (prohibition of torture and inhuman or degrading treatment), the applicant complained about the harsh conditions of his solitary confinement and the damaging effects on his physical and mental health. He further alleged that this treatment had been inflicted on him on account of his sexual orientation, in breach of Article 14 (prohibition of discrimination) taken together with Article 3.

Decision of the Court

The finding of a breach of Article 3, taken in isolation: the right of prisoners to conditions of detention compatible with human dignity

"42. The Court observes that the cell in which the applicant had been placed measured 7 m², with living space vital not exceeding half of that surface area. The cell was fitted with a bed and toilets, but no washbasin. According to the applicant, it was very poorly lit, very dirty and infested with rats, which the Government does not deny. It was a cell intended for inmates who were placed in solitary confinement as a disciplinary measure or those accused of paedophilia or rape. While in that cell the applicant had been deprived of any contact with other inmates and social activity. He had had no access to outdoor exercise and had been allowed out only to see his lawyer or to attend hearing, which took place periodically, about once a month.

43. The Court observes that [···] certain aspects of those conditions were stricter than the regime applied in Turkey for prisoners serving life sentences. [···].

44. The Court considers that the total prohibition of access to outdoor activities or the duration of the applicant's detention in the individual cell, combined with the lack of contact with other inmates, illustrates the exceptional nature of the applicant's conditions of detention. [···]

50. Consequently, the Court concludes that the applicant was deprived of any effective domestic remedy in respect of his complaint concerning the conditions of his detention and that he was not held in conditions that were appropriate or respectful of his dignity.

51. The Court finds that in the instant case, the conditions of the applicant's detention in solitary confinement were such as to cause him both mental and physical suffering and a strong feeling of being stripped of his dignity. Those conditions, aggravated by the lack of an effective remedy, thus constitute 'inhuman and degrading treatment' in breach of Article 3 of the Convention."

The finding of a breach of Article 14 taken in conjunction with Article 3: the right of prisoners to conditions of detention compatible with human dignity without discrimination based on sexual orientation"

The Court basically found that the Government's argument that it wished to protect the applicant against homophobic violence from the other inmates were not sufficient in themselves to justify his detention in solitary confinement under conditions incompatible with human dignity.

Even though the Court did not express itself in this way, one might say that the reason given for sheltering the applicant from possible discriminatory violence on the part of the other inmates cannot justify the Turkish prison authorities in inflicting on him a different type of discriminatory violence by detaining him under inhuman and degrading conditions of detention. In other words, the desire to guarantee a homosexual detainee's safety vis-à-vis violence perpetrated by other inmates because of his sexual orientation cannot serve as a pretext for the prison authorities to inflict on him a different type of violence which is also motivated by his sexual orientation.

"63. ···in the Court's view, the measure of completely excluding the applicant from prison life can in no way be seen as justified. In particular, there is no explanation of why the applicant had absolutely no access to outdoor exercise, even of a limited nature.

64. In the light of the foregoing comments, the Court is not persuaded that the need for security measures to protect the applicant's physical integrity was the overriding raison for his total exclusion from prison life. The Court considers that the applicant's sexual orientation was the main raison for the adoption of this measure. It consequently deems established the fact that the applicant suffered discrimination based on his sexual orientation. It further notes that the Government failed to advance any reasons demonstrating that the discrimination in question was compatible with the Convention.

65. Consequently, the Court concludes that in the instant case there has been a violation of Article 14 of the Convention taken in conjunction with Article 3."

B | Protection of inmates against ill-treament by other detainees

In the case considered next, the Court examined whether France had complied with the obligation on states to possess effective criminal legislation and to take appropriate measures against acts of physical harm. The case concerned a prisoner who complained of ill–treatment by other prisoners because of his sexual orientation.

***Stasi v. France*,**
20 October 2011, application n°. 25001/07

Principal facts

The applicant, Vincent Stasi, a French national born in 1955, lived in Lyon (France). Charged with criminal offences in two separate sets of proceedings, Mr Stasi was twice reminded in custody, the first time in the Saint Paul remand prison in Lyon, then in Villefranche–sur–Saône prison, and the second time in Villefranche–sur–Saône prison. He was convicted as charged and sentenced successively to two and three years' imprisonment (including a suspended sentence) in the two sets of proceedings. He served the second sentence immediately following the first in Villefranche–sur–Saône prison.

On his arrival in Villefranche–sur–Saône prison on 27 July 2006, Mr Stasi let it be known that he was a homosexual and that he had been the victim of acts of rape during his previous period of detention. He was therefore placed alone in a cell on a corridor of the prison reserved for "vulnerable" prisoners. He remained alone in the cell except for the period 26 February 2007 to 18 March 2007, when he had to share with another prisoner: Monsieur P (M.P.). The applicant stated that he had been forced to stop taking showers because of homophobic insults from other prisoners and that he had been ill–treated by M. P. because of his sexual orientation while they were sharingthe cell. According to him, he was forced to wear a pink star, was beaten, burned, deprived of food and prevented from leaving his cell so as not to reveal his injuries. A medical certificate issued three weeks later by the prison doctor attested to significant bruising. On 9 July 2007Mr Stasi said that he had wanted to commit suicide. He was seen by the building supervisor, a doctor and a psychiatrist, and was placed until 26 July 2007 on suicide watch. During his imprisonment Mr Stasi was the victim of other acts, and medical certificates were issued attes– ting to bruising. On 6 November 2007 he was pushed down the stairs by an unidentified inmate and injured his right leg. On 31 January 2008 a prisoner stubbed a cigarette under his left eye.In August 2008 another inmate assaulted him in the shower. In August 2008 the applicant was informed that he had to change floors because of the introduction of a special regime for prisoners sentenced to less than eighteen months. He went on a hunger strike in protest. After refusingthe first transfer he agreed to the second and stopped his hunger strike on 15 September 2008. Mr Stasi met the Inspector–General of Detention Facilities during a visit to his prison. On the

inspector's recommendation he was placed on suicide watch. As a result, the prison doctor issued a certificate to the effect that the applicant's state of health warranted his immediate segregation. He was placed in a segregation unit from 29 September 2008 onwards until his release on 18 October 2008. On the day of his release he was admitted to the psychiatric hospital of Saint-Cyrau Mont d'Or, where he remained until 14 January 2009. After the publication of an article in a newspaper reporting the rapes, assaults and bullying to which he had been subjected duringhis two periods of imprisonment, the Principal Public Prosecutor at the Lyon Court of Appeal ordered a preliminary police investigation. In the light of the results of that investigation the public prosecutor decided to call for the opening of a judicial investigation into acts of rape and assault committed during the applicant's first period of imprisonment. That judicial investigation is currently pending. On 24 October 2008 the public prosecutor of Villefranche-sur-Saône entrusted the local *sûreté départementale* branch of the police force with the task of investigating the assaults allegedly committed during Mr Stasi's second period of imprisonment. The inves- tigators questioned the deputy governor of the prison, the successive building supervisors, the head warder and M. P., with whom the applicant had shared a cell. An investigation report was drawn up on 25 May 2009.

Relying on Article 3 (prohibition of torture and inhuman or degrading treatment), Mr Stasi alleged that he had been the victim of ill-treatment by other inmates during his two periods of imprisonment, in particular because of his sexual orientation, and he further alleged that the authorities had not taken the necessary measures to ensure his protection.

Decision of the Court

The Court considered the case from the angle of Article 3 alone and found that this article had not been violated. It reached that conclusion after reiterating certain general principles which, as such, constitute guarantees benefiting homosexuals in particular because they are, unfortunately, often subjected to ill-treatment

"75. The Court notes first of all that ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3. The assessment of that minimum is relative in essence; it depends on all the circumstances of the case, such as the duration of the treatment, its physical or mental effects and, in some cases, the sex, age and state of health of the victim (*Ilhan v. Turkey* [GC], n°. 22277/93, §84, ECHR 2000-VII).

76. Allegations of ill-treatment must be supported before the Court by appropriate evidence (see, *mutatis mutandis*, *Klaas v. Germany*, 22 September 1993, Series A n°. 269, p. 17, §30). To establish the facts alleged, the Court applies the criterion of proof 'beyond all reasonable doubt'; such proof may, however, follow from the co-existence of sufficiently strong, clear and concordant inferences or unrebutted presumptions (*Ireland v. the United Kingdom*, judgmentof 18 January 1978, Series A n°. 25, p. 65, §161 in *fine*, *Selmouni*, cited above, §88, and *Pantea v. Romania*, n°. 33343/96, §181, ECHR 2003-VI (extracts).

77. The Court further notes that Article 3 of the Convention enshrines one of the fundamental values of democratic societies and accordingly prohibits in absolute terms torture and inhuman or degrading treatment or punishment (*Labita v. Italy* [GC], n°. 26772/95, §119, ECHR 2000-IV, and Rodić and Oth*ers v. Bosnia and Herzegovina*, n°. 22893/05, §66, 27 May 2008). It requires the authorities of the Contracting States not only to refrain from causing such treatment butalso to take measures to prevent such persons from being subjected to torture or inhuman or degrading treatment or punishment, even inflicted by private individuals (*A. v. the United Kingdom,* cited above, §22, *M. C. v. Bulgaria*, cited above, §149, and *Šečić v. Croatia*, n°. 40116/02, §52, 31 May 2007).

78. Where prisoners in particular are concerned, the Court has already had occasion to stress that they are in a position of vulnerability and that the authorities are under a duty to protect them (*Keenan v. the United Kingdom*, n°. 27229/95, §91, ECHR 2001-III, and *Renolde v. France*, n°. 5608, §83, 16 October 2008). However, that duty must be interpreted in such a way as not to place an intolerable or excessive burden on the authorities (*Pantea*, cited above, §189).

79. In the Court's view, having regard to the nature of the right protected by Article 3, it is sufficient for an applicant to show that the authorities have not done everything that could be reasonably expected of them to avoid a real and immediate risk of physical harm, of which they were, or should have been, aware. This is a question the answer to which depends on all the circumstances of the particular case.

80. The Court notes lastly that Article 3 requires member states to put in place effective criminal legislation which constitutes an effective deterrent against acts of physical harm and allows them to be punished (*A. v. the United Kingdom*, cited above, §22, *M. C. v. Bulgaria*, cited above, §150, and *Beganović v. Croatia*, n°. 46423/06, §71, 25 June 2009)." [Unofficial translation]

After reiterating these general principles, the Court said that, in the circumstances of the case and having regard to the facts which were brought to their knowledge, the authorities had taken all the measures that could reasonably be expected of them to protect the applicant from physical harm.

The Court observed that the applicant's allegation that his fellow inmate M.P. had forced him to wear a pink star was not supported by any proof and that it could not therefore be regarded as established. As to Mr Stasi's other allegations, the Court noted that he had produced a number of medical certificates concerning the various incidents complained of. It thus held it to be established that while in prison he had been subjected to acts of violence that were serious enough for the facts in question to be classified as inhuman and degrading treatment.

On the question whether the prison authorities had taken appropriate measures, the Court observed that on his arrival at Villefranche-sur-Saône prison the applicant had mentioned his sexual orientation and reported the acts of violence against him during his first period of imprisonment. He had thus been placed in a corridor reserved for vulnerable inmates. As regards the most serious facts complained of, which allegedly occurred when he was sharing a cell with M. P, the Court observed that he had never complained of them to the prison authorities and in particular to the building supervisors who had received him, and that he had not forwarded the medical certificate issued to him. In view of the position of his injuries, the Court considered that the prison authorities could not have been aware of the acts of violence committed against him. Concerning the incident of 6 November 2007, when according to the applicant he had been pushed down the stairs by a fellow inmate, resulting in bruising on his right leg, it did not appear from the file that he had reported this to the prison authorities. However, he had informed them of the incident of 31 January2008 in which an inmate had stubbed a cigarette under his left eye, but the enquiries made in order to identify the assailant had been unsuccessful because of the applicant's failure to cooperate.The Court noted that Mr Stasi had then been transferred to another cell, that he had been allowed to take a shower alone at a different time to other inmates and that he was systematically accompanied by a warder when he moved around. As regards his allegation that he had been beaten in the shower block, no culprit had been identified. Lastly, the Court noted that the prisonauthorities had taken the appropriate measures both when the applicant was on hunger strike and when he tried to commit suicide. On the recommendation of the Inspector-General of Detention Facilities he had been seen by a doctor and placed in a segregation unit until his release.The Court considered that, in the circumstances of the case, and taking into account the facts that had been brought to their attention, the authorities had taken all the measures that could reasonably be expected of them to protect the applicant from physical harm.

On the qUestion of effective criminal legislation, the CoUrt observed that French criminal law pUnished assaults causing bodily harm sUch as those complained of by Mr Stasi: rape was pUnishable by fifteen years' imprisonment, extended to twenty years when committed on accoUnt of the victim's sexUal orientation; acts of violence were pUnishable by a prison sentence of between three and five years and a fine whose amoUnt varied depending on the circUmstances of the case. The CoUrt noted that, as regards the rape and assaults complained of by the applicant dUring his first period of imprisonment, a preliminary police investigation had been condUcted and a jUdicial investigation in respect of rape and assault was pending. As regards the acts of violence that had occUrred dUring the applicant's second period of imprisonment, the CoUrt observed that they had also given rise to a preliminary police investigation, following which Mr Stasi coUld have filed a criminal complaint bUt had not done so. The CoUrt foUnd no reason to consider that sUch a complaint woUld not have had a reasonable prospect of sUccess. The CoUrt thUs came to the conclUsion that domestic law provided the applicant with effective and sUfficient protection against physical harm. The CoUrt held that, having regard to the facts of the case, there had been no violation of Article 3 of the Convention.

The reqUirement that the state mUst take adeqUate preventive measUres against any risk of harm to the integrity or secUrity of the detainee can be foUnd in the case law regarding LGBTI migrants who are deprived of their liberty: the CoUrt has specified that, in the context of the placement of asylUm seekers, LGBTI persons – because they belong to a vUlnerable groUp – mUst receive increased attention. This dUty of care, derived this time from Article 5 of the Convention (right to liberty and secUrity), was stated in the following jUdgment.

O.M. v. Hungary,
5 July 2016, nº. 9912/15

The applicant, O.M., is an Iranian national who applied for asylUm in HUngary, claiming that he had been forced to flee his coUntry of origin, Iran, because of his homosexUality. The HUngarian authorities ordered his detention (which lasted 58 days) on the groUnds that his identity and nationality had not yet been established with certainty and that he might flee or hinder the coUrse of the proceedings if he was released.

Examining the lawfUlness of the detention in the light of Article 5 of the EUropean Convention on HUman Rights, the CoUrt conclUded that the applicant's detention had not been "lawfUl" Under Article 5 § 1 of the Convention. Among the varioUs factors that led to the finding that the detention was arbitrary and UnjUstified, the last one was the failUre to take into accoUnt individUal circUmstances, and more precisely the fact that he belonged to a vUlnerable groUp on groUnds of his sexUal orientation.

"53. [···] the CoUrt considers that, in the coUrse of placement of asylUm seekers who claim to be a part of a vUlnerable groUp in the coUntry which they had to leave, the authorities shoUld exercise particUlar care in order to avoid sitUations which may reproduce the plight that forced these persons to flee in the first place. In the present case, the authorities failed to do so when they ordered the applicant's detention withoUt considering the exten to which vUlnerable individUals – for instance, LGBTI people like the applicant – were safe or unsafe in cUstody among other detained persons, many of whom had come from coUntries with widespread cUltUral or religioUs prejUdice against sUch persons. [···] the decisions of the authorities did not contain any adeqUate reflection on the individUal circUmstances of the applicant, member of a vUlnerable groUp by virtUe of belonging to a sexUal minority in Iran"

C | Protection of demonstrators against homophobic violence by counter-demonstrators

Identoba and Others v. Georgia,
12 May 2015, n°. 73235/12

Principal facts

This case concerned a peaceful demonstration organised in Tbilisi on 17 May 2012 by a non-governmental organisation (NGO) set up to promote and protect the rights of LGBTI people to mark the International Day Against Homophobia. During the demonstration, participants were insulted, threatened and assaulted by a larger group of counter-demonstrators. Following these events, the applicants filed several criminal complaints, requesting in particular the opening of a criminal investigation into the attacks perpetrated against them by the counter-demonstrators with discriminatory intent and the attitude of the police officers who had failed to protect them from these attacks.

Among the various articles relied on by the applicants, the latter alleged in particular that they had been victims of a violation of Article 3 (prohibition of inhuman or degrading treatment) takenin conjunction with Article 14 (prohibition of discrimination). Indeed, the individual applicants in this case complained that the Georgian authorities had failed to protect them from the violent attacks perpetrated by the counter-demonstrators and to investigate effectively the incidents by establishing, in particular, the discriminatory motive for these attacks (for a more detailed statement of facts: see below the developments concerning freedom to demonstrate).

Decision of the Court

In addition to the violation of Article 11 guaranteeing freedom of assembly in conjunction with Article 14 prohibiting discrimination (see below the developments concerning freedom to demonstrate), the Court also found a violation of Article 3 (prohibition of inhuman or degrading treatment) in conjunction, once again, with Article 14 of the European Convention on Human Rights. This last violation was stated based on the following reasoning.

The Court first set out a number of principles, including the following.

"63. The Court considers that the authorities' duty to prevent hatred-motivated violence on the part of private individuals, as well as to investigate the existence of a possible link between a discriminatory motive and the act of violence can fall under the procedural aspect of Article 3 of the Convention, but may also be seen to form part of the authorities' positive responsibilities under Article 14 of the Convention to secure the fundamental value enshrined in Article 3 without discrimination. Owing to the interplay of the two provisions, issues such as those in the present case may indeed fall to be examined under one of the two provisions only, with no separate issue arising under the other, or may require simultaneous examination under both Articles. This is a question to be decided in each case in the light of its facts and the nature of the allegations made (see Bekos and Koutropoulos v. Greece, n°. 15250/02, § 70, ECHR 2005 XIII (extracts); B.S. v. Spain, n°. 47159/08, §§ 59 63, 24 July 2012; and compare with Begheluri and Others v. Georgia, n°. 28490/02, §§ 171 79, 7 October 2014).

"64. In the particular circumstances of the present case, in view of the applicants' allegations that the violence perpetrated against them had homophobic and transphobic overtones which rendered their ill-treatment sufficiently severe to attain the relevant threshold, and that the authorities failed both to protect them from and then sufficiently investigate that bias-motivated violence, the Court deems that the most appropriate way to proceed would

be to subject the applicants' complaints to a simultaneous dual examination under Article 3 taken in conjunction with Article 14 of the Convention (compare with Abdu v. Bulgaria, n°. 26827/08, § 31, 11 March 2014)."

The European Court then noted that, in the present case, it was undisputed that the individual applicants who had taken part in the demonstration were the target of hate speech and aggressive behaviour. The question then arises as to whether the aggression against the applicants reached the threshold of severity required to constitute a violation of Article 3 in conjunction with Article 14 of the Convention. In doing so, the Court took account of the following elements. It took into account the precarious position of LGBTI persons in the respondent State at the time of the events and various reports showing that negative attitudes towards them are widespread in some parts of Georgian society. In this context, the Court first noted that during the demonstration, the applicants were surrounded by a mob of angry counter-demonstrators who outnumbered them, uttered death threats and beat them at random. This behaviour was undoubtedly motivatedby homophobic bias. This was evidenced by the particularly insulting and threatening statementsmade by members of both religious groups, as well as the ripping of flags and posters of the LGBTI rights movement and the acts of physical assault perpetrated against some of the applicants. The aim of this verbal and physical abuse was clearly to frighten the applicants so that they would stop publicly supporting LGBTI people. The applicants' distress was probably exacerbated bythe fact that the police did not provide them with the protection they had been promised before the demonstration, either adequately or in due time. This violence made the thirteen applicants experience feelings of fear, anguish and insecurity intense enough to reach the threshold of severity required for the application of Article 3 in conjunction with Article 14 of the Convention (see paragraphs 68 to 71 of the judgment).

Consequently, the Court held the state liable for several reasons.

First, the Court found that the Georgian authorities had failed to provide adequate protection to the applicants.

"72. The Court observes that the municipal and police authorities had been informed well in advance of the LGBTI community's intention to hold a march in the centre of Tbilisi on 17 March 2012. The organisers of the march specifically requested the police to provide protection against foreseeable protests by people with homophobic and transphobic views. Furthermore, given the history of public hostility towards the LGBTI community in Georgia, the Court considers that the domestic authorities knew or ought to have known of the risks associated with any public event concerning that vulnerable community, and were consequently under an obligation to provide heightened State protection (compare with, mutatis mutandis, *Milanović v. Serbia*,n°. 44614/07, §§ 84 and 89, 14 December 2010; *Members of the Gldani Congregation of Jehovah's Witnesses and Others v. Georgia,* [...]; and *Beghelluri and Others*, [...]).

73. However, in contrast to the respondent State's positive obligation to provide the peaceful demonstrators with heightened protection from attacks by private individuals, the Court notes the limited number of police patrol officers initially present at the demonstration distanced themselves without any prior warning from the scene when the verbal attacks started, thus allowing the tension to degenerate into physical violence. By the time the police officers finally decided to step in, the applicants and other participants of the march had alreadybeen bullied, insulted or even assaulted (compare with *Members of the Gldani Congregation of Jehovah's Witnesses and Others*, [...]). Furthermore, instead of focusing on restraining the most aggressive counter-demonstrators with the aim of allowing the peaceful processionto proceed, the belated police intervention shifted onto the arrest and evacuation of someof the applicants, the very victims whom they had been called to protect.

74. In the light of the foregoing, the Court considers that the domestic authorities failed to provide adequate protection to the thirteen individual applicants from the bias-motivated attacks of private individuals during the march of 17 May 2012."

75.

Secondly, the Court found that the events were not investigated effectively by the Georgian authorities. It is this point that will now be developed.

D | The obligation to investigate possible homophobic motives for acts of violence

The principle established by the *Identoba* judgment

***Identoba and Others v. Georgia*,**
12 May 2015, n°. 73235/12

In this case (the facts of which have just been briefly set out: see the previous developments), the Court found a violation of Article 3 (prohibition of inhuman or degrading treatment) taken in conjunction with Article 14 of the European Convention on Human Rights not only for failing to provide adequate protection to the demonstrators (as has just been mentioned) but also for not effectively investigating the violence affecting them and in particular its discriminatory nature. On this point, its argument reads as follows.

"75. The Court observes that the criminal complaints into the ill treatment of the participants of the march, including the thirteen individual applicants, by counter-demonstrators as well as the purported inaction of the police in the face of the violence, were filed the day after the incident, on 18 May 2012. Subsequently, all of the applicants again requested, on 3 and 5 July 2012, the initiation of an investigation of the two above-mentioned facts. However, the relevant domestic authorities, instead of launching a comprehensive and meaningful inquiry into the circumstances surrounding the incident with respect to all of the applicants, inexplicably narrowed the scope of the investigation and opened two separate and detached cases concerning the physical injuries inflicted on two individual applicants only. Even in those separate criminal cases, no significant progress has been made for more than two years. The investigations are still pending at the early stages and the applicants have not even been granted victim status [...]. The only tangible result was the administrative sanctioning of two counter demonstrators, who were punished for minor breach of public order by a fine of some EUR 45 each. However, given the level of the unwarranted violence and aggression against the applicants, the Court does not consider that such a light administrative sanction was sufficient to discharge the State of its procedural obligation under Article 3 of the Convention.

76. Bearing in mind the factual circumstances of the acts that constituted the violence perpetrated against the applicants, the Court notes that there are quite a few provisions in the Criminal Code of Georgia which could have constituted a more appropriate ground for launching a criminal investigation into the violence, such as physical assault (Article 125), uttering death threats or threatening to damage health (Article 151) and encroachment on the right to freedom of peaceful assembly (Article 161). Furthermore, it should have been possible for the

investigation to narrow down the pool of possible assailants. First, it was a well-known fact that representatives of two religious organisations – the Orthodox Parents' Union and the Saint King Vakhtang Gorgasali's Brotherhood – had participated in the counter-demonstrations and, secondly, video recordings of the clashes had captured clear images of the most aggressive assailants from those two religious groups [...].

77. More importantly, the domestic criminal legislation directly provided that discrimination onthe grounds of sexual orientation and gender identity should be treated as a bias motive andan aggravating circumstance in the commission of an offence. The Court therefore considersthat it was essential for the relevant domestic authorities to conduct the investigation in that specific context, taking all reasonable steps with the aim of unmasking the role of possible homophobic motives for the events in question. The necessity of conducting a meaningful inquiry into the discrimination behind the attack on the march of 17 May 2012 was indispensable given, on the one hand, the hostility against the LGBTI community and, on the other, in the light of the clearly homophobic hate speech uttered by the assailants during the incident. The Court considers that without such a strict approach from the law enforcement authorities, prejudice-motivated crimes would unavoidably be treated on an equal footing with ordinary cases without such overtones, and the resultant indifference would be tanta- mount to official acquiescence to or even connivance with hate crimes [...].

78. The Court accordingly considers that the domestic authorities have failed to conduct a proper investigation of the thirteen applicants' allegations of ill-treatment."

To sum up, Article 14, taken in conjunction with Article 3 (and a fortiori with Article 2), induces a positive procedural obligation on member states to initiate an effective investigation into the possible existence of homophobic motivations leading to brutality if there are presumptions that may suggest it. Such an investigation must be carried out regardless of the cause of the violence, including when it comes from private individuals. The Court transposed here in the field of the prohibition of discrimination on grounds of sexual orientation its case law relating to the prohibition of racial discrimination (from the *Bekos and Koutropoulos v. Greece* judgment,13 December 2005, §69-75).

Case law applications

***M.C. and A.C. v. Romania*,**
12 April 2016, nº. 12060/12

Principal facts

The applicants, M.C. and A.C., are Romanian nationals who were born in 1978 and 1986 and live in Bucharest and Curtea de Argeş (Romania) respectively. They complained that they had been assaulted on their way home from a gay march and that the ensuing investigation had been inadequate. On 3 June 2006, the applicants participated in the annual gay march in Bucharest. In the metro, on their way home, they were attacked by a group of six young men and a woman. The attackers kicked and punched them and shouted homophobic insults at them. Both applicants suffered injuries, including bruises, contusions and minor cranio-cerebral trauma, which were all confirmed by medical examinations. In addition, they mentioned that they underwent group therapy to recover from the psychological trauma caused by the attacks. The applicants immediately filed a criminal complaint against the assailants, stating that the attacks had been motivated by their sexual orientation. They believed that the attackers had identified them at the march and then followed them in the metro because, following instructions issued by the organisers, they were not wearing any visible signs that

could have revealed they had attended the march. In the following days, they also produced all the evidence at their disposal, especially pictures taken by a photographer during the attack andthe identification of some of the attackers by both the photographer and M.C., the first applicant.In April 2007, the Metro Police Station was finally seized of the case. A witness was later heard and, as one of the attackers was believed to be a football team supporter, the police attended 29 football matches and carried out random checks in metro stations. However, in 2011, the police informed them that they did not intend to initiate criminal proceedings, as they considered it impossible to identify the culprits and the alleged offences had become statute-barred in the meantime. The prosecutor's office subsequently endorsed the police position and, in August 2012, the courts finally dismissed the applicants' appeal against the refusal to initiate criminal procee- dings, also on the grounds that the offences were now statute-barred.

Relying in particular on Article 14 (prohibition of discrimination) and Article 3 (prohibition of inhuman or degrading treatment), the applicants complained that the investigation into the attack against them had been inadequate. They specifically alleged that the authorities had failed to take into account that the offences committed against them were motivated by hatred towards homosexuals and, more generally, that there was a lack of adequate legislative or other measures to combat hate crimes directed against the LGBTII minority (lesbian, gay, bisexual, transgender and intersex).

Decision of the Court

Following on from the above-mentioned *Identoba* judgment, the Court considered that the failureto take into account possible homophobic discriminatory motives in the investigation into the aggression suffered by the applicants after the gay march in which they had participated infringed Article 14, read in conjunction with Article 3 (see § § 105 to 126 of the judgment).

The Court considered indeed that the physical and verbal attacks to which the applicants were subjected probably aimed at frightening them so that they would renounce their public expression of support for the LGBTI community. The fact that the applicants were attacked because they were exercising rights guaranteed by the Convention, namely participating in an LGBTI march, must have exacerbated the distress they experienced. In view of the reports drawn up by several international bodies, including the Council of Europe Commissioner for Human Rights, the Court acknowledged that the LGBTI community finds itself in a precarious situation in the territory of the respondent State due to the negative attitudes to which its members are subjected. Accordingly, the treatment to which the applicants were subjected reached the requisite threshold of severity to fall within the scope of Article 3 taken in conjunction with Article 14 of the Convention.

As for the investigation of the incidents, it should be noted that the applicants promptly filed a criminal complaint and produced all the evidence at their disposal, which, in their opinion, was sufficient to identify at least some of the perpetrators. However, no significant steps were taken by the authorities for almost a year and, more than five years after the initial complaint was lodged, they had still not established the identity of the perpetrators of the assault. In addition, the Court observed several shortcomings. In particular, the authorities failed to take into account the role that possible homophobic motives could have played in these attacks. Yet it was indispensable to take this factor into account given the hostility shown against the LGBTI community in the respondent State and in view of the applicants' statements that hate speech, that was clearly homophobic, had been uttered by the assailants during the attack. When law-enforcement authorities do not adopt a rigorous approach, prejudice-motivated offences are inevitably treated on the same footing as cases without such connotations, and the resultant indifference amounts to acquiescence to, or even connivance with hate crimes by the authorities. Moreover, the lack of a serious investigation may make it difficult for the respondent State to take measures aimed at improving the policing of similar peaceful demonstrations in the future, which may undermine public confidence in the state's anti-discrimination policy.

§ 2 – Protection against verbal violence

As the case law currently stands, homophobic speech is viewed by the European Court of Human Rights from two angles: from the point of view of the freedom of expression of those who stigmatise this type of speech, on the one hand, and from the point of view of those who make it, on the other. In both cases, the question is how far verbal disapproval of homosexuality by some and homophobia by others can go. In other words, to what extent can the state restrict each other's freedom of speech? While verbal condemnation of homosexuality seems to be subject to very narrow limits, denunciation of homophobia seems to be much less restricted. Indeed, it follows from European case law that individuals have a wide freedomof expression to denounce homophobic statements made by politicians, while symmetrically, states enjoy a wide margin of appreciation to restrict the freedom of expression of the authors of homophobic comments. Clearly, freedom of expression seems to be greater for defenders of homosexuality than for its detractors.

In the first case, the protection of lesbian and gay persons derives directly from their right to freedom of expression under Article 10 of the Convention. European case law has established, since the *Mladina D.D. Ljubljana v. Slovenia* judgment in 2014, followed by other judgments, the right of individuals to a wide freedom of expression relating to sexual orientation (see below).

In the second case, the protection of lesbian and gay persons is the indirect consequence of the limitation of others' freedom of expression, which is at the same time allowed by the same Convention. The Court held in a general way that, in the context of their positive obligations under Article 10 of the Convention, states must strike a fair balance between freedom of expression and the rights of others. The protection that will be discussed here is not a direct guarantee offered by the European Convention on Human Rights to LGBTI persons. From a strictly formal point of view, this is not a right that a gay or lesbian person would be entitled to claim. This is an indirect protection in the sense that it derives from the limitations placed on the rights of third parties. Indeed, the protection in question stems from the restrictions that states are entitled to place on other people's freedom of expression without infringing Article 10. In plain language, the Convention allows states to pass laws or take decisions that punish homophobic statements without Article 10 being regarded as having been violated. In fact, several European countries have specific criminal legislation punishing homophobic statements (this is the case, for example, in the following countries: Belgium, Denmark, Spain, Great Britain, the Netherlands and Sweden). For those states or for all states which, in one way or another, are led to take equivalent measures, the question arises as to how far this restriction on the freedom of expression can go for people who make statements denigrating homosexuality. This question as to the restriction of the freedom of expression of perpetrators of homophobic speech will be addressed in this section through the *Vejdeland v. Sweden* judgment of 9 February 2012, n°. 1813/07 and the *Sousa Goucha v. Portugal* judgment of 22 March 2016, n°. 70434/12.

Vejdeland v. Sweden,
9 February 2012, application n°. 1813/07

Principal facts

The applicants, Tor Fredrik Vejdeland, Mattias Harlin, Björn Täng and Niklas Lundström, are Swedish nationals and were born in 1978, 1981, 1987 and 1986 respectively.

In December 2004 the applicants, together with three other persons, went to an upper secondary school and distributed approximately a hundred leaflets written by an organisation called National

Youth by leaving them in or on the pupils' lockers. The episode ended when the school's principal intervened and made them leave the premises. The leaflets contained, inter alia, statements presenting homosexuality as a "sexual deviance proclivity", as having a "morally destructive effect on the substance of society" and as being the cause of AIDS and HIV propagation.

The applicants claimed that they had not intended to express contempt for homosexuals as a group and stated that the purpose of their activity had been to start a debate about the lack of objectivity in the education dispensed in Swedish schools. The District Court found that the applicants' intention had been to express contempt for homosexuals and convicted the applicants of agitation against a national or ethnic group. The Court of Appeal invalidated that decision on the ground that a conviction would amount to a violation of their right to freedom of expression as guaranteed by the Convention.

On 6 July 2006, the Supreme Court convicted the applicants of agitation against a national or ethnic group. The majority of judges first considered that the young people received the leaflets without having the possibility to refuse them and that it would have been possible to supply the pupils with arguments in order to initiate a debate in a way that was offensive and disparaging for homosexuals as a group. The first three applicants were given suspended sentences combined with fines ranging from approximately 200 to 2000 EUR and the fourth applicant was sentenced to probation.

The applicants alleged in particular that their conviction by the Supreme Court for agitation against a national or ethnic group had violated their right to freedom expression under Article10 of the Convention.

Decision of the Court

"50. It remains for the Court to consider whether the interference was "necessary in a democratic society".

51. The test of "necessity in a democratic society" requires the Court to determine whether the interference complained of corresponded to a "pressing social need". In this respect, the Contracting States enjoy a margin of appreciation in assessing whether such a need exists, but it goes hand in hand with a European supervision, embracing both the legislation and the decisions applying it, even those given by an independent court. The Court is therefore empowered to give the final ruling on whether a "restriction" is reconcilable with freedom of expression as protected by Article 10 (see, among other authorities, *Pedersen and Baadsgaardv. Denmark* [GC], n°. 49017/99, § 68, ECHR 2004 XI).

52. In reviewing under Article 10 the decisions taken by the national authorities pursuant to their margin of appreciation, the Court must determine, in the light of the case as a whole, including the content of the comments held against the applicants and the context in which they made them, whether the interference at issue was "proportionate" to the legitimate aim pursued and whether the reasons adduced by them to justify the interference are "relevant and sufficient" (see, among other authorities, *Pedersen and Baadsgaard*, cited above, § § 69 and 70, and *Kobenter and Standard Verlags GmbH v. Austria*, n°. 60899/00, § 29, 2 November 2006).

53. The Court further reiterates that freedom of expression is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb. As set forth in Article 10, this freedom is subject to exceptions, which must, however, be construed strictly, and the need for any restrictions must be established convincingly (see, among other authorities, *Pedersen and Baadsgaard*, cited above, § 71).

54. The Court notes that the applicants distributed the leaflets with the aim of starting a debate about the lack of objectivity of education in Swedish schools. The Court agrees with the Supreme

Court that even if this is an acceptable purpose, regard must be paid to the wording of the leaflets. The Court observes that, according to the leaflets, homosexuality was "a deviant sexual proclivity" that had "a morally destructive effect on the substance of society". The leaflets also alleged that homosexuality was one of the main reasons why HIV and AIDS had gaineda foothold and that the "homosexual lobby" tried to play down paedophilia. In the Court's opinion, although these statements did not directly recommend individuals to commit hateful acts, they are serious and prejudicial allegations.

55. Moreover, the Court reiterates that inciting to hatred does not necessarily entail a call for an act of violence, or other criminal acts. Attacks on persons committed by insulting, holding up to ridicule or slandering specific groups of the population can be sufficient for the authorities to favour combating racist speech in the face of freedom of expression exercised in an irresponsible manner (see *Féret v. Belgium*, n°. 15615/07, § 73, 16 July 2009). In this regard, the Court stresses that discrimination based on sexual orientation is as serious as discrimination based on "race, origin or colour" (see, *inter alia*, *Smith and Grady v. the United Kingdom*, n^os^. 33985/96 and 33986/96, § 97, ECHR 1999 VI).

56. The Court also takes into consideration that the leaflets were left in the lockers of young people who were at an impressionable and sensitive age and who had no possibility to decline to accept them (see, *mutatis mutandis*, *Handyside v. the United Kingdom,* 7 December 1976, § 52, Series A n°. 24). Moreover, the distribution of the leaflets took place at a school which none of the applicants attended and to which they did not have free access.

57. In considering the approach of the domestic courts when deciding whether a "pressing social need" existed, and the reasons the authorities adduced to justify the interference, the Court observes the following. The Supreme Court acknowledged the applicants' right to express their ideas while at the same time stressing that along with freedoms and rights people also have obligations; one such obligation being, as far as possible, to avoid statements that are unwarrantably offensive to others, constituting an assault on their rights. The Supreme Court thereafter found that the statements in the leaflets had been unnecessarily offensive. It also emphasised that the applicants had left the leaflets in or on the pupils' lockers, thereby imposing them on the pupils. Having balanced the relevant considerations, the Supreme Court found no reason not to apply the relevant Article of the Penal Code.

58. Finally, an important factor to be taken into account when assessing the proportionality of an interference with freedom of expression is the nature and severity of the penalties imposed (see *Ceylan v. Turkey* [GC], n°. 23556/94, § 37, ECHR 1999-IV; *Tammer v. Estonia*, n°. 41205/98, § 69, ECHR 2001-I; and *Skałka v. Poland*, n°. 43425/98, §§ 41 42, 27 May 2003). The Court notes that the applicants were not sentenced to imprisonment, although the crime of which they were convicted carries a penalty of up to two years' imprisonment. Instead, three of them were given suspended sentences combined with fines ranging from approximately EUR 200 to EUR 2,000, and the fourth applicant was sentenced to probation. The Court does not find these penalties excessive in the circumstances.

59. Having regard to the foregoing, the Court considers that the conviction of the applicants and the sentences imposed on them were not disproportionate to the legitimate aim pursued and that the reasons given by the Supreme Court in justification of those measures were relevant and sufficient. The interference with the applicants' exercise of their right to freedom of expression could therefore reasonably be regarded by the national authorities as necessary in a democratic society for the protection of the reputation and rights of others.

60. The foregoing considerations are sufficient to enable the Court to conclude that the application does not reveal a violation of Article 10 of the Convention."

***Sousa Goucha v. Portugal*,**
22 March 2016, nº. 70434/12

This case is characterized by the satirical way of qUestioning homosexUality. More precisely, it concerns a satire of artistic expression, which was not made in the context of a debate of pUblic interest and, as sUch, no matter of pUblic interest was at stake. It was actUally a joke aboUt a famoUs homosexUal, described as being a "female", dUring a television entertainment show.

This SoUsa GoUcha v. PortUgal jUdgment of 22 March 2016 shows that states seem to enjoy a certain margin of appreciation not to restrict the freedom of expression of persons who make sUch mockery. However, the procedUres for the review condUcted by the CoUrt indicate that the assessment is highly relative, UniqUe to each case, and that the context in which the joke is made plays an important role.

Principal facts

The applicant, ManUel LUís SoUsa GoUcha, is a PortUguese national who was born in 1954 and lives in Fontanelas (PortUgal). He is one of the most famoUs television hosts in PortUgal and has been working in the media for almost forty years. The case concerned the dismissal by the PortUguese coUrts of defamation proceedings broUght by Mr SoUsa GoUcha against a television company. The applicant alleged, inter alia, that the decisions to dismiss his complaint were discriminatory and based on his homosexUality. Following a joke made dUring the recording of a late-night comedy show broadcast in December 2009, Mr SoUsa GoUcha filed a complaint for defamation and insUlt against the State-owned television channel RTP, the prodUction company, the host of the show and the directors of programming and content. Among other things, he alleged in his complaint that the joke, which consisted in inclUding his name in a list of the best female television hosts, had damaged his repUtation by mixing his gender with his sexUal orientation. In April 2012, the PortUguese coUrts Ultimately dismissed his claim for damages as ill-foUnded. They considered that fora reasonable person, the joke woUld not be perceived as defamation because it referred to Mr SoUsa GoUcha's characteristics, behavioUr and way of expressing himself that coUld be seen as feminine. In addition, the coUrts took into accoUnt the show's playfUl and irreverent style and considered that the defendants had not intended to criticise Mr SoUsa GoUcha's sexUal orientation.

Relying in particUlar on Article 8 (right to respect for private and family life) and Article 14 (prohibition of discrimination), the applicant complained that the domestic coUrts had based their decisions to dismiss his complaint on discriminatory groUnds, namely his sexUal orientation.

It is important to note that the applicant relied on Article 8 of the Convention. In essence, he complained that the state had not fUlfilled a positive obligation Under this provision: the obligation to protect his repUtation, as his personal identity (inclUding sexUal orientation and gender identity) had been qUestioned in a sUfficiently serioUs manner to jUstify sUch an action. In other words, the main issUe was whether the state, in the context of its positive obligations, had struck a fair balance between the applicant's right to protection of his repUtation Under Article 8, on the one hand, and the other parties' right to freedom of expression guaranteed by Article 10, on the other hand.

Decision of the Court

The CoUrt foUnd that there had been no violation of Article 8, taken in isolation, and no violation of Article 14, in conjUnction with Article 8.

The non-violation of Article 8 was jUstified as follows.

"47. At the oUtset, the CoUrt notes that the alleged violation does not stem from a civil jUdgment on the merits or a jUdgment of a trial coUrt, bUt from the refUsal of the authorities to prosecUte in a criminal case. The main issUe in the present case is thUs whether the State, in the

context of its positive obligations under Article 8, achieved a fair balance between the applicant's right to protection of his reputation, which is an element of his "private life", and the other parties' right to freedom of expression guaranteed by Article 10 of the Convention (see *Von Hannover*, [...]).

48. The Court firstly notes that the applicant was a well-known television host in Portugal and thus a "public figure" within the meaning of the Court's case-law (see *Courdec and Hachette Filipacchi Associés*, [...]). In that respect and in line with its case-law, the Court has already stated that the extent to which an individual has a public profile or is well-known influences the protection that may be afforded to his or her private life (ibid. [...]).

49. The Court further notes that the disputed joke was made during the broadcast of a late-night comedy show on television. It allegedly played with his sexual orientation and gender by including him in the list of female hosts.

50. Having been required on numerous occasions to consider disputes involving humour and satire, the Court reiterates that satire is a form of artistic expression and social commentary and, by its inherent features of exaggeration and distortion of reality, naturally aims to provoke and agitate. Accordingly, any interference with an artist's right to such expression must be examined with particular care (see *Vereinigung Bildender Künstler v. Austria*, n°. 68354/01, § 33, 25 January 2007, and *Alves da Silva v. Portugal*, n°. 41665/07, § 27, 20 October 2009; see also, *mutatis mutandis*, *Tuşalp v. Turkey*, nos. 32131/08 and 41617/08, § 48, 21 February 2012, and *Welsh and Silva Canha v. Portugal*, n°. 16812/11, §§ 29-30, 17 September 2013). The Court further observes that in the judgment of *Nikowitz and Verlagsgruppe News* ([...]) it introduced the criterion of the reasonable reader when approaching issues relating to satirical material (§ § 24-26). Additionally, as also acknowledged by the Court of Justice of the European Union, a particularly wide margin of appreciation should be given to parody in the context of freedom of expression ([...]).

51. The Court then observes that in the cases in which it was confronted with a satiric form of expression, the artistic creations in question were made against a background of political critique and debate. For instance, in the case of *Alves da Silva*, it took into account the specific context of carnival festivities in Portugal in which citizens take the opportunity to, through satire and caricature, criticise politicians ([...], § § 28-29). In the case of *Welsh and Silva Canha*, it took into account the content of the article written by the journalists – the misuse of public money — in a satirist newspaper. In this regard, the instant case is distinguishable from previous cases where the right to respect for private life had to be balanced against the right to freedom of expression, as the joke was not made in the context of a debate of public interest and, as such, no matters of public interest were at stake (see, for example, *Axel Springer AG v. Germany* and *A. v. Norway*, [...]).

52. In this context, the Court considers that a State's obligation under Article 8 to protect an applicant's reputation may arise where the statements go beyond the limits of what is considered acceptable under Article 10.

53. The Court observes that in the defamation proceedings brought by the applicant, the domestic courts had to decide whether the joke fulfilled the elements of the offence of defamation. The applicant's allegations that the statement in question damaged his reputation were analysed by the domestic courts, which dismissed his claims in respect of damage as ill-founded. They considered that for a reasonable person, the joke would not be perceived as defamation because it referred to the applicant's characteristics, his behavior and way of expressing himself ([...]).

In their assessment, the domestic courts took into account the context in which the joke had been made, in particular by taking into account the playful and irreverent style of the television comedy show and its usual humour (see paragraphs 14 and 15 above). Additionally, they took into account the fact that the applicant was a public figure.

54. The Court also notes that in reaching the conclusion to dismiss the applicant's defamation proceedings, the authorities considered that the defendants had not intended to criticise the applicant's sexual orientation ([…]).

55. In the light of the above, the Court considers that the domestic courts did convincingly establish the need for placing the protection of the defendants' freedom of expression above the applicant's right to protection of reputation. It notes, in particular, that they took into account the defendants' lack of intent to attack the applicant's reputation and assessed the way in which a reasonable spectator of the comedy show in question would have perceived the impugned joke – rather than just considering what the applicant felt or thought towards the joke. A limitation on freedom of expression for the sake of the applicant's reputation would therefore have been disproportionate under Article 10 of the Convention.

56. Having regard to all the foregoing factors, and the margin of appreciation afforded to the State in this area, the Court concludes that the domestic courts struck a fair balance between the television show's freedom of expression under Article 10 and the applicant's right to have his reputation respected under Article 8. In sum, the Court is satisfied that this decision was in line with Convention standards, and finds no reason to substitute its view for that of the domestic courts.

There has, accordingly, been no violation of Article 8 of the Convention."

The non-violation of Article 14, in conjunction with Article 8, was justified as follows.

"64. In the instant case, the Court observes that the applicant himself had mentioned his sexual orientation in public and to the domestic courts. In this context, in the analysis of the case it would have been difficult for the domestic courts to avoid referring to it. In addition the domestic courts framed the impugned joke in the light of the applicant's external behaviour and the style of the talk show (see paragraphs 14 and 15 above) albeit, as submitted by the Government, through debatable comments. The Court takes further note that, in their decisions, the domestic courts considered that the television show and its host did not have any intention to attack the applicant's sexual orientation.

65. In this regard, and in the light of the above considerations concerning the domestic courts' analysis of the case, there is nothing to suggest that the Portuguese authorities would have arrived at different decisions had the applicant not been homosexual (contrast with *Salgueiro da Silva Mouta v. Portugal*, n°. 33290/96, §§ 34-36, ECHR 1999 IX). The reason for refusing to prosecute seems rather to have been the weight given to freedom of expression in the circumstances of the case and the lack of intention to attack the applicant's honour. Consequently, in the absence of any firm evidence, it is not possible to speculate whether the applicant's sexual orientation had any bearing on the domestic courts' decisions.

66. Given the circumstances of the case, the Court is persuaded by the Government's argument that the relevant passages were "debatable" and "could have been avoided", but did not have discriminatory intent.

67. In the light of these findings, therefore, it cannot be said that the applicant was discriminated against on the grounds of his sexual orientation. There has, accordingly, been no violation of Article 14 taken together with Article 8."

Section 3. Access to employment

As the case law currently stands, the question of access to employment for lesbians and gays has mainly concerned access to the armed forces. This question has been dealt with under Article 8. It reflects the requirement for private life to be kept separate from professional life.

The right of lesbians and gays to enter the armed forces

The principle established by the *Lustig-Prean and Beckett* judgment

***Lustig-Prean and Beckett v. United Kingdom*,**
27 September 1999, nos. 31417/96 and 32377/96.

Principal facts

Duncan Lustig-Prean and John Beckett, British citizens born in 1959 and 1970, lived in London and Sheffield (United Kingdom), respectively. Jeannette Smith and Graeme Grady, British citizens born in 1966 and 1963, lived in Edinburgh and London (United Kingdom), respectively.

The applicants, who at the time of the facts were serving in the British armed forces, were all homosexuals. The Ministry of Defence applied a policy of exclusion of homosexuals from the armed forces. The applicants were the subject of an investigation by the service police concerningtheir homosexuality, which they all admitted, and were then discharged administratively on the sole ground of their sexual orientation, in line with the Ministry of Defence policy. They were discharged respectively in January 1995, July 1993, November 1994 and December 1994. In November 1995 the Court of Appeal dismissed their application for judicial review.

Decision of the Court

The Court found a violation of Article 8. The main points in its argument were as follows: "62.The applicants complained that the investigations into their homosexuality and their subsequent

> discharge from the Royal Navy on the sole ground that they were homosexual, in pursuance of the Ministry of Defence's absolute policy against homosexuals in the British armed forces, constituted a violation of their right to respect for their private lives protected by Article 8 of the Convention [...]

80. An interference will be considered "necessary in a democratic society" for a legitimate aim if it answers a pressing social need and, in particular, is proportionate to the legitimate aim pursued (see the Norris judgment cited above, p. 18, § 41).

> Given the matters at issue in the present case, the Court would underline the link between the notion of "necessity" and that of a "democratic society", the hallmarks of the latter including pluralism, tolerance and broadmindedness (see the *Vereinigung Demokratischer Soldaten Österreichs and Gubi* judgment cited above, p. 17, § 36, and the *Dudgeon* judgment cited above, p. 21, § 53).

81. The Court recognises that it is for the national authorities to make the initial assessment of necessity, though the final evaluation as to whether the reasons cited for the interference are relevant and sufficient is one for this Court. A margin of appreciation is left open to Contracting States in the context of this assessment, which varies according to the nature of the activities restricted and of the aims pursued by the restrictions (see the *Dudgeon* judgment cited above, pp. 21 and 23, § § 52 and 59).

82. Accordingly, when the relevant restrictions concern "a most intimate part of an individual's private life", there must exist "particularly serious reasons" before such interferences can satisfy the requirements of Article 8 § 2 of the Convention (see the *Dudgeon* judgment cited above, p. 21, § 52).

When the core of the national security aim pursued is the operational effectiveness of the armed forces, it is accepted that each State is competent to organise its own system of military discipline and enjoys a certain margin of appreciation in this respect (see the *Engel and Others* judgment cited above, p. 25, § 59). The Court also considers that it is open to the State to impose restrictions on an individual's right to respect for his private life where there is a real threat to the armed forces' operational effectiveness, as the proper functioning of an army is hardly imaginable without legal rules designed to prevent service personnel from undermining it. However, the national authorities cannot rely on such rules to frustrate the exercise by individual members of the armed forces of their right to respect for their private lives, which right applies to service personnel as it does to others within the jurisdiction of the State. Moreover, assertions as to a risk to operational effectiveness must be "substantiated by specific examples" (see, mutatis mutandis, the *Vereinigung Demokratischer Soldaten Österreichs and Gubi* judgment citedabove, p. 17, § § 36 and 38, and the *Grigoriades* judgment cited above, pp. 2589–90, § 45).

83. It is common ground that the sole reason for the investigations conducted and for the applicants' discharge was their sexual orientation. Concerning as it did a most intimate aspect of an individual's private life, particularly serious reasons by way of justification were required (see paragraph 82 above). In the case of the present applicants, the Court finds the interferences to have been especially grave for the following reasons [...]"

The Court considered the investigations, and in particular the questioning of the applicants, to have been particularly indiscreet; it noted that their administrative discharge had far-reaching effects on their careers and prospects and was struck by the absolute and general nature of the policy, which allowed no exceptions. It therefore considered that the investigation into the applicants' sexual orientation and their discharge from the armed forces could be seen as particularly serious interference with their right to respect for their private lives].

"87. Accordingly, the Court must consider whether, taking account of the margin of appreciation open to the State in matters of national security, particularly convincing and weighty reasons exist by way of justification for the interferences with the applicants' right to respect for their private lives.

88. The core argument of the Government in support of the policy is that the presence of open or suspected homosexuals in the armed forces would have a substantial and negative effect on morale and, consequently, on the fighting power and operational effectiveness of the armed forces. The Government rely in this respect on the report of the HPAT and, in particular, on Section F of the report.

Although the Court acknowledges the complexity of the study undertaken by the HPAT, it entertains certain doubts as to the value of the HPAT report for present purposes. The independence of the assessment contained in the report is open to question given that it was completed by Ministry of Defence civil servants and service personnel and given the approach to the policy outlined in the letter circulated by the Ministry of Defence in August 1995 to management levels in the armed forces [and which is encouraging to gather "evidence in support of the current policy"[112]]. In addition, on any reading of the Report and the methods used, only a very small proportion of the armed forces' personnel participated in the assessment.

[112] The inserted clause is an addition to the text of the judgment

Moreover, many of the methods of assessment (including the consultation with policy-makers in the Ministry of Defence, one-to-one interviews and the focus group discussions) were not anonymous. It also appears that many of the questions in the attitude survey suggested answers in support of the policy.

89. Even accepting that the views on the matter which were expressed to the HPAT may be considered representative, the Court finds that the perceived problems which were identified in the HPAT report as a threat to the fighting power and operational effectiveness of the armed forces were founded solely upon the negative attitudes of heterosexual personnel towards those of homosexual orientation. The Court observes, in this respect, that no moral judgment is made on homosexuality by the policy, as was confirmed in the affidavit of the Vice Chief of the Defence Staff filed in the Perkins' proceedings. It is also accepted by the Government that neither the records nor conduct of the applicants nor the physical capability, courage, dependability and skills of homosexuals in general are in any way called into question by the policy.

90. The question for the Court is whether the above-noted negative attitudes constitute sufficient justification for the interferences at issue.

The Court observes from the HPAT report that these attitudes, even if sincerely felt by those who expressed them, ranged from stereotypical expressions of hostility to those of homosexual orientation, to vague expressions of unease about the presence of homosexual colleagues. To the extent that they represent a predisposed bias on the part of a heterosexual majority against a homosexual minority, these negative attitudes cannot, of themselves, be considered by the Court to amount to sufficient justification for the interferences with the applicants' rights outlined above, any more than similar negative attitudes towards those of a different race, origin or colour.

91. The Government emphasised that the views expressed in the HPAT report served to show that any change in the policy would entail substantial damage to morale and operational effectiveness. The applicants considered these submissions to be unsubstantiated.

92. The Court notes the lack of concrete evidence to substantiate the alleged damage to morale and fighting power that any change in the policy would entail. Thorpe LJ in the Court of Appeal found that there was no actual or significant evidence of such damage as a result of the presence of homosexuals in the armed forces, and the Court further considers that the subsequent HPAT assessment did not, whatever its value, provide evidence of such damage in the event of the policy changing. Given the number of homosexuals dismissed between 1991 and 1996, the number of homosexuals who were in the armed forces at the relevant time cannot be said to be insignificant. Even if the absence of such evidence can be explained by the consistent application of the policy, as submitted by the Government, this is insufficient to demonstrate to the Court's satisfaction that operational effectiveness problems of the nature and level alleged can be anticipated in the absence of the policy (see the *Vereinigung Demokratischer Soldaten Österreichs and Gubi* judgment cited above, p. 17, § 38).

93. However, in the light of the strength of feeling expressed in certain submissions to the HPAT and the special, interdependent and closely knit nature of the armed forces' environment, the Court considers it reasonable to assume that some difficulties could be anticipated as a result of any change in what is now a long-standing policy. Indeed, it would appear that the presence of women and racial minorities in the armed forces led to relational difficulties of the kind which the Government suggest admission of homosexuals would entail.

94. The applicants submitted that a strict code of conduct applicable to all personnel would address any potential difficulties caused by negative attitudes of heterosexuals. The Government, while not rejecting the possibility out of hand, emphasised the need for caution given the subject matter and the armed forces context of the policy and pointed out that this was one of the options to be considered by the next Parliamentary Select Committee in 2001.

95. The Court considers it important to note, in the first place, the approach already adopted by the armed forces to deal with racial discrimination and with racial and sexual harassment and bullying. The January 1996 Directive, for example, imposed both a strict code of conduct on every soldier together with disciplinary rules to deal with any inappropriate behaviour and conduct. This dual approach was supplemented with information leaflets and training programmes, the army emphasising the need for high standards of personal conduct and for respect for others.

The Government, nevertheless, underlined that it is "the knowledge or suspicion of homosexuality" which would cause the morale problems and not conduct, so that a conduct code would not solve the anticipated difficulties. However, in so far as negative attitudes to homosexuality are insufficient, of themselves, to justify the policy (see paragraph 90 above), they are equally insufficient to justify the rejection of a proposed alternative. In any event, the Government themselves recognised during the hearing that the choice between a conduct code and the maintenance of the policy lay at the heart of the judgment to be made in this case. This is also consistent with the Government's direct reliance on Section F of the HPAT's report, where the anticipated problems identified as posing a risk to morale were almost exclusively problems relating to behaviour and conduct.

The Government maintained that homosexuality raised problems of a type and intensity that race and gender did not. However, even if it can be assumed that the integration of homosexuals would give rise to problems not encountered with the integration of women or racial minorities, the Court is not satisfied that the codes and rules which have been found to be effective in the latter case would not equally prove effective in the former. The "robust indifference" reported by the HPAT of the large number of British armed forces' personnel serving abroad with allied forces to homosexuals serving in those foreign forces, serves to confirm that the perceived problems of integration are not insuperable.

96. The Government highlighted particular problems which might be posed by the communal accommodation arrangements in the armed forces. Detailed submissions were made during the hearing, the parties disagreeing as to the potential consequences of shared single-sex accommodation and associated facilities.

The Court notes that the HPAT itself concluded that separate accommodation for homosexuals would not be warranted or wise and that substantial expenditure would not, therefore, have to be incurred in this respect. Nevertheless, the Court remains of the view that it has not been shown that the conduct codes and disciplinary rules referred to above could not adequately deal with any behavioural issues arising on the part either of homosexuals or of heterosexuals.

97. The Government, referring to the relevant analysis in the HPAT report, further argued that no worthwhile lessons could be gleaned from the relatively recent legal changes in those foreign armed forces which now admitted homosexuals. The Court disagrees. It notes the evidence before the domestic courts to the effect that the European countries operating a blanket legal ban on homosexuals in their armed forces are now in a small minority. It considers that, even if relatively recent, the Court cannot overlook the widespread and consistently developing views and associated legal changes to the domestic laws of Contracting States on this issue (see the *Dudgeon* judgment cited above, pp. 23-24, § 60).

98. Accordingly, the Court concludes that convincing and weighty reasons have not been offered by the Government to justify the policy against homosexuals in the armed forces or, therefore, the consequent discharge of the applicants from those forces.

99. While the applicants' administrative discharges were a direct consequence of their homosexuality, the Court considers that the justification for the investigations into the applicants' homosexuality requires separate consideration in so far as those investigations continued after the applicants' early and clear admissions of homosexuality.

100. The Government maintained that investigations, including the interviews and searches, were necessary in order to detect false claims of homosexuality by those seeking administrative discharges from the armed forces. The Government cited five examples of individuals in the armed forces who had relatively recently made such false claims. However, since it was and is clear, in the Court's opinion, that at the relevant time both Mr Lustig-Prean and Mr Beckett wished to remain in the navy, the Court does not find that the risk of false claims of homosexuality could, in the case of the present applicants, provide any justification for their continued questioning.

101. The Government further submitted that the medical, security and disciplinary concerns outlined by the HPAT justified certain lines of questioning of the applicants. However, the Court observes that, in the HPAT report, security issues relating to those suspected of being homosexual were found not to stand up to close examination as a ground for maintaining the policy. The Court is, for this reason, not persuaded that the risk of blackmail, being the main security ground canvassed by the Government, justified the continuation of the questioning of either of the present applicants. Similarly, the Court does not find that the clinical risks (which were, in any event, substantially discounted by the HPAT as a ground for maintaining the policy) justified the extent of the applicants' questioning. Moreover, no disciplinary issue existed in the case of either applicant.

102. The Government, referring to the cautions given to the applicants at the beginning of their interviews, further argued that the applicants were not obliged to participate in the interview process. Moreover, Mr Beckett was asked to consent to a search of his locker. The Court considers, however, that the applicants did not have any real choice but to cooperate. It is clear that the interviews formed a standard and important part of the investigation process which was designed to verify to "a high standard of proof" the sexual orientation of the applicants. Had the applicants not participated in the interview process and had Mr Beckett not consented to the search, the Court is satisfied that the authorities would have proceeded to verify the suspected homosexuality of the applicants by other means which were likely to be less discreet. This was, in fact, made clear a number of times to Mr Lustig-Prean during his interview, who confirmed that he wished to keep the matter as discreet as possible.

103. In such circumstances, the Court considers that the Government have not offered convincing and weighty reasons justifying the continued investigation of the applicants' sexual orientation once they had confirmed their homosexuality to the naval authorities.

104. In sum, the Court finds that neither the investigations conducted into the applicants' sexual orientation, nor their discharge on the grounds of their homosexuality in pursuance of the Ministry of Defence policy, were justified under Article 8 § 2 of the Convention.

105. Accordingly, there has been a violation of Article 8 of the Convention."

Case law applications

Smith and Grady v. the United Kingdom, *27 September 1999*

In the *Smith and Grady v. United Kingdom* judgment, delivered on the same day as the *Lustig-Prean and Beckett v. United Kingdom* judgment, the Court adopted the same reasoning and reached the same finding regarding the violation of Article 8. In this second case too, the applicants, Jeanette Smith and Graeme Grady, were serving in the British armed forces and were the subject

of an investigation by the service police concerning their homosexuality. They were subsequently administratively discharged on the sole ground of their sexual orientation and were refused leave by the Court of Appeal to apply for judicial review.

However, the Smith and Grady v. United Kingdom judgment differs in that the applicants alleged not only a violation of Article 8 but also a violation of Article 13 (right to an effective remedy): *see below*.

***Perkins and R. v. the United Kingdom*,**
22 October 2002, applications nos. 43208/98 and 44875/98;

***Beck, Copp and Bazeley v. the United Kingdom*,**
22 October 2002 applications nos. 48535/99, 48536/99 and 48537/99.

Terence Perkins and Ms R. were born in 1969 and 1972 and lived in London and Surrey, respectively. John Beck, Howard Copp and Kevin Bazeley were born in 1959, 1957 and 1967 and lived in the counties of Lancashire, Tyne and Wear and Worcester, respectively. The applicants, all of British nationality, were discharged from the British armed forces on the grounds of their sexual orientation.

Mr Perkins joined the Royal Navy in 1991 as a medical assistant. At the time of his discharge he held the position of leading medical assistant. His service record indicated that he was in line for promotion and his superiors had a "very good" opinion of him. He admitted his homosexuality in an interview after the naval authorities had received information concerning his sexual orientation.

Ms R. joined the Royal Navy in 1990 and trained as a radio operator. In 1992 she passed a professional qualifying examination for wren radio operator first class and received an assessment of "very good" from her superiors. She confided in a colleague that she had had a brief lesbian relationship with a civilian. The colleague passed on this information to the authorities, following which Ms R. was questioned and then discharged from the armed forces.

Mr Beck joined the Royal Air Force (RAF) in 1976. At the time of his discharge he was a communications systems analyst with the rank of sergeant. His conduct was considered exemplary and his superiors recommended him for promotion. He revealed that he was a celibate homosexual in 1993 when he was studying theology and considering ordination.

Mr Copp joined the Royal Army Medical Corps in 1978. At the time of his discharge he was a private training as a nurse. A report drawn up in 1982 recommended him for promotion. When he received a posting order to Germany in 1981 he revealed his sexual orientation so as not to be separated from his civilian partner.

Mr Bazeley joined the RAF in 1985. At the time of his discharge he held the rank of flight lieutenant and was considered to have good potential for the future. He admitted his homosexuality during an interview held after membership cards of two homosexual clubs had been found in his wallet.

On 24 January 1996, Mr Perkins applied to the High Court for leave to take judicial review proceedings on the basis that the Ministry of Defence policy was "irrational" and in breach of the European Convention on Human Rights and the European Union Directive on Equal Treatment (76/207/EEC). The High Court referred a question to the Court of Justice of the European Communities, which ruled that the Directive did not apply to discrimination on grounds of sexual orientation. The High Court withdrew its question and refused leave to appeal. Following this decision, Mr Beck, Mr Copp, Mr Bazeley and Ms R. withdrew the applications they had lodged with the Industrial Tribunal for unfair dismissal and sexual discrimination.

All the applicants alleged that the investigation into their sexuality and their discharge due to the total ban on homosexuals serving in the armed forces at the time violated Articles 8 (right to respect for private life) and 14 (prohibition of discrimination) of the Convention. In the Beck, Copp and Bazeley case, the applicants also relied on Articles 3 (prohibition of degrading treatment) and 13 (right to an effective remedy).

Finding that there was no material difference between these two cases and the Lustig-Prean and Becket v. United Kingdom and Smith and Grady v. United Kingdom cases, the Court held unanimously in both cases that there had been a violation of Article 8 in respect of each applicant and that no separate issue arose under Article 14.

Section 4. Access to housing

As the case law currently stands, the question of access to employment for lesbians and gays has mainly concerned access to the armed forces. This question has been dealt with under Article 8. It reflects the requirement for private life to be kept separate from professional life.

The right of a partner in a same-sex couple to succeed to a tenancy following the other partner's death

For a long time, according to the Commission's case law, the European Convention on Human Rights did not prevent the eviction of the surviving member of a homosexual couple from his or her partner's home following the latter's death where the surviving partner was not legally entitled to continue living there. This case law came to an end with the Karner v. Austria judgment of 24 July 2003: this judgment censured the Austrian legislation which allowed the surviving homosexual partner to be evicted in such cases, contrary to the legal rules applying to hetero-sexual couples.

The principle established by the *Karner* judgment

Karner v. Austria,
24 July 2003, application n°. 40016/98

In this case, the Court held that the difference of treatment between partners of a different-sex couple and partners of a same-sex couple regarding succession to a tenancy in the event of the death of the partner holding the lease constituted – in terms of enjoyment of the right to respect for the home – discrimination on grounds of sexual orientation in breach of Article 14 of the Convention taken in conjunction with Article 8.

Principal facts

Siegmund Karner, an Austrian national, was born in 1955 and lived in Vienna. He died on 26 September 2000. His lawyer informed the Court that his mother had waived her right to succeed to the estate. He subsequently notified the Court that the notary handling the applicant's estate had begun to look for other heirs.

Mr Karner had been living with his partner since 1989 in a flat which the latter had rented one year previously. They shared all expenditure relating to the flat. In 1991, Mr Karner's partner discovered that he was infected with the Aids virus. In 1993, when he developed Aids, Mr Karner nursed him. In 1994 he died after designating Mr Karner as his heir.

In 1995, the owner of the flat brought proceedings against Mr Karner for termination of the tenancy. The district court dismissed the action. It considered that the legal right of family members to succeed to a tenancy was also applicable to same-sex couples. This decision was upheld by the regional court, but was quashed on 5 December 1996 by the Supreme Court, which considered that the notion of "life companion" was to be interpreted as at the time the legislation was enacted, and the legislature's intention in 1974 was not to include same-sex couples.

Decision of the Court

The Court found a violation of Article 14 of the Convention taken in conjunction with Article 8. The main points in its argument were as follows:

"29. The applicant claimed to have been a victim of discrimination on the ground of his sexual orientation in that the Supreme Court, in its decision of 5 December 1996, had denied him the status of "life companion" of the late Mr W. within the meaning of section 14 of the Rent Act, thereby preventing him from succeeding to Mr W.'s tenancy. He relied on Article 14 of the Convention taken in conjunction with Article 8. [...]

33. The Court has to consider whether the subject matter of the present case falls within the ambit of Article 8. The Court does not find it necessary to determine the notions of "private life" or "family life" because, in any event, the applicant's complaint relates to the manner in which the alleged difference in treatment adversely affected the enjoyment of his right to respect for his home guaranteed under Article 8 of the Convention (see *Larkos v. Cyprus* [GC], n°. 29515/95, § 28, ECHR 1999-I). The applicant had been living in the flat that had been let to Mr W. and if it had not been for his sex, or rather, sexual orientation, he could have been accepted as a life companion entitled to succeed to the lease, in accordance with section 14 of the Rent Act. Therefore, Article 14 of the Convention applies.

34. The applicant submitted that section 14 of the Rent Act aimed to provide surviving cohabitants with social and financial protection from homelessness but did not pursue any family – or social-policy aims. That being so, there was no justification for the difference in treatment of homosexual and heterosexual partners. Accordingly, he had been the victim of discrimination on the ground of his sexual orientation.

35. The Government accepted that in respect of succession to the tenancy the applicant had been treated differently on the ground of his sexual orientation. They maintained that that difference in treatment had an objective and reasonable justification, as the aim of the relevant provision of the Rent Act had been the protection of the traditional family.

36. ILGA-Europe, Liberty and Stonewall submitted as third-party interveners that a strong justification was required when the ground for a distinction was sex or sexual orientation. They pointed out that a growing number of national courts in European and other democratic societies required equal treatment of unmarried different-sex partners and unmarried same-sex partners, and that that view was supported by recommendations and legislation of European institutions, such as Protocol N°. 12 to the Convention, recommendations by the Parliamentary Assembly of the Council of Europe (Recommendations 1470 (2000) and 1474 (2000)), the European Parliament (Resolution on equal rights for homosexuals and lesbians in the EC, OJ C 61, 28 February 1994, p. 40; Resolution on respect for human rights in the European Union 1998-1999, A5-0050/00, § 57, 16 March 2000) and the Council of the European Union (Directive 2000/78/EC, OJ L 303/16, 27 November 2000).

37. The Court reiterates that, for the purposes of Article 14, a difference in treatment is discriminatory if it has no objective and reasonable justification, that is, if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realised (see *Petrovic*, cited above, p. 586, § 30). [...] Just like differences based on sex, differences based on sexual orientation require particularly serious reasons by way of justification (see *Smith and Grady*, cited above, § 90, and *S.L. v. Austria*, cited above, § 37).

38. In the present case, after Mr W.'s death, the applicant sought to avail himself of the right under section 14(3) of the Rent Act, which he asserted entitled him as a surviving partner to succeed to the tenancy. The court of first instance dismissed an action by the landlord for termination

of the tenancy and the Vienna Regional Court dismissed the appeal. It found that the provision in issue protected persons who had been living together for a long time without being married against sudden homelessness and applied to homosexuals as well as to heterosexuals.

39. The Supreme Court, which ultimately granted the landlord's action for termination of the tenancy, did not argue that there were important reasons for restricting the right to succeed to a tenancy to heterosexual couples. It stated instead that it had not been the intention of the legislature when enacting section 14(3) of the Rent Act in 1974 to include protection for couples of the same sex. The Government now submit that the aim of the provision in issue was the protection of the traditional family unit.

40. The Court can accept that protection of the family in the traditional sense is, in principle, a weighty and legitimate reason which might justify a difference in treatment (see Mata Estevez v. Spain (dec.), n°. 56501/00, ECHR 2001-VI, with further references). It remains to be ascertained whether, in the circumstances of the case, the principle of proportionality has been respected.

41. The aim of protecting the family in the traditional sense is rather abstract and a broad variety of concrete measures may be used to implement it. In cases in which the margin of appreciation afforded to States is narrow, as is the position where there is a difference in treatment based on sex or sexual orientation, the principle of proportionality does not merely require that the measure chosen is in principle suited for realising the aim sought. It must also be shown that it was necessary in order to achieve that aim to exclude certain categories of people – in this instance persons living in a homosexual relationship – from the scope of application of section 14 of the Rent Act. The Court cannot see that the Government have advanced any arguments that would allow such a conclusion.

42. Accordingly, the Court finds that the Government have not offered convincing and weighty reasons justifying the narrow interpretation of section 14(3) of the Rent Act that prevented a surviving partner of a couple of the same sex from relying on that provision.

43. Thus, there has been a violation of Article 14 of the Convention taken in conjunction with Article 8."

Case law applications

***Kozak v. Poland*, 2 March 2010,**
application n°. 13102/02

Principal facts

The applicant, Piotr Kozak, a Polish national, was born in 1951 and lived in Szczecin (Poland). He lived for several years with his partner, with whom he was involved in a homosexual relationship, in a council flat to which his partner held the lease. After the latter's death in April 1998, he applied to the local authority to take over the tenancy. The Department for Municipal Buildings rejected his application in June 1998, claiming that he had not lived in the flat before his partner's death, and ordered him to vacate the premises.

In 2000, while the eviction proceedings against him were still pending, the applicant brought an action against the municipality seeking recognition of his right to succeed to the tenancy. Relying on the Housing Act then in force, he argued that he was entitled to succeed to the tenancy because he had cohabited with his partner for several years and they had run a common household. The district court dismissed the claim, stating in particular that only cohabitation between two different-sex persons was recognised under Polish law. Following an appeal, the regional court upheld the judgment in June 2001.

The regional court dismissed the applicant's request to refer a legal question to the Supreme Court on whether the "cohabitation" clause should be interpreted as applying also to persons living in a homosexual relationship. It also dismissed his request that the Constitutional Court be asked to give a ruling on whether the interpretation of this clause as applying only to heterosexual partners was compatible with the Polish Constitution and the Convention.

Relying in particular on Articles 8 and 14 of the Convention, the applicant complained of discrimination on the grounds of his sexual orientation in that the Polish courts had refused to recognise his right to succeed to the tenancy following his partner's death.

Decision of the Court

Like the Polish government, the Court found inconsistencies in certain statements made by the applicant before the domestic courts and authorities concerning the nature and duration of his relationship with his partner and their cohabitation in the latter's flat. However, it was not its role to say which of the trial courts had made correct findings of fact. It must limit its review to the proceedings complained of concerning the applicant's succession to the tenancy.

The Court observed that, in seeking to determine whether the applicant satisfied the conditions laid down in the Housing Act, the domestic courts had focused mainly on his homosexual relationship with his partner. Although the district court had also expressed doubts as to whether the applicant had actually lived in the flat at the material time, both courts dismissed the applicant's claims on the ground that, under Polish law, only a relationship between a man and a woman satisfied the requirements of the cohabitation clause.

Now that the reason for the different treatment accorded to the applicant had been identified, namely his sexual orientation, it remained to be determined whether or not this distinction was discriminatory. For this purpose the Court considered the following points:

"98.It remains for the Court to determine whether the Polish authorities can be said to have given "objective and reasonable justification" for the impugned distinction in law in respect of same- and different-sex partners, that is to say whether this measure pursued a "legitimate aim" and maintained "reasonable proportionality between the means employed and the aim sought to be realised" (see paragraph 91 above).

It emerges from the grounds given by the Regional Court that the essential objective of the difference in treatment was to ensure the protection of the family founded on a "union of a man and a woman", as stipulated in Article 18 of the Polish Constitution (see paragraphs 38 and 44 above). The Court accepts that protection of the family in the traditional sense is, in principle, a weighty and legitimate reason which might justify a difference in treatment (see Karner, cited above, § 40, with further references).

However, in pursuance of that aim a broad variety of measures might be implemented by the State (ibid). Also, given that the Convention is a living instrument, to be interpreted in the light of present-day conditions (see E.B. cited above, § 92), the State, in its choice of means designed to protect the family and secure, as required by Article 8, respect for family life must necessarily 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 in the sphere of leading and living one's family or private life.

99. Striking a balance between the protection of the traditional family and the Convention rights of sexual minorities is, by the nature of things, a difficult and delicate exercise, which may require the State to reconcile conflicting views and interests perceived by the parties concerned as being in fundamental opposition. Nevertheless, having regard to the State's

narrow margin of appreciation in adopting measures that result in a difference based on sexual orientation (see paragraph 92 above), a blanket exclusion of persons living in a homosexual relationship from succession to a tenancy cannot be accepted by the Courtas necessary for the protetion of the family viewed in its traditional sense (see Karner,cited above, § 41). Nor have any covincing or compelling reasons been advanced by the Polish Government to justify the distinction in treatment of heterosexual and homosexual partners at the material time. Moreover, the fact that the provision which shortly afterwards replaced section 8(1) removed the difference between "marital" and other forms of cohabitation (see paragraphs 40–41 above) confirms that no such reasons were found to maintainthe previous regulation.

In view of the foregoing, the Court finds that the Polish authorities, in rejecting the applicant's claim on grounds related to the homosexual nature of his relationship with T.B. failed to maintain a reasonable relationship of proportionality between the aim sought and the means employed. The impugned distinction was not, therefore, compatible with the standards under the Convention.

The Court accordingly rejects the Government's objection regarding the applicant's victim status and holds that there has been a violation of Article 14 taken in conjunction with Article 8 of the Convention."

Section 5. Access to services

The right to an extension of sickness insurance coverage between partners in a same-sex couple

It was established in the *P. B. and J. S. v. Austria* judgment of 22 July 2010 that if a Contracting State's domestic law allows the extension of a particular type of insurance coverage between heterosexual partners, it must also allow such an extension between homosexual partners too. A homosexual partner is entitled in the same way as a heterosexual partner to any extensions of sickness and accident insurance coverage provided for in an insurance policy. Insurance companies must therefore afford identical treatment to homosexual and heterosexual couples.

It will be noted that, in this case, the Court applied Article 14 to legislation governing private relations: responsibility for the distinction complained of lay with a private person (the insurance company). The principle of non-discrimination guaranteed by the Convention has a "horizontal" effect between private persons (insurance company and insured)[113].

***P.B. and J.S. v. Austria*,**
22 July 2010, application n°. 18984/02

In this case, the Court held that the difference of treatment between partners of a different-sex couple and partners of a same-sex couple regarding succession to a tenancy in the event of the death of the partner holding the lease constituted – in terms of enjoyment of the right to respect for the home – discrimination on grounds of sexual orientation in breach of Article 14 of the Convention taken in conjunction with Article 8.

[113] This application of the principle of non-discrimination is, however, indirect in that the principle only applies because the conflict between the insurance company and persons insured by it was brought before the domestic courts responsible for applying the relevant legislation. On this basis the Court declared itself competent to examine the impact of the relevant judicial decisions and legislation on the right not to be discriminated against in the enjoyment of the right to respect for private and family life.

Principal facts

The applicants, P. B., a Hungarian national, and J. S., an Austrian national, were born in 1963 and 1959 respectively. They were living in Vienna. The case concerned the fact that it was impossible under Austrian legislation to extend the latter's sickness and accident insurance to cover the former.

J. S. was a civil servant while P. B., who had no gainful employment, looked after the home. In July 1997, P. B. asked the civil servants' insurance corporation (*Versicherungsanstalt Öffentlicher Bediensteter* – hereafter CSIC) to recognise him as being dependent on J. S. and to extend the latter's insurance cover to include him. This body dismissed the request in January 1998 on the ground that, under the relevant clause of the Civil Servants Sickness and Accident Insurance Act (Section 56-6 of the *Beamten-Kranken- und Unfallversicherungsgesetz* – hereafter CSSAIA), onlya close relative of the principally insured person or a person of the opposite sex living with him could be considered as dependents. In October 2001, the Administrative Court dismissed P. B.'s appeal against this decision, arguing that the notion of cohabitation applied only to two personsof different sex living together in a household in which one of them was running the household without being gainfully employed, and not to two persons of the same sex living together.

An amendment to the Insurance Act in August 2006 created the possibility for a same-sex partner to be regarded as a dependent if he or she was raising children or providing care within the home. This condition was not applicable to heterosexual couples. A further amendment came into force in July 2007: partners of the opposite sex were no longer allowed to be considered as dependents if they were not raising children or providing care within the home. The amended Act included a transitional provision for persons previously entitled to an extension of coverage.

Relying on Article 14 taken in conjunction with Article 8, the applicants complained that the Administrative Court's decision had discriminated against them on the grounds of their sexual orientation.

Decision of the Court

After identifying different periods according to the various amendments to the relevant legislation, the Court found a violation of Article 14 taken in conjunction with Article 8 for the period up to 1 July 2007 (and found no violation from that date onwards). Its reasoning was as follows:

"39. In order to determine whether the difference in treatment that the applicants complained of had an objective and reasonable justification, the Court will consider each of the periods separately.

(a) First period: until the entry into force of section 56(6a) of the CSSAIA on 1 August 2006

40. The Court notes that on 1 July 1997 the first applicant asked the CSIC to recognise him as a dependent of the second applicant and to extend the latter's health and accident insurance cover to him. On 2 September 1997 the CSIC dismissed the request, holding that, because the first applicant was of the same sex as the second applicant, he did not qualify as a dependent within the meaning of section 56(6) of the CSSAIA. It did not accept the applicants' argument that section 56(6) should be interpreted so as to also include homosexual relationships. The appeal authorities also refuted this argument. The Administrative Court, in its judgment of 4 October 2001 found that the exclusion of homosexual partnerships from the scope of section 56(6) of the CSSAIA also complied with the principle of equality because that difference in treatment was justified. It argued that, while it was true that where persons of different sex living together in a household in which one of them was running that householdand not being gainfully employed, it was, as a rule, safe to conclude that they were cohabiting in a partnership, that was not the case if two persons of the same sex were living together ina household. In the absence of any possibility to register a homosexual partnership, it would be necessary to undertake delicate enquiries into the most intimate sphere of the person concerned. That difference in the factual situation justified different treatment in law.

41. The Court further observes that the Government themselves have not given any justification for the difference in treatment experienced by the applicants and that experienced by cohabitees of the opposite sex.

42. The Court reiterates that in the case of *Karner v. Austria*, which bears certain similarities to the present case, it found that in cases in which the margin of appreciation afforded to States is narrow, as is the position where there is a difference in treatment based on sex or sexual orientation, the principle of proportionality does not merely require that the measure chosen is in principle suited for realising the aim sought. It must also be shown that it was necessary in order to achieve that aim to exclude certain categories of people – in this instance persons living in a homosexual relationship – from the scope of application of a specific provision of law (see *Karner*, cited above, § 41). It does not consider, however, that the Government or the domestic authorities and courts have advanced any arguments that would allow such a conclusion.

Accordingly, there was a breach of Article 14, read in conjunction with Article 8, in respect of the period in question.

(b) Second period: from the entry into force of section 56(6a) of the CSSAIA on 1 August 2006 until the entry into force of the amended section 56(6) and (6a) of the CSSAIA on 30 June 2007

43. The Court considers that the discriminatory character of the CSSAIA established above did not change after the first amendment, because unmarried male/female couples qualified for preferential treatment, whereas unmarried couples of the same sexual orientation, irrespective of their sexual orientation, only qualified if they were raising children together. Even though the situation improved as a result of that amendment because homosexual couples were in principle no longer excluded from the scope of application of section 56 of the CSSAIA, there remained a substantial difference in treatment for which no sufficient justification had been advanced by the Government.

44. Accordingly, there was also a breach of Article 14, read in conjunction with Article 8, in respect of this period.

(c) Third period: after the entry into force of the amended section 56(6) and (6a) of the CSSAIA on 1 July 2007

45. The Court observes that the newly amended version of the CSSAIA as in force from 1 July 2007 onwards omitted the explicit reference to partners of the opposite sex in section 56(6a) and restricted the scope of application of section 56(6) to relatives. It is thus formulated in a neutral way concerning the sexual orientation of cohabitees.

46. The applicants submitted that, following the above-mentioned amendment, the legal situation is still discriminatory, because the opportunity to extend health and accident insurance cover has become more difficult following the amendment because additional conditions were introduced which not all couples, and in particular the applicants, fulfil. Moreover, they were also victims of discrimination because persons to whom the extension of insurance cover had been granted before the entry into force of the amendment continued to benefit from an extension of the insurance cover.

47. As regards the applicants' first argument, the Court observes that Article 14 of the Convention only guarantees a right to equal treatment of persons in relatively similar situations but does not guarantee access to specific benefits. It further observes that the condition to which the applicants refer, the raising of children in the common household, is formulatedin a neutral way and the applicants did not argue that under Austrian law homosexuals are excluded from caring for children.

48. As regards the applicants' second argument, the Court observes that, according to the transitory provision of section 217 of the CSSAIA, the continued application of section 56(6a) is restricted to persons having passed a certain age limit and where the relevant circumstances remain the same, and also applies to those who will not have yet reached the age limit by 31 December 2010. The Court cannot find that it is incompatible with the requirements of Article 14 for those who have previously been entitled to a specific benefit under the law in force at the time to be given sufficient time to adapt to changing circumstances.

49. In this context, the Court notes its case-law according to which the principle of legal certainty, which is necessarily inherent in the law of the Convention, may dispense States from questioning legal acts or situations that antedate judgments of the Court declaring domestic legislation incompatible with the Convention. The same considerations apply where a constitutional court annuls domestic legislation as being unconstitutional(see *Marckx v. Belgium,* 13 June 1979, § 58, Series A n°. 31). Moreover, it has also been accepted, in view of the principle of legal certainty that a constitutional court may set a time-limit for the legislator to enact new legislation with the effect that an unconstitutional provision remains applicable for a transitional period (see *Walden v. Liechtenstein* (dec.), n°. 33916/96, 16 March 2000; and *J.R. v. Germany* (dec.), n°. 22651/93, Decisions and Reports 83-A).

50. The Court therefore considers that from 1 July 2007 the applicants were no longer subject to an unjustified difference in treatment as regards the benefit of extending health and accident insurance cover to the second applicant. Accordingly there was no breach of Article 14, read in conjunction with Article 8, in respect of this period."

§ 2 – Protection against refusal of service to same-sex couples

In the case law which will now be considered, the protection afforded by the Convention to LGBTI persons, and particularly to gays and lesbians, is not the result of a right directly conferred on them, as in most of the cases discussed previously; the protection here is only indirect in the sense that it derives from the restrictions placed by states on the rights of others, and specifically on the freedom to manifest one's religion at the workplace. To put this in plain language, member states can restrict the religious freedom of employees who rely on it to refuse to perform certain duties on the grounds that performing the duties in question would imply acceptance of homosexuality and, for that reason, would be contrary to their declared religious beliefs. More precisely, the domestic law of states may permit an employer to initiate disciplinary and dismissal proceedings against employees who refuse service to gays or lesbians.

It should be noted that, according to the explanations given by the Court, this power falls within the margin of appreciation afforded to states in balancing the right to manifest one's religion with the rights of others, ie the right to non-discrimination on grounds of sexual orientation[114].

This indirect protection of LGBTI people's access to services derives from a judgment of 15 January 2013 on four joined applications from United Kingdom nationals (Ms Eweida, Ms Chaplin, Ms Ladele

[114] Consequently, if this matter lies within states' margin of appreciation, the protection afforded appears to be dependent on each state's assessment of it. The Court seems to entertain the possibility that a state might assess this balance differently and incline more towards wider protection of religious freedom. This question could therefore have been dealt with in the chapter on matters falling wholly or partially within the national margin of appreciation. Given, however, that the margin of appreciation argument is often purely rhetorical, the choice was made to deal with this question in the chapter describing the standard of protection at European level insofar as the solution on the merits is favourable to the situation of homosexuals.

and Mr McFarlane). Only applications n°. 51671/10, *Ladele v. United Kingdom*, and n°. 56516/10, *McFarlane v. United Kingdom*, concerned the qUestion of refUsal of service. It is interesting to notethat the first case concerned a service provided in the context of a pUblic activity and the seconda service provided in the context of a private activity.

Ladele v. the United Kingdom,
15 JanUary 2013, application n°. 51671/10 (jUdgment in the case of Eweida and Others v. the United Kingdom, 15 JanUary 2013, applications n os. 48420/10, 59842/10, 51671/10 and 36516/10)

In a sitUation where states choose to grant gay and lesbian coUples a certain degree of legal recognition, whatever form that may take, those states enjoy a certain margin of appreciation Under Article 14 to reqUire others to respect this legal recognition of homosexUal coUples in the same way as they reqUire recognition of a heterosexUal marriage. More precisely, when a state decides to grant legal recognition in one form or another to homosexUal coUples, it is jUstified in reqUiring it to be applied by the pUblic employees responsible for these matters, withoUt those employees being able to cite their religioUs beliefs as groUnds for refUsing to apply it.

Principal facts

Ms Ladele is a Christian who holds the view that homosexUal relations are contrary to God's law and that any act implying recognition of homosexUality is incompatible with her beliefs. Ms Ladele was employed by the London BoroUgh of Islington as a registrar from 1992 to 2009. When the Civil Partnership Act came into force in the United Kingdom in December 2005, she was informed by her employer that she woUld be reqUired to condUct civil partnership ceremonies between persons of the same sex. When, in May 2007, she refUsed to agree to have her contract amended accordingly, disciplinary proceedings were commenced against her. Following these proceedings, she was warned that if she refUsed to perform same-sex civil partnership ceremonies, she woUld be in breach of Islington CoUncil's eqUality and diversity policy and woUld therefore be dismissed. Finally, in March 2010, Ms Ladele was refUsed permission to appeal to the SUpreme CoUrt. Relying on Article 9 taken in conjUnction with Article 14, Ms Ladele alleged that domestic law had not afforded sUfficient protection to her right to manifest her religion.

Decision of the Court

This case gave the CoUrt the opportUnity to determine the limits to the rights of persons who rely on their religioUs beliefs to refUse to apply legislation granting legal recognition to same-sex coUples. In its jUdgment of 15 JanUary 2013, the CoUrt held (§ 102- § 106) that the national authorities enjoy a wide margin of appreciation when it comes to striking a balance between competing rights (§106): the local authority was therefore jUstified in commencing disciplinary then dismissal proceedings against the applicant in view of her refUsal to agree to an amendment to her contract of employment as a registrar to inclUde the reqUirement to perform same-sex civil partnership ceremonies following the legislative change which introdUced this possibility.

McFarlane v. the United Kingdom,
15 JanUary 2013, application n°. 51671/10 (jUdgment in the case of Eweida and Others v. the United Kingdom, 15 JanUary 2013, applications n os. 48420/10, 59842/10, 51671/10 and 36516/10)

In a sitUation where states choose to grant gay and lesbian coUples a certain degree of legal recognition, whatever form that may take, those states enjoy a certain margin of appreciation Under Article 14 to reqUire others to respect this legal recognition of homosexUal coUples in the same

way as they requIre recognition of a heterosexUal marriage. More precisely, when a state decides to grant legal recognition in one form or another to homosexUal coUples, it is jUstified in reqUiring it to be applied by the pUblic employees responsible for these matters, withoUt those employees being able to cite their religioUs beliefs as groUnds for refUsing to apply it.

Principal facts

Mr McFarlane worked for Relate as a coUnsellor from May 2003 to March 2008. In 2007 he began stUdying for a postgradUate diploma in psycho-sexUal therapy, a discipline which is concerned in particUlar with sexUal dysfUnction and whose pUrpose is to enhance the coUple's sexUal activity by working on all aspects of their relationship. In late 2007, Mr McFarlane's sUperiors and colleagues expressed concerns that there might be a conflict between his religioUs beliefs and his work with same-sex coUples. In JanUary 2008, a disciplinary investigation was condUcted. In March 2008, he was dismissed sUmmarily for gross miscondUct on the groUnds that he had said he had no intention of honoUring the commitment he had made to comply with his employer's policy of eqUal treatment of homosexUal and heterosexUal coUples and to provide coUnselling to same-sex coUples too. He appealed UnsUccessfUlly against this decision.

Mr McFarlane lodged a claim with the Employment TribUnal, alleging wrongfUl dismissal and discrimination on the groUnds of his religioUs beliefs. The case was dismissed on appeal on the groUnds that his employer was entitled not only to expect him to perform his dUties bUt also to refUse to accommodate views which contradicted its fUndamental declared principles.

In his application to the CoUrt, the applicant argued that domestic law had not afforded sUfficient protection to his right to respect for his religioUs beliefs, and alleged a violation of Article 9 (freedom of religion) taken in isolation and of Article 14 (prohibition of discrimination) taken in conjUnction with Article 9.

Decision of the Court

The CoUrt foUnd that there had been no violation of Article 9 of the Convention taken alone or in conjUnction with Article 14. The main points in its argument were as follows:

"109. [...] [F]or the CoUrt the most important factor to be taken into accoUnt is that the employer's action was intended to secUre the implementation of its policy of providing a service withoUt discrimination. The State authorities therefore benefitted from a wide margin of appreciation in deciding where to strike the balance between Mr McFarlane's right to manifest his religioUs belief and the employer's interest in secUring the rights of others. In all the circUmstances, the CoUrt does not consider that this margin of appreciation was exceeded in the present case.

110. In conclUsion, the CoUrt does not consider that the refUsal by the domestic coUrts to Uphold Mr McFarlane's complaints gave rise to a violation of Article 9, taken alone or in conjUnction with Article 14."

Section 6. Freedom of expression

Article 10 of the Convention protects the right to expression relating to sexUal orientation. Indeed, it follows from the case law of the EUropean CoUrt of HUman Rights that Article 10 guarantees in particUlar the right to impart information regarding homosexUality, inclUding to minors (*Bayev and Others v. RUssia*, 20 JUne 2017, n°. 67667/09, 44092/12 and 56717/12), the right to report homophobic statements (*Mladina D.D. LjUbljana v. Slovenia*, 17 April 2014, n°. 20981/10), or the right to pUblish a magazine with homosexUal pornographic content (*Kaos GL v. TUrkey*, 22 November 2016, n°. 4982/07), etc.

§ 2 – The right to impart information regarding homosexuality, including to minors

In the jUdgment rendered in the case of *Bayev and Others v. RUssia* on 20 JUne 2017, the CoUrt ruled that RUssian legislation banning the promotion of homosexUality interfered with freedom of expression and was also discriminatory. Specifically, althoUgh the laws in qUestion were mainly intended to protect minors, the CoUrt held that the limits of their scope had not been clearly defined and their application had been arbitrary. Moreover, the very pUrpose of the laws and the way they were formU-lated and applied in the case of the applicants were discriminatory and did not serve any legitimate pUblic interest in the end. Indeed, by adopting these laws, the authorities have reinforced stigma and prejUdice and encoUraged homophobia, which is incompatible with the valUes of a democratic society. The principal facts of the case and the details of the CoUrt's decision are as follows.

***Bayev and Others v. Russia*,**
20 JUne 2017, n^os. 67667/09, 44092/12 and 56717/12

Principal facts

The applicants, Nikolay Bayev, Aleksey Kiselev and Nikolay Alekseyev, are RUssian nationals who were born in 1974, 1984 and 1977 respectively and live in Moscow and Gryazy (RUssia). They are gay rights activists. Initially introdUced at regional level in 2003 and 2006 and then at federal level in 2013, the laws banning so-called "propaganda of homosexUality" provide, according to the applicants, for an almost absolUte prohibition on making any pUblic reference to homosexUality. In particUlar, the Code of Administrative Offences was amended in 2013 to specifically ban the "promoting of non-traditional sexUal relationships among minors, (...) creating a distorted image of the social eqUivalence of traditional and non-traditional sexUal relationships". In protest against these laws, the three applicants held demonstrations between 2009 and 2012, first in front of a secondary school in Ryazan, then in front of a children's library in Arkhangelsk and lastly in front of an administrative bUilding in St PetersbUrg. They displayed banners stating that homosexUality is natUral/normal and not a perversion. The three applicants were sUbseqUently foUnd guilty of adminis-trative offences and sentenced to fines. They appealed, withoUt sUccess. All their ensUing appeals to the ConstitUtional CoUrt were also dismissed. The applicants contested among other things the compatibility of the new laws with the ConstitUtion, in particUlar with the principle of eqUal treatment and freedom of expression. In its decisions, the ConstitUtional CoUrt held in sUbstance that this ban was jUstified on the groUnds of protection of morals, referring in particUlar to the potential risk of "creating a distorted impression of the social eqUivalence of traditional and non-traditional marital relations" and of leading children into non-traditional sexUal relations.

Relying on Article 10 (freedom of expression) and Article 14 (prohibition of discrimination) of the Convention, the applicants complained aboUt the ban on pUblic statements concerning the identity, rights and social statUs of sexUal minorities, alleging that it was discriminatory. They argued in parti-cUlar that they had been foUnd guilty of administrative offences for displaying the most trivial and inoffensive banners, according to them. They also highlighted the general impact of this ban on their daily lives, stating that it not only prevented them from campaigning for LGBTI rights bUt also reqUired them in practice to conceal their sexUal orientation every time they were in the presence of a minor.

Decision of the Court

The EUropean CoUrt of HUman Rights held, by six votes to one, that there had been a violation of Article 10 (freedom of expression) of the Convention, and also a violation of Article 14 in conjUnction with Article 10 of the Convention (prohibition of discrimination in the exercise of freedom of expression).

The finding of a violation of Article 10

RUssian legislation banning the promotion of homosexUality interfered with freedom of expression for the following reasons.

(a) Whether there was interference with the exercise of the applicants freedom of expression

61. The CoUrt observes that the central issUe in this case is the very existence of a legislative ban on promotion of homosexUality or non-traditional sexUal relations among minors, which the applicants contest as inherently incompatible with the Convention. The applicants complained aboUt the general impact of these laws on their lives, in that it not only preventedthem from campaigning for LGBTI rights bUt in effect reqUired them to be aware of the presence of minors in their daily activities, in order to conceal their sexUal orientation from them. They pointed oUt that they had been convicted of administrative offences for displayingthe most trivial and inoffensive banners.

62. It is of relevance that even before any administrative measUres were taken against the applicants the ban on promotion of non–traditional sexUal relations among minors had arguably encroached on the activities in which they might personally have wished to engage, especially as LGBTI activists. The CoUrt has previoUsly held that the chilling effect of a legislative provision or policy may in itself constitUte an interference with freedom of expression (see ***Smith and Grady***, cited above, § 127). However, in the present case the CoUrt is not reqUired to establish the existence of an interference on the basis of the general impact of the impUgned laws on the applicants' lives because these laws have actUally been enforced against the applicants in the administrative proceedings. As admitted by the Government, there has been an interference with the applicants' freedom of expression.

(b) Whether the interference was jUstified

63. The measUres taken against the applicants were based on the legislative provisions specifically adopted to oUtlaw the promotion of homosexUality and non–traditional sexUal relations among minors. While there is no dispUte aboUt the authorities' compliance with law, the qUestion of lawfUlness arises in relation to the applicants' allegations that the law itself was inappropriately vague and was Unforeseeable in its application. However, the CoUrt considers that the issUe with the qUality of law is secondary to the qUestion of necessity of sUch laws as general measUres. The CoUrt reiterates that, in order to determine the proportionality of a general measUre, it mUst primarily assess the legislative choices Underlying it, regard being had to the qUality of the parliamentary and jUdicial review of the necessity of the measUre, and the risk of abUse if a general measUre were to be relaxed. In doing so it will take into accoUnt its implementation in the applicants' concrete cases, which is illUstrative of its impact in practice and is thUs material to the measUre's proportionality (see *Animal Defenders International v. the United Kingdom* [GC], n°. 48876/08, § 108, ECHR 2013 (extracts) and the cases cited therein). As a matter of principle, the more convincing the general jUstifications for the general measUre are, the less importance the CoUrt will attach to its impact in the particUlar case (ibid, § 109).

64. Accordingly, the CoUrt's assessment in this case will focUs on the necessity of the impUgned laws as general measUres, an approach which is to be distinguished from a call to review domestic law in the abstract (see, for example, *James and Others v. the United Kingdom*, 21 February 1986, § 36, Series A n°. 98; cf. *Perinçek v. Switzerland* [GC], n°. 27510/08, § 136, ECHR 2015 (extracts)).

(i) Justification on the grounds of protection of morals

65. As a first line of argument, the Government relied on moral imperatives and on popular support for the measures in question. They alleged that an open manifestation of homosexuality was an affront to the mores prevailing among the religious and even non-religious majority of Russians and was generally seen as an obstacle to instilling traditional family values.

66. The Court would generally accept a wider margin of appreciation in the absence of consensus among member States where the subject matter may be linked to sensitive moral or ethical issues. In the instant case, however, the Court notes that there is a clear European consensus about the recognition of individuals' right to openly identify themselves as gay, lesbian or any other sexual minority, and to promote their own rights and freedoms (see *Alekseyev*, cited above, § 84). Moreover, before deciding on the breadth of the margin of appreciation the Court must scrutinise the legitimate aim advanced by the Government in connection with their claim that the matter constitutes a sensitive moral or ethical issue. It will examine whether it is open to the Government to rely on the grounds of morals in a case which concerns facets of the applicants' existence and identity, and the very essence of the right to freedom of expression.

67. With regard to the issue of morals, the Government advanced the alleged incompatibility between maintaining family values as the foundation of society and acknowledging the social acceptance of homosexuality. The Court sees no reason to consider these elements as incompatible, especially in view of the growing general tendency to include relationships between same-sex couples within the concept of "family life" (see *P.B. and J.S. v. Austria*,n°. 18984/02, §§ 27-30, 22 July 2010, and *Schalk and Kopf v. Austria*, n°. 30141/04, §§ 91-94, ECHR 2010) and the acknowledgement of the need for their legal recognition and protection (see *Oliari and Others v. Italy*, *nos.* 18766/11 and 36030/11, § 165, 21 July 2015). 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 leadingone's family or private life (see *Kozak v. Poland*, n°. 13102/02, § 98, 2 March 2010, and *X and Others v. Austria* [GC], n°. 19010/07, § 139, ECHR 2013). It may be added that – far from being opposed to family values – many persons belonging to sexual minorities manifest allegiance to the institutions of marriage, parenthood and adoption, as evidenced by the steady flow of applications to the Court from members of the LGBTI community who wish to have access to them (see, among many examples, *Salgueiro da Silva Mouta*; *Oliari and Others; X and Others v. Austria*; and *E.B. v. France*, all cited above). The Government failed to demonstratehow freedom of expression on LGBTI issues would devalue or otherwise adversely affect actualand existing "traditional families" or would compromise their future.

68. The Court has consistently declined to endorse policies and decisions which embodied a predisposed bias on the part of a heterosexual majority against a homosexual minority (see *Smith and Grady*, cited above, § 102; *Salgueiro da Silva Mouta v. Portugal*, n°. 33290/96, §§ 34-36, ECHR 1999-IX; and *L. and V. v. Austria*, nos. 39392/98 and 39829/98, §§ 51-52, ECHR 2003-I). It held that these negative attitudes, references to traditions or general assumptionsin a particular country cannot of themselves be considered by the Court to amount to sufficient justification for the differential treatment, any more than similar negative attitudes towards those of a different race, origin or colour (see *Smith and Grady*, cited above, § 97; *Konstantin Markin v. Russia* [GC], n°. 30078/06, § 143, ECHR 2012 (extracts); *Vallianatos and Others v. Greece* [GC], nos. 29381/09 and 32684/09, § 77, ECHR 2013 (extracts); and *Hämäläinen v. Finland* [GC], n°. 37359/09, § 109, ECHR 2014).

69. The legislation at hand is an example of such predisposed bias, unambiguously highlighted by its domestic interpretation and enforcement, and embodied in formulas such as "to create a distorted image of the social equivalence of traditional and non-traditional sexual relationships" (see paragraph 34 above) and references to the potential dangers of "creating a distorted impression of the social equivalence of traditional and non-traditional marital relations" (see paragraph 22 above). Even more unacceptable are the attempts to draw parallels between homosexuality and paedophilia (see paragraphs 16 and 50 above).

70. The Court takes note of the Government's assertion that the majority of Russians disapprove of homosexuality and resent any display of same-sex relations. It is true that popular sentiment may play an important role in the Court's assessment when it comes to the justification on the grounds of morals. However, there is an important difference between giving way to popular support in favour of extending the scope of the Convention guarantees and a situation where that support is relied on in order to narrow the scope of the substantive protection. The Court reiterates that it would be incompatible with the underlying values of the Convention if the exercise of Convention rights by a minority group were made conditional on its being accepted by the majority. Were this so, a minority group's rights to freedom of religion, expression and assembly would become merely theoretical rather than practical and effective as required by the Convention (see *Alekseyev*, cited above, § 81).

71. In view of the above considerations, the Court rejects the Government's claim that regulating public debate on LGBTI issues may be justified on the grounds of the protection of morals.

(ii) Justification on the grounds of protection of health

72. Next, the Government argued that the promotion of same-sex relationships had to be banned on the grounds that same-sex relationships posed a risk to public health and the demographic situation. As regards the alleged health risks, the Government have not demonstrated that the applicants' messages advocated reckless behaviour or any other unhealthy personal choices. In any event, the Court considers it improbable that a restriction on potential freedom of expression concerning LGBTI issues would be conducive to a reduction of health risks. Quite the contrary, disseminating knowledge on sex and gender identity issues and raising awareness of any associated risks and of methods of protecting oneself against those risks, presented objectively and scientifically, would be an indispensable part of a disease-prevention campaign and of a general public-health policy.

73. It is equally difficult to see how the law prohibiting promotion of homosexuality or non-traditional sexual relations among minors could help in achieving the desired demographic targets, or how, conversely, the absence of such a law would adversely affect them. Population growth depends on a multitude of conditions, economic prosperity, social-security rights and accessibility of childcare being the most obvious factors among those susceptible to State influence. Suppression of information about same-sex relationships is not a method by which a negative demographic trend may be reversed. Moreover, a hypothetical general benefit would in any event have to be weighed against the concrete rights of LGBTI individuals who are adversely affected by the impugned restrictions. It is sufficient to observe that social approval of heterosexual couples is not conditional on their intention or ability to have children. It follows that this argument cannot provide a justification for a restriction of freedom of speech on the subject of same-sex relationships.

(iii) Justification on the grounds of protection of the rights of others

74. Finally, the Government's third line of argument focused on the need to shield minors from information which could convey a positive image of homosexuality, as a precaution against their conversion to a "homosexual lifestyle" which would be detrimental to their development and make them vulnerable to abuse. They stressed the potential risk of minors being induced

or forced into adopting a different sexUal orientation which, qUite apart from the moral aspect discUssed above, toUched Upon issUes concerning the personal autonomy of minors and encroached Upon the edUcational choices of their parents.

75. The CoUrt notes that the need to protect minors was the main reason for the adoption of the laws, and this is reflected in their texts. However, the restrictions on "promotion" are not limited to specific sitUations, as evidenced by the fact that one of the applicants was fined for a demonstration in front of the St PetersbUrg City Administration (see paragraph 17 above),a pUblic place that is not specifically assigned to minors. It appears that an incidental or potential sighting by a minor woUld sUffice to oUtlaw "promotion" in any venUe. The essence of the offence is in fact defined by the content of the expression in qUestion. The ConstitUtional CoUrt clarified that the prohibition did not concern "information ... presented in a neutral (edUcational, artistic, historical) context ... devoid of indications of promotion, that is, if it is not aimed at creating preferences linked to the choice of non–traditional forms of sexUal identity". In practice, however, the reqUirement of neutrality may prove unattainable with regard to the expression of opinions, and even statements of facts, since the absence of a negative connotation may in itself be perceived as conveying a positive attitUde. The statements "HomosexUality is not a perversion" and "HomosexUality is natUral" were deemed insUfficiently neutral and were considered to amoUnt to "promotion".

76. With regard to the scope of the ban, the CoUrt refers to the definition provided by the Government of "promotion" or "propaganda", describing them as "active dissemination of information aimed at indUcing others to sUbscribe to particUlar sets of valUes ..." (see paragraph 46 above), to the jUdgments in the applicants' cases, and to the decisions of the ConstitUtional CoUrt. The CoUrt shares the view of the Venice Commission, which referred to the vaguenessof the terminology Used in the legislation at hand, allowing for extensive interpretation of therelevant provisions (see § § 31–37 of the Opinion, qUOted in paragraph 36 above). It considersthat the broad scope of these laws, expressed in terms not sUsceptible to foreseeable application, shoUld be taken into accoUnt in the assessment of the jUstification advanced by the Government.

77. In expressing their concerns aboUt the possible forceful or underhand "recruiting" of minors by the LGBTI commUnity, the Government reiterated essentially the same allegations as those dismissed by the CoUrt in *Alekseyev*, cited above, on the following groUnds:

"86 the [Government] considered it necessary to confine every mention of homosexUality to the private sphere and to force gay men and lesbians oUt of the pUblic eye, implying that homosexUality was a resUlt of a conscioUs, and antisocial, choice. However, they were unable to provide jUstification for sUch exclUsion. There is no scientific evidence or sociological data at the CoUrt's disposal sUggesting that the mere mention of homosexUality, or open pUblic debate aboUt sexUal minorities' social statUs, woUld adversely affect children or 'vUlnerable adUlts'. On the contrary, it is only throUgh fair and pUblic debate that society may address sUch complex issUes as the one raised in the present case. SUch debate, backed Up by academic research, woUld benefit social cohesion by ensUring that representatives of all views are heard, inclUding the individUals concerned. It woUld also clarify some common points of confUsion, sUch as whether a person may be edUcated or enticed into or oUt of homosexUality, or opt into or oUt of it volUntarily. This was exactly the kind of debate that theapplicant in the present case attempted to launch, and it coUld not be replaced by the officialsspontaneoUsly expressing uninformed views which they considered popUlar. In the circUmstancesof the present case the CoUrt cannot bUt conclUde that the authorities' decisions to ban the events in qUestion were not based on an acceptable assessment of the relevant facts."

78. The position of the Government has not evolved since *Alekseyev*, and it remains unsubstantiated. The Government were unable to provide any explanation of the mechanism by which a minor could be enticed into "[a] homosexual lifestyle", let alone science-based evidence that one's sexual orientation or identity is susceptible to change under external influence. The Court therefore dismisses these allegations as lacking any evidentiary basis.

79. In so far as the Government alleged a risk of exploitation and corruption of minors, referring to the latter's vulnerability, the Court upholds the applicants' objection to the effect that protection against such risks should not be limited to same-sex relationships; the same positive obligation should, as a matter of principle, be equally relevant with regard to opposite-sex relationships. As the applicants pointed out, Russian law already provides for criminal liability in respect of lecherous actions against minors and dissemination of pornography to minors, and these provisions are applicable irrespective of the sexual orientation of those involved. The Government have not advanced any reasons why these provisions were insufficient and why they considered that minors were more vulnerable to abuse in the context of homosexual relationships than in heterosexual ones. The Court cannot but reiterate its finding that such an assumption would be a manifestation of predisposed bias (see *L. and V. v. Austria*, cited above, § 52).

80. As regards the applicants' alleged intrusion in the field of educational policies and parental choices on sex education, the Court observes that in staging their demonstrations the applicants did not seek to interact with minors, nor intrude into their private space. Nothing on their banners could be interpreted as a proposal to provide tuition on gender issues. This case therefore does not directly touch upon the functions assumed by the State with regard to school education and teaching (cf. *Kjeldsen, Busk Madsen and Pedersen*, cited above, § 54; *Jiménez Alonso and Jiménez Merino v. Spain* (dec.), n°. 51188/99, ECHR 2000-VI; and *Mansur Yalçın and Others v. Turkey*, n°. 21163/11, § 75, 16 September 2014).

81. Even assuming that the authorities' obligation to respect parents' religious or philosophical views may be interpreted as requiring them to take measures beyond setting the curricula of educational institutions, it would be unrealistic to expect that parents' religious or philosophical views would have to be given automatic priority in every situation, particularly outside school. The Court reiterates in this context that the Convention does not guarantee the right not to be confronted with opinions that are opposed to one's own convictions (see *Appel-Irrgang and Others v. Germany* (dec.), n°. 45216/07, 6 October 2009, and *Dojan and Others v. Germany* (dec.), n°. 319/08, 13 September 2011).

82. In sensitive matters such as public discussion of sex education, where parental views, educational policies and the right of third parties to freedom of expression must be balanced, the authorities have no choice but to resort to the criteria of objectivity, pluralism, scientific accuracy and, ultimately, the usefulness of a particular type of information to the young audience. It is important to note that the applicants' messages were not inaccurate, sexually explicit or aggressive (see, by contrast, *Vejdeland and Others*, cited above, § 57, where the Court agreed with the domestic courts' finding that the homophobic messages in question were "unwarrantably offensive to others, constituting an assault on their rights"). Nor did the applicants make any attempt to advocate any sexual behaviour. Nothing in the applicants' actions diminished the right of parents to enlighten and advise their children, to exercise with regard to their children the natural parental functions as educators, or to guide their children on a path in line with the parents' own religious or philosophical convictions (see, for similar considerations, *Kjeldsen, Busk Madsen and Pedersen*, cited above, § 54). To the extent that the minors who witnessed the applicants' campaign were exposed to the ideas of diversity, equality and tolerance, the adoption of these views could only be conducive to social cohesion. The Court recognises that

the protection of children from homophobia gives practical expression to the Committee of Ministers' Recommendation Rec(2010)5 which encourages "safeguarding the right of children and youth to education in safe environment, free from violence, bullying, social exclusion or other forms of discriminatory and degrading treatment related to sexual orientation or gender identity" (see paragraph 31 of the Recommendation) as well as "providing objective information with respect to sexual orientation and gender identity, for instance in school curricula and educational materials" (see paragraph 32 of the Recommendation).

(c) Conclusion

83. In the light of the above considerations the Court finds that the legal provisions in question do not serve to advance the legitimate aim of the protection of morals, and that such measures are likely to be counterproductive in achieving the declared legitimate aims of the protection of health and the protection of rights of others. Given the vagueness of the terminology used and the potentially unlimited scope of their application, these provisions are open to abuse in individual cases, as evidenced in the three applications at hand. Above all, by adopting such laws the authorities reinforce stigma and prejudice and encourage homophobia, which is incompatible with the notions of equality, pluralism and tolerance inherent in a democratic society.

84. The foregoing considerations are sufficient to enable the Court to conclude that in adopting the various general measures in question and by implementing them in the applicants' cases the Russian authorities overstepped the margin of appreciation afforded by Article 10 of the Convention. Accordingly, there has been a violation of this provision."

The finding of a violation of Article 14 in conjunction with Article 10

The Court considered that Russian legislation banning the promotion of homosexuality reinforced prejudices against the homosexual minority and thus enshrined the inferiority of same-sex relationships compared with opposite-sex relationships: in so doing, it infringed the right not to be subjected to discrimination on the grounds of sexual orientation. The Court's reasoning was as follows:

"89. [...] [W]ith specific regard to differences in treatment based on sexual orientation, the Court has held that the State's margin of appreciation is a narrow one; in other words, such differences require particularly convincing and weighty reasons by way of justification (see *X and Others v. Austria*, cited above, § 99, and the cases cited therein). The Court has stressed that differences based solely on considerations of sexual orientation are unacceptable under the Convention (see *E.B. v. France* [GC], n°. 43546/02, §§ 93 and 96, 22 January 2008, and *Salgueiro da Silva Mouta*, cited above, § 36).

90. The Court observes that the Code of Administrative Offences specifically bans "promoting the attractiveness of non-traditional sexual relationships, creating a distorted image of the social equivalence of traditional and non-traditional sexual relationships", in concertwith the Constitutional Court's position. The legislation at hand thus states the inferiority of same-sex relationships compared with opposite-sex relationships.

91. The Court has already found above that the legislative provisions in question embodied a predisposed bias on the part of the heterosexual majority against the homosexual minority and that the Government have not offered convincing and weighty reasons justifying the difference in treatment.

92. The foregoing findings also give rise to a violation of Article 14 of the Convention taken in conjunction with Article 10 of the Convention."

§ 2 – The right to denounce homophobic statements made by politicians

In its judgment in the case of *Mladina D.D. Ljubljana v. Slovenia*, n°. 20981/10, European case law has established the right of individuals to a wide freedom of expression to denounce homophobic statements made by politicians.

***Mladina D.D. Ljubljana v. Slovenia*,**
17 April 2014, n°. 20981/10

Principal facts

The applicant company, Mladina d.d. Ljubljana, is a Slovenian private company with a registered office in Ljubljana (Slovenia). It publishes the weekly magazine *Mladina*. In June 2005, the applicant company published an article that harshly criticised a parliamentarian for his remarks and, above all, his conduct during a parliamentary debate concerning legal recognition of same-sex relationships. During the debate, the parliamentarian expressed the opinion that homosexuals were generally undesirable, whether as children, same-sex couples or parents. In support of these words, he imitated a homosexual man picking up his children from school, using effeminate speech and gestures. The article related this behaviour and called the parliamentarian a "cerebral bankrupt" who, in a country with less limited human resources, would not be able to find work even as a school janitor. In August 2005, the parliamentarian brought an action against the applicant company, claiming that the article was offensive and had caused him severe distress. The Slovenian judges ruled on this action and acknowledged the importance of the applicant company's freedom of expression and its right to criticise the parliamentarian, but they held that the expression "cerebral bankrupt" was offensive and constituted a personal attack. The publishing company was ordered to pay the parliamentarian 2,921 euros in damages.

Relying on Article 10, the applicant publisher challenged the decisions rendered by the national courts ordering it to pay damages to a parliamentarian for remarks published in its magazine on the latter's controversial and homophobic conduct during a parliamentary debate. It saw this as a violation of its right to freedom of expression. It argued, in particular, that the national courts had been unwilling to expose harmful homophobic stereotypes and had not taken into account the fact that the exaggerated and satirical style of the article was a reaction to the parliamentarian's highly questionable behaviour.

Decision of the Court

The European Court of Human Rights unanimously held that there had been a violation of Article 10 (right to freedom of expression) of the European Convention on Human Rights.

After finding that the disputed decisions of the national courts amounted to an interference, provided for by Slovenian law, with the exercise of the applicant company's right to freedom of expression, the Court examined whether that interference could be analysed as being "necessary in a democratic society" for the protection of the reputation and rights of others. The Court stated that, while journalists are required to respect certain boundaries, in particular with regard to the reputation and rights of others, they have a responsibility to impart information and ideas on all matters of public interest. It is therefore essential to protect the competing interests of freedom of expression on the one hand and the rights of others on the other. The Court also pointed out that the threshold as regards permissible criticism of a politician is higher than that of a private individual, especially if the politician himself has made controversial statements in public. That being said, the Court held that the national courts had not established any pressing social need to place the protection of the parliamentarian's reputation above the applicant company's right to freedom of expression. Its argument was as follows.

"43. In this regard, the Court reiterates that the domestic decisions must be reviewed in the light of the case as a whole, including the content of the comments held against the applicant company and the context in which it made them (see *News Verlags GmbH & Co. KG v. Austria*,n°. 31457/96, § 52, ECHR 2000-I). The Court agrees that describing S.P.'s conduct as that of a "cerebral bankrupt" who, in a country with less limited human resources, would not even be able to find work as a primary school janitor, was indeed extreme and could legitimately be considered offensive. However, it is noted that the impugned remark was a value judgment, as acknowledged by the Government. It is true that in the absence of any factual basis even value judgments can be considered excessive. Nevertheless, in the present case the facts on which the impugned statement was based were outlined in considerable detail; with the exception of his concluding remark, S.P.'s parliamentary speech was quoted almost in its entirety, along with a mention of his accompanying imitation of a homosexual man. This description was followed by the author's commentary which, in the Court's opinion, was not only a value judgment, but also had the character of a metaphor. In the context of what appears to be an intense debate in which opinions were expressed with little restraint, the Court would interpret the impugned statement as an expression of strong disagreement, even contempt for S.P.'s position, rather than a factual assessment of his intellectual abilities. Viewed in this light, the description of the parliamentarian's speech and conduct can be regarded as a sufficient foundation for the author's statement.

44. Moreover, the controversial statement was construed as a counterpoint to S.P.'s own remarks. In his speech, S.P. followed the line of other members of his party and portrayed homosexuals as a generally undesirable sector of the population, whether as children, same-sex couples or parents. In order to reinforce his point, he imitated a homosexual man through the useof specific gestures which, according to the domestic courts, were reminiscent of gestures used by actors to portray homosexuals. The Court, however, considers that S.P.'s imitation may be regarded as ridicule promoting negative stereotypes.

45. Lastly, the Court observes that, at least in the part which included the statement in issue aimed at S.P., the article matched not only the latter's provocative comments, but also the style in which he had expressed them. The author's critical opinions were coloured by a number of evocative, exaggerated expressions. Having already held that Article 10 protects both the content and the form of expression (see *Oberschlick v. Austria* (n°. 1), 23 May 1991, § 57, Series A n°. 204), the Court considers that even offensive language, which may fall outside the protection of freedom of expression if its sole intent is to insult, may be protected by Article 10 when serving merely stylistic purposes (see *Tuşalp v. Turkey*, n°s. 32131/08 and 41617/08, § 48, 21 February 2012).

46. In the Court's opinion the context in which the impugned statement was made, and the style used in the article were not given sufficient consideration by the domestic courts. Viewed in the light of these two factors, the Court considers that the statement did not amount to a gratuitous personal attack on S.P. Moreover, in this regard the Court also points out that political invective often spills over into the personal sphere; such are the hazards of politics and the free debate of ideas, which are the guarantees of a democratic society (see *Lopes Gomes da Silva*, [···]).

47. In the light of the above, the Court considers that the domestic courts did not convincingly establish any pressing social need for placing the protection of S.P.'s reputation above the applicant company's right to freedom of expression and the general interest in promoting freedom of expression where issues of public interest are concerned. The Court thus con-cludes that the reasons given by the domestic courts cannot be regarded as a sufficient

justification for the interference with the applicant company's right to freedom of expression. The domestic courts therefore failed to strike a fair balance between the competing interests. Moreover, this conclusion cannot be affected by the fact that the proceedings complained of were civil rather than criminal in nature.

48. Accordingly, the interference complained of was not "necessary in a democratic society" within the meaning of Article 10 § 2 of the Convention.

49. There has therefore been a violation of Article 10 of the Convention."

§ 3 – The right to publish a magazine with homosexual pornographic content

In the *Kaos GL v. Turkey* judgment of 22 November 2016, the Court held that the seizure of copies of a magazine published by an LGBTI rights association containing articles on the sexuality of the LGBTI community and pornography on the one hand, and sexually explicit images on the other, violated its right to freedom of expression.

***Kaos GL v. Turkey*,**
22 November 2016, n°. 4982/07

Principal facts

The applicant is an association under Turkish law known as "the Kaos cultural Research and solidarity association for gays and lesbians" (*Kaos Gey ve Lezbiyen Kültürel Araştırmalarve Dayanışma Derne*gi),vbased in Ankara. It aims to promote the rights of the lesbian, gay, bisexual and transgender (LGBTI) community in Turkey. On 21 July 2006, the Ankara Chief Prosecutor, drawing on Article 25 § 1 of the Press Act, seized three copies of issue 28 of the magazine Kaos GL before its distribution. The issue in question contained articles and interviewson pornography related to homosexuality, some of which were illustrated with explicit images.On the same day, the Criminal Court of First Instance, at the request of the Chief Prosecutor, ordered the seizure of the 375 copies of issue 28 of the magazine with a view to launching criminal investigations. It considered that the content of some of the articles and images published was contrary to the principle of protection of public morals. The Kaos GL association filed an opposition against this decision before the Ankara Criminal Court, which dismissed the appeal. Furthermore, the Ankara Chief Prosecutor charged Mr Umut Güner, presidentof the applicant association and editor–in–chief of the *Kaos GL* magazine, with publishing obscene images via the press, an offence punishable under Article 226 § 2 of the Penal Code.He considered that the painting reproduced on page 15 of the seized issue, which showeda sexual act between two men whose sexual organs were visible, was clearly obscene and pornographic. In 2007, the Ankara Criminal Court acquitted Mr. Güner of the charge against him. It held that not all the factors constituting the offence were present because the copiesof the magazine had been seized before they could be distributed. The Court also ordered the return to the defendant of the 378 copies of the magazine seized once the decision had become final. In 2012, the Court of Cassation upheld the judgment of the Criminal Court.

Relying in particular on Article 10 (freedom of expression) of the European Convention on Human Rights, the applicant association complained of the seizure of issue 28 of the magazine *Kaos GL* and the criminal proceedings brought against the president of the association and editor–in–chief of the magazine.

Decision of the Court

In its judgment of 22 November 2016, the European Court of Human Rights unanimously held that there had been a violation of freedom of expression. Its argument first set out the general principles and then applied them to the present case; this argument was as follows.

(a) General principles

46. The Court first recalls its settled case-law relating to freedom of expression (see, *inter alia, Morice v. France* [GC], n°. 29369/10, § 124, 23 April 2015, *Delfi AS v. Estonia* [GC], n°. 64569/09, § 131, ECHR 2015, and *Perinçek v. Switzerland* [GC], n°. 27510/08, § 196, ECHR 2015 (extracts)).

47. It then recalls that Article 10 of the Convention includes freedom of artistic expression – notably within freedom to receive and impart information and ideas – which affords the opportunity to take part in the public exchange of cultural, political and social information and ideas of all kinds (*Müller and Others v. Switzerland*, 24 May 1988, § 27, Series A n°. 133). It also recallsthat who create, perform, distribute or exhibit works of art contribute to the exchange of ideasand opinions which is essential for a democratic society. Hence the obligation on the State not to encroach undully on their freedom of expression (see, inter alia, *Vereinigung Bildender Künstler v. Austria*, n°. 68354/01, § 26, ECHR 2007 II, and *Müller*, cited above, §§ 32-33).

48. It reaffirms that the artist and those who promote their work are certainly not immune from the possibility of limitations as provided for in paragraph 2 of Article 10. Whoever exercises his freedom of expression undertakes, in accordance with the express terms of that paragraph, "duties and responsibilities", their scope will depend on his situation and the means he uses; in considering whether the penalty was necessary in a democratic society, the Court cannot overlook this aspect of the matter (*Akdaş v. Turkey*, n°. 41056/04, § 26, 16 February 2010).

49. As regards the protection of morals, the Court reaffirms that, both today and at the time of the adoption of the *Müller* judgment (cited above, § 35), it is not possible to find in the legal and social orders of the Contracting States a uniform European conception of morals. States' views of the requirements of morals vary from time to time and from place to place, and often require that the existence of diverse cultural, religious, civil or philosophical communities be taken into account within the same State. By reason of their direct and continuous contact with the vital forces of their countries, State authorities are in principle in a better position than the international judge to give an opinion on the exact content of these requirements as well as on the "necessity" of a "restriction" or "penalty" intended to meet them (*Akdaş*, cited above, § 27).

50. Finally, the Court reiterates that Article 10 does not prohibit prior restraints on publication as such. This is borne out not only by the words "conditions", "restrictions", "preventing" and "prevention" which appear in that provision, but also by the Court's judgment in *The Sunday Times v. the United Kingdom* (n°. 1) (26 April 1979, Series A n°. 30) and in markt intern *Verlag GmbH and Klaus Beermann v. Germany* (20 November 1989, Series A n°. 165). On the other hand, the dangers inherent in prior restraints are such that they call for the most careful scrutiny on the part of the Court (Association *Ekin v. France*, n°. 39288/98, § 56, ECHR 2001-VIII). News is a perishable commodity and to delay its publication, even for a short period, may well deprive it of all its value and interest (*Ahmet Yıldırım v. Turkey*, n°. 3111/10, § 47, ECHR 2012).

(b) Application in the present case of the above principles

51. The Court observes that it is not controversial between the parties that the seizure of all copies of issue 28 of the magazine Kaos GL constitutes an interference with the applicant's freedom of expression, a right protected under Article 10 § 1 of the Convention. Such

interference constitUtes a violation of Article 10, Unless it is ″prescribed by law″, pUrsUes one or more of the legitimate aims referred to in paragraph 2 of Article 10 and may be regarded as ″necessary in a democratic society″.

i. Interference prescribed by law

52. The CoUrt notes that the domestic authorities seized the copies of issUe 28 of the Kaos GL magazine pUrsUant to Article 28 of the ConstitUtion and Article 162 of the Code of Criminal ProcedUre. […].

It observes [...] that Article 28 of the ConstitUtion provides for the possibility of seizing a periodic pUblication or not by decision of a jUdge when an investigation or prosecUtion has been initiated in connection with one of the offences specified by law, on the one hand, and on the other hand, by order of the authority expressly authorised by law for this pUrpose, when a delay woUld be prejUdicial from the perspective, among others, of protecting pUblic morals.

54. The CoUrt therefore considers that the dispUted interference was prescribed by law within the meaning of Article 10 of the Convention.

ii. Interference pUrsUing a legitimate aim

55. The CoUrt can accept that the dispUted interference pUrsUed the legitimate aim of protecting pUblic morals (*Müller and Others*, cited above, § 39).

iii. Interference ″necessary in a democratic society″

56. First of all, the CoUrt notes that, in the present case, all the copies of issUe 28 of the Kaos GL magazine pUblished by the applicant were seized by the domestic authorities on 24 JUly 2006. In this regard, it observes that Criminal CoUrt of First Instance that ordered the seizUre foUnd that the content of certain articles and images pUblished as part of the ″pornography″ file of the issUe in qUestion violated the principle of protection of pUblic morals. It fUrther notes that the confiscation of the copies of the magazine woUld not cease until the decision of the Criminal CoUrt of 28 February 2007 became final in the criminal proceedings against the editor-in-chief of the magazine. It also points oUt that the said decision became final following the jUdgment of the CoUrt of Cassation of 29 February 2012.

57. In assessing whether the ″necessity″ of the restriction imposed on the applicant's freedom of expression had been determined in a convincing manner in the present case, the CoUrt mUst essentially focUs on the reasoning followed by the national coUrt (*Sapan v. TUrkey*, n°. 44102/04, § 37, 8 JUne 2010). However, in the present case, it is impossible to deter- mine, on the basis of the decisions of the domestic coUrts, why a given article or image in the relevant issUe of the magazine was damaging to pUblic morals. Indeed, the seizUre decisionby the Criminal CoUrt of First Instance does not sUggest in any way that the jUdge examinedin detail the qUestion of the compatibility of the magazine's content with the principle ofthe protection of pUblic morals. The Criminal CoUrt of First Instance does not explain which article or image in this issUe of the magazine contravened pUblic morals. The decision ofthe Criminal CoUrt dismissing the applicant's opposition to the seizUre decision does not provide any fUrther clarification or reasoning in this respect.

58. Accordingly, in the absence of any reasoning in the decisions rendered, the argument that the national coUrt dUly considered the criteria to be taken into accoUnt before restricting the applicant's freedom of expression cannot be accepted. The CoUrt therefore holds that the groUnd for the protection of pUblic morals, which was raised in sUch a general manner and withoUt any reason, was not sUfficient to jUstify the seizUre and confiscation of all copies of issUe 28 of the magazine for more than five years.

59. Aside from that conclUsion, the CoUrt also analysed the contested pUblication (for a similar approach, see Gözel and Özer v. TUrkey, n^os. 43453/04 and 31098/05, § 56, 6 JUly 2010) and foUnd that the relevant issUe of the magazine as a whole dealt throUgh critical and analytical articles with pornography from varioUs angles, particUlarly from the perspective of LGBTI persons. It observes that the dispUted pUblication also contained some images with explicit content, in particUlar a painting reprodUced on page 15, which illUstrated the sexUal act performed by two men, each representing the painter himself. It considers that these images, in particUlar the painting in qUestion, notwithstanding their intellectUal and artistic natUre, may be deemed likely to offend the sensitivity of an Uninformed pUblic. According to the CoUrt, given the content of the articles dealing with the sexUality of the LGBTI commUnity and pornography, and the explicit natUre of some of the images Used, issUe 28 of the magazine can be considered as a specific pUblication aimed at a certain category of society.

60. In view of the foregoing, the CoUrt considers that the magazine in qUestion was not appropriate for any pUblic, which the applicant acknowledges as well. ConseqUently, the CoUrt can accept that, even if only a small proportion of the copies of the magazine were intended for sale at newsagents, the measUres taken to prevent certain groUps of persons, in particUlar minors, from accessing this pUblication may have responded to a pressing social need.

61. However, the CoUrt points oUt that the natUre and severity of the penalties imposed are also factors to be taken into accoUnt when assessing the proportionality of an interference (see, for example, *Sürek v. TUrkey* (n°. 1)[GC], n°. 26682/95, § 64, second paragraph, ECHR 1999-IV, and *Chauvy and Others v. France*, n°. 64915/01, § 78, ECHR 2004-VI). It considers in the present case that, while the necessity to preserve the sensitivity of part of the pUblic, in particUlar minors, is acceptable with regard to the protection of pUblic morals, it was not jUstified to prevent the entire pUblic from having access to the dispUted issUe of the magazine. In this respect, it points oUt that the domestic authorities did notseek to apply a less bUrdensome preventive measUre than the seizUre of all copies of the issUe in order to avoid access by an Uninformed pUblic to the magazine in qUestion. SUch a measUre coUld, for example, have taken the form of a prohibition on the sale of the magazineto persons Under 18 years of age or an obligation to sell the magazine in special packaging with an advisory for the under-18s or, at worst, a withdrawal from the kiosks, bUt not the seizUre of copies for sUbscribers.

62. Even assUming, as the decision of the Ankara Criminal CoUrt of 28 February 2007 sUggests, that the distribUtion of the seized issUe with an advisory for under-18s was possible after the retUrn of the confiscated copies following the criminal proceedings against the magazine's editor-in-chief, i.e. after the jUdgment of the CoUrt of Cassation of 29 February 2012, the CoUrt considers that the confiscation of the copies of the magazine and the five years and seven months delay in its pUblication cannot be regarded as proportionate to the aim pUrsUed (see, *mUtatis mUtandis*, *Alınak v. TUrkey*, n°. 40287/98, § 46, 29 March 2005 and *Vereinigung Bildender Künstler v. AUstria*, n°. 68354/01, § 37, 25 JanUary 2007).

63. In view of the foregoing, the CoUrt considers that the seizUre of all the copies of issUe 28 of the magazine Kaos GL amoUnts to a disproportionate interference with the applicant's right to freedom of expression which is not "necessary in a democratic society" within the meaning of Article 10 of the Convention.

Accordingly, there has been a violation of Article 10 of the Convention."

Section 7. Freedom to demonstrate

The right to openly proclaim one's sexual orientation through demonstrations or, more broadly, the right to publicly defend the LGBTI cause have been protected mainly through Article 11 (freedom of assembly and association), where applicable in conjunction with Article 14 (prohibition of discrimination), as in the cases *Bączkowski and Others v. Poland* of 3 May 2007, *Alekseyev v. Russia* of 21 October 2010 or *Genderdoc-M v. Republic of Moldova* of 12 June 2012, but they have also been protected through Article 10 (freedom of expression) – as in the case of *Bayev and Others v. Russia* of 20 June 2017, which was previously discussed (see above).

The right to demonstrate for the cause of LGBTI persons has also been guaranteed indirectly through Article 13 (right to an effective remedy), which allows demonstrators to challenge public authorities' decisions that are unfavourable to them – as in the *Genderdoc-M* case mentioned above – and even through Article 3 (prohibition of inhuman or degrading treatment), which grants demonstrators a right to adequate protection by public authorities against violence – as in the case of *Identoba and Others v. Georgia* on 12 May 2015.

§ 1 – The right to openly proclaim one's sexual orientation by participating in demonstrations

The principle established by the *Bączkowski* judgment

***Bączkowski and Others v. Poland*,**
3 May 2007, n°. 1543/06

Principal facts

The applicants were the Foundation for Equality (*Fundacja Równości*) and five of its members, Tomasz Bączkowski, Robert Biedroń, Krzysztof Kliszczyński, Inga Kostrzewa and Tomasz Szypuła, who were also members of non-governmental organisations seeking to raise public awareness of various forms of discrimination, including those based on sexual orientation.

As part of an "Equality Days" campaign organised by the Foundation and planned for 10 12 June 2005, the applicants wished to hold a march through the streets of Warsaw to alert public opinion to the issue of discrimination against minorities, women and disabled persons. They also intended to hold assemblies on 12 June in seven squares in Warsaw to protest, in some cases, against discrimination against various minorities, and in others, against discrimination towards women.

The applicants applied for permission to hold the march and the assemblies on 12 May 2005 and3 June 2005 respectively.

On 20 May 2005, a national newspaper, *Gazeta Wyborcza*, published an interview with the Mayor of Warsaw, who, in reply to questions about the applicants' request to organise the march, said that he would ban it whatever the circumstances and that, in his opinion, "propaganda about homosexuality is not the same as exercising one's freedom of assembly".

On 3 June 2005, a representative of the Mayor of Warsaw refused permission to hold the march on the ground that the organisers had failed to submit a "traffic organisation plan" in accordance with Article 65 a) of the Road Traffic Act. According to the applicants, they were never asked to provide this document.

On 9 June 2005, the Mayor issued decisions banning the assemblies to be organised by Mr Bączkowski, Mr Biedroń, Mr Kliszczyński, Ms Kostrzewa and Mr Szypuła. He relied on the argument that assemblies held under the provisions of the Assemblies Act of 1990 had to be organised away from roads used for road traffic and that, if they were to use roads, more stringent requirements applied in order to avoid disruptions to traffic. Permission was also refused on the ground that a number

of requests had been submitted to organise other assemblies on the same day defending ideas and intentions which ran counter to those of the applicants, which meant that there were likely to be clashes between demonstrators.

On the same day, assemblies on the issue of discrimination against women were authorised, as were various other demonstrations on such subjects as "Against propaganda for partnerships", "Christians respecting God's and nature's laws are citizens of the first rank" and "Against adoption of children by homosexual couples".

Despite the decision of 3 June, the march took place on 11 June 2005. It was attended by some 3000 people under police protection. The authorised assemblies were held on the same day.

On 17 June and 22 August 2005, the appeals board set aside the decisions of 3 and 9 June on the ground that they gave insufficient reasons and were unlawful. The appeal decisions were given after the dates on which the applicants had planned their demonstrations. The proceedings were therefore discontinued as they had become devoid of purpose.

On 18 January 2006, the Constitutional Court examined a request submitted to it by the Ombudsman to determine whether the requirements imposed on organisers of public events by the provisions of the Road Traffic Act were compatible with the Constitution. In its judgment the Constitutional Court found that the provisions of the Act as applied in the applicants' case were incompatible with the constitutional safeguards relating to freedom of assembly.

The applicants therefore lodged a complaint alleging a violation of their right to freedom of peaceful assembly owing to the manner in which the domestic authorities had applied the relevant domestic law in their case. They also alleged that they had not had access to a procedure which would have enabled them to obtain a final decision before the planned date of the demonstrations. Lastly, they alleged discriminatory treatment in that they had not been authorised to hold certain demonstrations whereas other organisers had. They relied on Article 11 and Articles 13 and 14 taken in conjunction with Article 11.

Decision of the Court

The Court found a violation of the above-mentioned three articles. The violation of Article 11 and that of Article 14 taken in conjunction with Article 11 are considered below (the violation of Article 13 taken in conjunction with Article 11 will be discussed later)[115].

The finding of a violation of Article 11 taken alone: the right to openly proclaim one's sexual orientation by participating in demonstrations

"62. While in the context of Article 11 the Court has often referred to the essential role played by political parties in ensuring pluralism and democracy, associations formed for other purposes are also important to the proper functioning of democracy. For pluralism is also built on genuine recognition of, and respect for, diversity and the dynamics of cultural traditions, ethnic and cultural identities, religious beliefs and artistic, literary and socio-economic ideas and concepts. The harmonious interaction of persons and groups with varied identities is essential for achieving social cohesion. It is only natural that, where a civil society functions in a healthy manner, the participation of citizens in the democratic process is to a large extent achieved through belonging

[115] Regarding the finding of a violation of Article 13 taken in conjunction with Article 11, the Court's argument may be summarised as follows: after noting that the applicants did not obtain a judicial ruling on the legality of the refusal of permission to hold the demonstrations until after the planned date of the assemblies and that they had no legal possibility of obtaining one before that date, it held that the applicants had not had access to an effective domestic remedy. For more details, see below.

to associations in which they may integrate with each other and pursue common objectives collectively (see *Gorzelik and Others v. Poland* [GC], n°. 44158/98, § 92, 17 February 2004).

63. Referring to the hallmarks of a "democratic society", the Court has attached particular importance to pluralism, tolerance and broadmindedness. In that context, it has held that although individual interests must on occasion be subordinated to those of a group, democracy does not simply mean that the views of the majority must always prevail: a balance must be achieved which ensures the fair and proper treatment of minorities and avoids any abuse of a dominant position (see *Young, James and Webster v. the United Kingdom*, 13 August1981, Series A n°. 44, p. 25, § 63, and *Chassagnou and Others v. France* [GC], n^os^. 25088/95and 28443/95, ECHR 1999 III, p. 65, § 112).

64. In *Informationsverein Lentia and Others v. Austria* (judgment of 24 November 1993, Series A n°. 276, p. 16, § 38) the Court described the State as the ultimate guarantor of the principleof pluralism. Genuine and effective respect for freedom of association and assembly cannot be reduced to a mere duty on the part of the State not to interfere; a purely negative conceptionwould not be compatible with the purpose of Article 11 nor with that of the Convention in general. There may thus be positive obligations to secure the effective enjoyment of these freedoms (see *Wilson & the National Union of Journalists and Others v. the United Kingdom*, n^os^. 30668/96, 30671/96 and 30678/96, § 41, ECHR 2002 *V, and Ouranio Toxo v. Greece*, n°. 74989/01, 20 October 2005, § 37). This obligation is of particular importance for persons holding unpopularviews or belonging to minorities, because they are more vulnerable to victimisation."

After reiterating these principles, the Court continued its argument: it acknowledged that the demonstrations had finally taken place on the planned dates, but noted that the applicants had taken a risk because they had been banned by the authorities. This ban might have dissuaded the applicants and other persons from participating in the demonstrations because, in the absence of official authorisation, they were not assured of receiving protection from the authorities against any hostile demonstrators. There was therefore an interference in the applicants' rights as guaranteed by Article 11. As the decisions refusing the applicants permission to demonstrate and organise assemblies were set aside on appeal, that interference was not "provided for by law". This finding can only be confirmed by the Constitutional Court's finding with regard to the unconstitutionality of the road traffic legislation"

The finding of a breach of Article 14 taken in conjunction with Article 3: the right of prisoners to conditions of detention compatible with human dignity without discrimination based on sexual orientation"

After noting, on the one hand, that the decisions refusing permission to hold the demonstrations showed no obvious discrimination in that they focused on technical aspects of the organisation of the planned assemblies, and, on the other, that it could not speculate as to the existence of motives other than those specified by the authority which had taken the decisions complained of, the Court decided to introduce other elements into its assessment, in particular the opinion expressed by the Mayor.

In this connection, it pointed out that the exercise of freedom of expression by elected politicians who at the same time are holders of public offices in the executive branch of government entails particular responsibility. Such persons must therefore exercise that freedom with due restraint, bearing in mind that their views can be regarded as instructions by civil servants whose employment and careers depend on their approval.

In relying on the interview published in the press, the Court seems to avail itself here of a possibility opened up by the *Nachova* Grand Chamber judgment of 6 July 2005, namely the application of a somewhat more flexible standard of proof (in relation to the general principle of proof "beyond

all reasonable doubt" which the Court normally applies in discrimination cases)[116]. In this judgment, it said that it did not rule out the possibility that proof of an allegation of discrimination might follow from the "coexistence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact"[117]. This is indeed the method it seems to apply in this case.

"100. However, in the present case the Court considers that in the assessment of the case it cannot disregard the strong personal opinions publicly expressed by the Mayor on issues directly relevant to the decisions regarding the exercise of freedom of assembly. It observes that the decisions concerned were given by the municipal authorities acting on the Mayor's behalf after he had made known to the public his opinions regarding the exercise of freedom of assembly and "propaganda about homosexuality" (see paragraph 27 above). It is further noted that the Mayor expressed these views when a request for permission to hold the assemblies was already pending before the municipal authorities. The Court is of the view that it may be reasonably surmised that his opinions could have affected the decision making process in the present case and, as a result, impinged on the applicants' right to freedom of assembly in a discriminatory manner."

101. Having regard to the circumstances of the case seen as a whole, the Court is of the view that there has been a violation of Article 14 in conjunction with Article 11 of the Convention."

Case law applications

***Alekseyev v. Russia*,**
21 October 2010, applications nos. 4916/07, 25924/08 and 14599/09

Principal facts

The applicant was one of the organisers of a series of marches which were to be held in Moscow in 2006, 2007 and 2008 to draw public attention to discrimination against the gay and lesbian community in Russia and call for tolerance towards them. The organisers notified the Mayor of Moscow of their intention to organise the marches in question. They also undertook to co-operate with the law-enforcement authorities in ensuring safety and respect for public order and to comply with regulations on restriction of noise levels.

Permission was refused on public order grounds: because the Mayor had received several petitions against the holding of these marches, the authorities considered that there was a risk of violent reactions which could turn into civil disorder and mass riots.

The Mayor of Moscow told the media that gay marches would not be allowed in the city "for as long as he was city mayor". He also called for an "active mass-media campaign [...] with the use of petitions brought by individuals and religious organisations" against Gay Pride marches. Having been refused permission to hold the planned marches, the organisers informed the Mayor of their intention of organising brief protest demonstrations in their place on the same dates. Permission was again refused. The applicant brought court actions challenging the decisions banning the marches and demonstrations, but these were unsuccessful.

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[116] "In assessing evidence, the general principle applied in cases has been to apply the standard of proof 'beyond reasonable doubt'", *Velikova v. Bulgaria*, 18 May 2000, §70. It was precisely in this judgment of 18 May 2000 that, for the first time, the Court explicitly stated that it was applying this standard of proof within the ambit of Article 14.

[117] *Nachova v. Bulgaria* (Grand Chamber), 6 July 2005, §147.

Relying on Articles 11, 13 and 14, the applicant complained that he had been banned on several occasions from organising marches and demonstrations in sUpport of LGBTI rights, that he had not had access to an effective remedy to challenge these decisions and that, together with the other participants, he had been the victim of discrimination on groUnds of sexUal orientation.

Decision of the Court

The CoUrt foUnd a violation of the above-mentioned three articles. The violation of Article 11 and that of Article 14 taken in conjUnction with Article 11 will be considered below (the violation of Article 13 taken in conjUnction with Article 11 will be discUssed later: see below.

The CoUrt pointed oUt that Article 11 protects non-violent demonstrations, inclUding those which may offend or shock people who do not share the ideas defended by the demonstrators. It also stressed that it shoUld be possible to demonstrate withoUt fear of being physically assaulted by one's opponents"

The finding of a violation of Article 11

Moreover, the mere risk that a demonstration might lead to disorder is not enoUgh to jUstify banning it. If one were to ban all demonstrations in which there were likely to be tensions and heated exchanges between opposing groUps, society woUld be deprived of the opportUnity of hearing differing views on qUestions which offend the sensitivity of the majority opinion, which woUld be contrary to the principles of the Convention.

For three years, the authorities in Moscow failed repeatedly to carry oUt a proper assessment of the risk to the safety of the participants and to pUblic order. There was indeed a risk that coUnter-demonstrators might take to the streets to protest against the Gay Pride marches, bUt in that case the necessary steps shoUld have been taken to ensUre that the demonstration and coUnter-demonstration proceeded peacefUlly and lawfUlly, and thUs allow both sides to express their respective opinions withoUt any violent clashes. Instead of that, the authorities qUite simply banned marches in sUpport of gays and lesbians. In so doing, they effectively gave their sUpport and approval to the groUps calling for sUch peacefUl marches to be disrupted, in breach of the law and pUblic order.

The CoUrt also noted that safety considerations had been of secondary importance in the decisions of the authorities, which had been mainly guided by the moral valUes of the majority. On several occasions the Mayor of Moscow had expressed his determination to prevent the holding of homosexUal marches, which he considered inappropriate. The RUssian government also stated in its observations to the CoUrt that demonstrations of this kind shoUld be prohibited because homosexUal propaganda is incompatible with religioUs doctrines and pUblic morality and coUld be harmfUl to children and adUlts who are exposed to it. According to the CoUrt:

"81.[…] it woUld be incompatible with the underlying valUes of the Convention if the exercise of Convention rights by a minority groUp were made conditional on its being accepted by the majority."

ContinUing its argument, the CoUrt noted that the pUrpose of Gay Pride marches was to "call for tolerance towards sexUal minorities" (§82), that they did not involve "any graphic demonstration of obscenity" and that the participants' intention was not to "exhibit nUdity, engage in sexUally provocative behavioUr or criticise pUblic morals or religioUs views" (§84).

FUrthermore, while there is no consensUs at EUropean level on the whole range of issUes relating to sexUal orientation.

"84.[…] There is no ambiguity about the other member States' recognition of the right of individuals to openly identify themselves as gay, lesbian or any other sexual minority, and to promote their rights and freedoms, in particular by exercising their freedom of peaceful assembly." The national margin of appreciation is therefore narrow and the Court applies strict scrutiny.

"85. […] The only factor taken into account by the Moscow authorities was the public opposition to the event, and the officials' own views on morals.

86. The mayor of Moscow, whose statements were essentially reiterated in the Government's observations, considered it necessary to confine every mention of homosexuality to the private sphere and to force gay men and lesbians out of the public eye, implying that homosexuality was a result of a conscious, and antisocial, choice. However, they were unable to provide justification for such exclusion. There is no scientific evidence or sociological data at the Court's disposal suggesting that the mere mention of homosexuality, or open public debate about sexual minorities' social status, would adversely affect children or "vulnerable adults". On the contrary, it is only through fair and public debate that society may address such complex issues as the one raised in the present case. Such debate, backed up by academic research, would benefit social cohesion by ensuring that representatives of all views are heard, including the individuals concerned. It would also clarify some common points of confusion, such as whether a person may be educated or enticed into or out of homosexuality, or opt into or out of it voluntarily. This was exactly the kind of debate that the applicant in the present case attempted to launch, and it could not be replaced by the officials spontaneously expressing uninformed views which they considered popular. In the circumstances of the present case the Court cannot but conclude that the authorities' decisions to ban the events in question were not based on an acceptable assessment of the relevant facts.

87. The foregoing considerations are sufficient to enable the Court to conclude that the ban on the events organised by the applicant did not correspond to a pressing social need and was thus not necessary in a democratic society.

88. There has accordingly been a violation of Article 11 of the Convention."

To encapsulate the issue involved in the review of conformity with Article 14 in this case, one might paraphrase the idea expressed previously by the Court in connection with Article 11 (see above § 81 of the *Alekseyev* judgment) and say that it would be incompatible with the values protected by Article 14 of the Convention if the exercise of Convention rights by a minority group were made conditional on its being accepted by the majority".

The finding of a violation of Article 14

After reiterating the principles of strict scrutiny in this area, the Court made the following points:

"109. It has been established above that the main reason for the ban imposed on the events organised by the applicant was the authorities' disapproval of demonstrations which they considered to promote homosexuality (see paragraphs 77–78 and 82 above). In particular, the Court cannot disregard the strong personal opinions publicly expressed by the mayor of Moscow and the undeniable link between these statements and the ban. In the light of these findings the Court also considers it established that the applicant suffered discrimination on the grounds of his sexual orientation and that of other participants in the proposed events. It further considers that the Government did not provide any justification showing that the impugned distinction was compatible with the standards of the Convention.

110. Accordingly, the Court considers that in the present case there has been a violation of Article 14 in conjunction with Article 11 of the Convention."

Genderdoc-M v. Republic of Moldova,
12 June 2012, n°. 9106/06

This case concerns the banning of a demonstration which a Moldovan non-governmental organisation, Genderdoc-M, planned to hold in Chisinau in 2005 to encourage the passage of laws on the protection of LGBTI persons from discrimination.

Besides violation of freedom of assembly and association, secured by Article 11 taken singly, the Court also found, in conjunction with Article 14, a violation of the right not to undergo discrimination in the exercise of this freedom and, in conjunction with Article 13, a violation of the right to an effective remedy.

In the ambit of Article 14, the Court used an array of evidence to establish firstly that the request for permission to demonstrate submitted by the applicant association had been dealt with differently by comparison with other such requests granted at the same period, and secondly that the ground for this distinctive treatment lay solely in disapproval of homosexuality, as disclosed by the arguments in defence which the Chisinau local authority presented to the domestic courts. Under Article 13, the Court's censure was directed at the ineffectiveness of the available remedies (see below).

Lashmankin and Others v. Russia,
7 February 2017, n°. 57818/09

Principal facts

Twenty-three applicants from different regions of Russia alleged that local authorities had imposed severe restrictions on peaceful assemblies they had planned, without any proper justification. Some of these events were aimed at promoting the rights of homosexuals. Indeed, among various demonstrations, a gay pride march and meeting in the centre of St Petersburg was planned on 26 June 2010 and on the same day, a picket in four different administrative districts of St Petersburg. However, the authorities refused to approve any location, time and manner of conduct for the planned meetings.

Among other things, the applicants complained before the Court that, under Articles 11 and 13, they had not had an effective remedy (concerning this complaint, see below) and that their right to freedom of assembly had been violated (complaint set out here).

Decision of the Court

On the issue of the right to freedom of assembly, the European Court unanimously held that there had been a violation of Article 11 (freedom of assembly and association). Its main arguments were as follows.

The finding of a violation of Article 14

The Court stated that in cases in which the location, date and time or manner of conduct of an assembly are crucial to the participants, the order to modify them may constitute an interference with the exercise by the participants of their right to freedom of assembly. The competent authorities refused to approve the location, date and time or manner of conduct of public events planned by the applicants and proposed alternative solutions. Considering that the authorities' proposals did not meet the purpose of their assemblies, the applicants either cancelled the demonstrations altogether or decided to hold them as initially planned, despite the risk of dispersal, arrest and prosecution to which they were exposed. There has therefore been an interference with the applicants' right to freedom of assembly.

On the justification for interference with the freedom of assembly and association

Applicable Russian legislation empowered local authorities to submit well-reasoned proposals to the organisers for changes in the location, date and time or manner of conduct of a public

event. Since the assessment of the proportionality of such a measure was not required, there was therefore a clear risk of arbitrariness in granting the executive authorities such a broad and unlimited discretionary power. Moreover, the present case shows that the above-mentioned powers have often been used in an arbitrary and discriminatory manner. There are many examples of cases where opposition groups, human rights defenders or gay rights activists have been denied permission to assemble in the city centre on the grounds that they might hinder traffic, interfere with people's everyday activities or present a security risk. So they had to hold their demonstrations in the outskirts of town and were dispersed or arrested if they refused to comply. While at the same time, pro-government public demonstrations were allowed to take place at the same locations, notwithstanding their potential disturbances to traffic and everyday life and security risks. The most telling example is the case of LGBTI rights activists who proposed ten different locations in the city centre, all of which were rejected on various grounds, while an anti-gay rally was allowed to take place at one of those locations on the same day.

The facts of the present case demonstrate the lack of adequate and effective legal safeguards against arbitrary and discriminatory exercise of the wide discretionary power granted to the executive authorities. Accordingly, the provisions of Russian legislation governing the power to propose a change of location, date and time or manner of conduct of public events did not meet the Convention's quality of law requirements.

On the ban of holding public demonstrations at certain locations

According to the Court, a general ban on demonstrations can only be justified if there is a real danger of them leading to a breach of public order which cannot be prevented by other less restrictive measures. In Russia, the ban on holding public demonstrations in the vicinity of courthouses has been formulated in absolute terms. It is not limited to assemblies held with the intention of obstructing or impeding the administration of justice. Some of the applicants were not allowed to hold a gay pride march in the city centre on the ground that the location they had chosen was in the vicinity of the Constitutional Court building. It is important to note that the rally at issue was not related to any case pending before the Court; its purpose was to celebrate the anniversary of the birth of the LGBTI rights movement in the 1960s and to condemn homophobia as well as discrimination against homosexuals. The refusal to approve this project of public demonstration on the sole ground of the general ban, without any consideration to the specific circumstances of the project, cannot be regarded as being necessary within the meaning of Article 11.

On the time limits for notification of rallies

According to the Court, the timing of a public meeting to voice certain opinions may be crucial for the political and social impact of such an event. If a public assembly is organised after a given social issue loses its relevance or importance in a current social or political debate, the impact of the meeting may be seriously diminished. Organisers of public events have six days to lodge a notification for their event: the public demonstration has to be notified between the 15th and 10th day before the planned date, except in the case of pickets, which can be notified up to three days before the planned date. Each year in January, due to an inflexible application of this provision, it is impossible to hold a public event other than a picket during a number of days following the New Year and Christmas holidays. The applicants were thus unable to organise a march and meeting on 19 January to commemorate the anniversary of the murders of a well-known human rights lawyer and a journalist. They were able to hold a picket on that day but had to content themselves witha static assembly instead of a march and could not express themselves through public speeches. The authorities did not provide relevant and sufficient reasons to justify the restrictions imposed on their freedom of assembly.

Moreover, Russian legislation does not allow taking into account the specific case of an event requiring an immediate response in the form of a spontaneous assembly. In such cases, the requirement to notify any demonstration at least 10 days in advance may render this type of response obsolete. One of the applicants wanted to protest against a draft law prohibiting the adoption of Russian children by United States citizens. The date of the parliamentary examination of this draft law was announced two days before, making it impossible for the parties concerned to comply with the three-day notification time limit for pickets, let alone with the normal ten-day time limit for other types of public events. When convicting an applicant for participating in a public demonstration held without prior notification, the domestic courts merely established that the applicant had taken part in a picket which had not been notified within the statutory time limit. They did not examine whether there were any special circumstances justifying a derogation from the strict application of the notification time limits.

In conclusion, the authorities did not give relevant and sufficient reasons for their proposals to change the location, date and time or manner of conduct of the public demonstrations that the applicants wanted to organise. These proposals were based on legal provisions that did not provide for adequate and effective legal safeguards against arbitrary and discriminatory exercise of the wide discretion enjoyed by the executive authorities and therefore did not meet the Convention's quality of law requirements. The automatic and inflexible application of the time limits for notifying public events, without taking public holidays or the spontaneous nature of a demonstration into account, was not justified. Furthermore, the authorities failed in their obligation to ensure that the official decision taken in response to a notification reached the applicant sufficiently in advance of the date scheduled for the event at issue, so as to guarantee the right to freedom of assembly which is practical and effective, and not theoretical or illusory. By dispersing the demonstrations organised by some of the applicants and arresting participants, the authorities failed to show the requisite degree of tolerance towards an unlawful but peaceful demonstration, which is in breach of the requirements of Article 11 § 2.

For more details on the violation of Article 11: see paragraphs 401 to 477 of the judgment. For more details on the circumstances of the restrictions on the freedom to demonstrate for the rights of gay and lesbian persons and on the right to appeal in this respect: see paragraphs 13 to 28 and paragraphs 383 to 387. For more details on the principal facts and the violation of Article 13 (right to an effective remedy) in conjunction with Article 11: see below. It should be noted that the Court also unanimously found a violation of Article 5 § 1 (right to liberty) and Article 6 § 1 (right to a fair hearing) in the case of certain applicants for demonstrations on a ground other than the defence of gay and lesbian persons.

Alekseyev and Others v. Russia,
27 November 2018, n°. 14988/09 and 50 others

Principal facts

The case brought together 51 applications lodged by seven Russian nationals: Nikolay Alekseyev, Irina Alekseyeva, Kirill Nepomnyashchiy, Aleksey Kiselev, Sofya Mikhaylova, Yaroslav Yevtushenko and Irina Fedotova. They live in Moscow, Shushenskoye (Krasnoyarsk region), Gryazi (Lipetsk region), Kemerovo, Sonchino (Voronezh region), and Luxembourg. At various points between 2009 and 2014, the applicants all informed the local authorities of their intention to organise public rallies on the issue of lesbian, gay, bisexual and transgender (LGBTI) rights. In each instance, the local authorities rejected the proposed date and location of the rally. The domestic courts, to which every applicant appealed, upheld these decisions and ruled in each case after the proposed date of the rally.

Relying on Articles 11, 13 and 14, the applicants complained that they had been banned from holding LGBTI events, that there had been no effective remedy to address this issue and that the authorities had handled their requests in a discriminatory manner.

Decision of the Court

The European Court of Human Rights unanimously held that there had been: a violation of Article 11 (right to freedom of assembly), a violation of Article 13 (right to an effective remedy), and a violation of Article 14 (right not to be discriminated against). Its argument, which is quite succinct, was as follows.

The Court observed that the Alekseyev case and the other 50 cases all concerned the continued refusal by the Russian authorities to approve requests to hold LGBTI rallies. The Court considered that this case and the 50 others brought before it were similar to the eponymous case of *Alekseyev and 2 Others v. Russia* (N°. 4916/07) adjudicated on 21 October 2010 (see above) and that it ought to replicate its then judgment in the case at issue. The Court found, in particular, that the rejection of the applicants' requests to hold LGBTI public events could not be justified by any imperative to defend public order and violated their right to freedom of assembly. It also found that the absence of any requirement on the authorities to make a decision on the events before the dates on which they were to be held amounted to an absence of effective remedy. The decision to block the LGBT events had been clearly motivated by the authorities' disapproval of the demonstrations and amoun-ted to discrimination, in violation of Article 14. The Court recalled that states had the obligation to implement its judgments and noted that Russia would need to make sustained and long-term efforts to adopt general measures, particularly on issues relating to freedom of assembly and discrimination (see, for all these violations, paragraphs 19 to 22 of the judgment).

§ 2 – The right to adequate protection of demonstrators by public authorities

***Identoba and Others v. Georgia*,**
12 May 2015, n°. 73235/12

Principal facts

The applicants are Identoba, a non-governmental organization (NGO) promoting and protecting the rights of lesbian, gay, bisexual and transgender people in Georgia, and 14 Georgian nationals who were born between 1959 and 1992 respectively and live in Tbilisi. Identoba organised a demonstration to take place on 17 May 2012 in Tbilisi to mark the International Day against Homophobia. On 8 May 2012, the NGO notified the authorities of its intention to hold a peaceful demonstration and requested them to provide sufficient protection against possible violence, having regard to the hostility towards sexual minorities in some parts of Georgian society. Some 30 people, including the 13 individual applicants, attended the demonstration. During the event, the demonstrators were threatened by counter-demonstrators – members of two religious groups – who outnumbered them. The counter-demonstrators shouted insults at the demonstrators – calling them among other things "perverts" and "sinners" –, blocked their passage and encircled them. Eventually, they attacked several of the applicants physically, causing injuries to at least three of them – haematomas, a closed head trauma and contusions – who required medical care. According to the applicants, the police officers remained relatively passive in the face of the violence. In particular, several police officers present at the scene, who were reportedly asked for help by the demonstrators, replied that they were not part of the police patrol and it was not their duty to intervene. Four applicants were arrested and briefly detained and/or taken away for a while in a police vehicle. According to the Government, these measures were takento protect them from the counter-demonstrators. Following the events, between May and July

2012, Identoba and 13 individUal applicants filed criminal complaints, reqUesting in particUlar that a criminal investigation be opened into the attacks against them by the coUnter-demonstrators, which they claimed were discriminatory, and into the acts and omissions of the police officers who had failed to protect them from those assaults. Two investigations into the injUries sUstainedby two of the applicants were opened in May and October 2012 respectively; they are still pending.Two coUnter-demonstrators, who had been arrested for a minor breach of pUblic order, were each fined an amoUnt eqUivalent to 45 euros (EUR).

Relying on Article 3 (prohibition of inhUman or degrading treatment) taken in conjUnction with Article 14 (prohibition of discrimination) of the Convention, the 13 individUal applicants complained that the Georgian authorities had failed to protect them from the violent attacks of the coUnter-demonstrators and to condUct effective investigations into the incidents by establishing, in particUlar, the discriminatory motive behind these attacks. Relying on Article 10 (freedom of expression) and Article 11 (freedom of assembly and association) in conjUnction with Article 14, Identoba and these 13 applicants fUrther alleged that they had been Unable to hold their peacefUl demonstration dUe to the attacks by coUnter-demonstrators and the inaction of the police.

Decision of the Court

In addition to the violation of Article 3 (prohibition of inhUman or degrading treatment) taken in conjUnction with Article 14 of the EUropean Convention on HUman Rights, the CoUrt held that there had been a violation of Article 11 guaranteeing freedom of assembly in conjUnction with Article 14 prohibiting discrimination (see above). This last violation was foUnd in light of the following reasoning.

"99. [...] [T]he CoUrt reiterates that despite the fact that the domestic authorities were given prior notice on 8 May 2012 aboUt the intention to organise a peacefUl march on 17 May 2012, they did not manage to Use that generoUs period of nine days for carefUl preparatory work. Indeed, given the attitUdes in parts of Georgian society towards the sexUal minorities, the authorities knew or shoUld have known of the risk of tensions associated with the applicant organisation's street march to mark the International Day Against Homophobia. They were thUs Under an obligation to Use any means possible, for instance by making pUblic statementsin advance of the demonstration to advocate, withoUt any ambiguity, a tolerant, conciliatory stance (compare with OUranio Toxo, [...], § 42) as well as to warn potential law-breakers ofthe natUre of possible sanctions. FUrthermore, it was apparent from the oUtcome of the LGBTIprocession, that the nUmber of police patrol officers dispatched to the scene of the demons-tration was not sUfficient, and it woUld have been only prudent if the domestic authorities, given the likelihood of street clashes, had ensUred more police manpower by mobilising, for instance, a sqUad of anti-riot police (contrast with Plattform "Ärzte für das Leben", § § 37and 38; and also OUranio Toxo, [...] , 43).

100. All in all, the CoUrt considers that the domestic authorities failed to ensUre that the march of 17 May 2012, which was organised by the first applicant and attended by the thirteen individUal applicants (from the second to the foUrteenth), coUld take place peacefUlly by sUfficiently containing homophobic and violent coUnter-demonstrators. In view of those omissions, the authorities fell short of their positive obligations Under Article 11 taken in conjUnction with Article 14 of the Convention."

Section 8. Access to justice

In the field of access to jUstice, the CoUrt has had occasion to point oUt that LGBTI persons mUst have access to an effective remedy to any violations of the Convention from which they might sUffer, particUlarly Under Articles 14, 8 or 11.

§ 1 – The right to effective redress for discrimination in the exercise of freedoms on grounds of sexual orientation

The principle established by the *Wolfmeyer* judgment

***Wolfmeyer v. Austria*,**
26 May 2005 (application n°. 5263/03)

Principal facts

The applicant, Thomas Wolfmeyer, was an Austrian national born in 1968. On 23 November 2000, the Feldkirch Regional Court (*Landesgericht*) found him guilty of engaging in homosexual acts with adolescents, contrary to Article 209 of the Criminal Code, and sentenced him to six months' imprisonment suspended on probation. It found that the applicant had committed homosexual acts with two adolescents in 1997. The applicant appealed. On 21 June 2002, the Constitutional Court declared Article 209 of the Criminal Code unconstitutional and, on 17 July 2002, the applicant was acquitted.

The applicant applied for reimbursement of his defence costs. On 12 November 2002, the Innsbruck Court of Appeal partly granted the applicant's appeal, noting that, under the law, only a maximum amount of 1091 euros could be reimbursed as a contribution to defence costs. It also awarded him 748.38 euros for cash expenses. The applicant complained that Article 209 was discriminatoryin that heterosexual or lesbian relations between adults and adolescents in the same age bracketwere not punishable. He also criticised the conduct of the criminal proceedings brought against him under that provision.

He relied in particular on Article 14 (prohibition of discrimination) taken in conjunction with Article 8 (respect for private life).

Decision of the Court

The main issue to be resolved by the Court in this case was whether or not the applicant, despite his acquittal, was still a victim of discrimination on the grounds of sexual orientation. The Court declared his application admissible in this respect after reasoning as follows:

"28. The Court reiterates that a decision or measure favourable to the applicant is not in principle sufficient to deprive him of his status as victim unless the national authorities have acknowledged, either expressly or in substance, and then afforded redress for, the breach of the Convention (see, for instance, *Dalban v. Romania* [GC], n°. 28114/95, § 43, ECHR 1999 VI).

29. It is true that Article 209 of the Criminal Code was repealed by the Constitutional Court and the applicant was subsequently acquitted. However, in the case of *S.L. v. Austria*, concerning an applicant who had never been prosecuted under Article 209 but was, on account of his sexual orientation, directly affected by the maintenance in force of that provision, the Court has already noted that the Constitutional Court's judgment has not acknowledged let alone afforded redress for the alleged breach of the Convention (n°. 45330/99, § 35, ECHR 2003 I (extracts).

30. Indeed the Constitutional Court did not rely on the argument of alleged discrimination of homosexual as compared to heterosexual or lesbian relationships, but rather on the lack of coherence and objective justification of the provision in other respects (see paragraph 23 above). The Government did not contest this. Instead they argue that the applicant's acquittal and the subsequent costs order contain at least an implicit acknowledgement of the breach of the Convention.

31. The Court does not share this view. It observes that neither the applicant's acquittal nor the subsequent costs order contains any statement acknowledging at least in substance the violation of the applicant's right not to being discriminated against in the sphere of his private life on account of his sexual orientation. Even if they did, the Court finds that neither of them provided adequate redress as required by its case law.

32. In this connection it is crucial for the Court's consideration that in the present case the maintenance in force of Article 209 of the Criminal Code in itself violated the Convention (*S.L. v. Austria*, cited above, § 45) and, consequently, the conduct of criminal proceedings under this provision.

33. The applicant had to stand trial and was convicted by the first instance court. In such circumstances, it is inconceivable how an acquittal without any compensation for damages and accompanied by the reimbursement of a minor part of the necessary defence costs could have provided adequate redress (see, *mutatis mutandis*, *Dalban*, cited above, § 44).This is all the more so as the Court itself has awarded substantial amounts of compensationfor non-pecuniary damage in comparable cases, having particular regard to the fact that thetrial during which details of the applicants' most intimate private life were laid open to the public, had to be considered as a profoundly destabilising event in the applicants' lives (*L. and V. v. Austria*, nos. 39392/98 and 39829/98, § 60, ECHR 2003 I).

34. In conclusion, the Court finds that the applicant's acquittal which did not acknowledge the alleged breach of the Convention and was not accompanied by adequate redress did not remove the applicant's status as a victim within the meaning of Article 34 of the Convention.

35. The Court notes that the application is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible."

Once the issue of admissibility had been settled, the Court turned to the merits and held unanimously that there had been a violation of Article 14 taken in conjunction with Article 8 owing to the maintenance in force of Article 209 and the conduct of the criminal proceedings against the applicant on the basis of that provision (§38-40).

Case law applications

H.G. and G.B. v. Austria,
2 June 2005, applications nos. 11084/02 and 15306/02

As in the *Wolfmeyer* case, the applicants in the *H.G. and G.B.* case were both convicted of committing homosexual acts with male minors, in 2001 and 1998 respectively. These convictions were handed down on the basis of Article 209 of the Criminal Code punishing homosexual acts committed by adult males with consenting adolescents aged 14-18. H.G. was sentenced on 3 December 2001 to 18 months' imprisonment. Having started to serve his sentence on 6 December 2001, he was granted early release on 1 September 2002. G.B. was sentenced on 25 September 2000 to three months' imprisonment suspended.

The Court noted that the subsequent repeal of Article 209 of the Criminal Code had not changed the applicants' situation in any way: their convictions had been maintained and they were not entitled to any form of compensation. H.G. in particular had not received any compensation for his 18 months in prison. Observing that the case raised the same issue as the *L. and V. v. Austria* case, the Court held that there had been a violation of Article 14 taken in conjunction with Article 8 on the ground that the government had not offered convincing and weighty reasons justifying the maintenance in force of Article 209 and, consequently, the applicants' convictions under this provision.

§ 2 – The right to an effective remedy against violations of the right of gays and lesbians to enter the armed forces

The principle established by the *Smith and Grady* judgment

***Smith and Grady v. the United Kingdom*,**
27 September 1999, nos. 33985/96 and 33986/96

Principal facts

In this case the Court found that the applicants' right to respect for private life under Article 8 had been violated as a result of the investigations which had been carried out and their discharge from the British armed forces in line with the Ministry of Defence policy against homosexuals in the armed forces (see above).

In this case the applicants also complained of a violation of Article 13 of the Convention taken in conjunction with Article 8 in that they had had no effective remedy before a national court to seek redress for the Convention violations complained of. Under the law then in force, the domestic courts were not empowered to hear an appeal lodged against the Ministry of Defence policy against homosexuals in the armed forces on the sole ground that it might be considered "irrational". The test of "irrationality" applied in this case was that explained in the decision given by the Court of Appeal in the domestic proceedings: a court was not entitled to interfere with the exercise of an administrative discretion on substantive grounds save where the court was satisfied that the decision was unreasonable in the sense that it was beyond the range of responses open to a reasonable decision-maker. In judging whether the decision-maker had exceeded this margin of appreciation, the human rights context was important, so that the more substantial the interference with human rights, the more the court would require by way of justification before it was satisfied that the decision was reasonable. The Court of Appeal emphasised that the threshold of irrationality which an applicant was required to surmount was a high one. In the view of the Court, this was confirmed by the judgments of the High Court and the Court of Appeal themselves. It reached the following conclusion:

Decision of the Court

"138. In such circumstances, the Court considers it clear that, even assuming that the essential complaints of the applicants before this Court were before and considered by the domestic courts, the threshold at which the High Court and the Court of Appeal could find the Ministry of Defence policy irrational was placed so high that it effectively excluded any consideration by the domestic courts of the question of whether the interference with the applicants' rights answered a pressing social need or was proportionate to the national security and public order aims pursued, principles which lie at the heart of the Court's analysis of complaints under Article 8 of the Convention.[…]

139. In such circumstances, the Court finds that the applicants had no effective remedy in relation to the violation of their right to respect for their private lives guaranteed by Article 8 of the Convention. Accordingly, there has been a violation of Article 13 of the Convention."

Case law applications

***Beck, Copp and Bazeley v. the United Kingdom*,**
22 October 2002, nos. 48535/99, 48536/99 and 48537/99

Holding that there was no material difference between the Beck, *Copp and Bazeley* case and the *Smith and Grady v. United Kingdom* case, the Court held unanimously that there had been aviolation of Article 13 taken in conjunction with Article 8 (cf. §58-59).

§ 3 – The right to an effective remedy against violations of the right to openly proclaim one's sexual orientation by participating in demonstrations

The principle established by the *Bączkowski* judgment

***Bączkowski and others v. Poland*,**
3 May 2007, nº. 1543/06

Principal facts

This case concerned the refusal by the Warsaw municipal authorities to authorise a march in support of the gay and lesbian cause (see above).

Decision of the Court

In addition to the violation of Article 11 (freedom of assembly and association) – see above – and that of Article 14 (prohibition of discrimination) – see above – the Court found a violation of Article 13 (right to an effective remedy) taken in conjunction with Article 11. Its reasoning was as follows:

"79. The Court reiterates that the effect of Article 13 is to require the provision of a domestic remedy allowing the competent national authority both to deal with the substance of the relevant Convention complaint and to grant appropriate relief, although Contracting States are afforded some discretion as to the manner in which they comply with their obligations under this provision (see, among many other authorities, *Chahal v. the United Kingdom*, judgmentof 15 November 1996, Reports of Judgments and Decisions 1996 V, pp. 1869 70, § 145).

In the present case the Court found that the applicants' rights under Article 11 were infringed [···]. Therefore, they had an arguable claim within the meaning of the Court's case-law and were thus entitled to a remedy satisfying the requirements of Article 13. [···]

81. Further, the Court accepts that the administrative authorities ultimately acknowledged that the first instance decisions given in the applicants' case had been given in breach of the applicable laws. However, the Court emphasises that they did so after the dates on which the applicants planned to hold the demonstrations. The Court notes that the present case is similar to that of *Stankov and the United Macedonian Organisation Ilinden v. Bulgaria* (nºs. 29221/95 and 29225/95, Commission decision of 29 June 1998, unreported), in which the former Commission held that "it [was] undisputed that had the applicants attempted [an appeal against the refusal of the district court to examine the appeal against the mayoral ban], the proceedings would have lasted for at least several months and any favourable outcome would have resulted long after the date of a planned meeting or manifestation". In other words, bearing in mind that the timing of the rallies was crucial for their organisers and participants and that the organisers had given timely notice to the competent authorities, the Court considers that, in the circumstances, the notion of an effective remedy implied the possibility to obtain a ruling before the time of the planned events.

82. In this connection, the Court is of the view that such is the nature of democratic debate that the timing of public meetings held in order to voice certain opinions may be crucial for the political and social weight of such meetings. Hence, the State authorities may, in certain circumstances, refuse permission to hold a demonstration if such a refusal is compatible with the requirements of Article 11 of the Convention, but they cannot change the date on which the organisers plan to hold it. If a public assembly is organised after a given

social issue loses its relevance or importance in a current social or political debate, the impact of the meeting may be seriously diminished. Freedom of assembly – if preventedfrom being exercised at a propitious time – can well be rendered meaningless.

83. The Court is therefore of the view that it is important for the effective enjoyment of freedom of assembly that the applicable laws provide for reasonable time-limits within which the State authorities, when giving relevant decisions, should act. The applicable laws provided for time limits for the applicants to submit their requests for permission. In contrast, the authorities were not obliged by any legally binding time frame to give their final decisions before the planned date of the demonstration. The Court is therefore not persuaded that the remedies available to the applicants in the present case, all of them being of a post hoc character, could provide adequate redress in respect of the alleged violations of the Convention.

84. Therefore, the Court finds that the applicants have been denied an effective domestic remedy in respect of their complaint concerning a breach of their freedom of assembly. Consequently, the Court dismisses the Government's preliminary objection regarding the alleged non exhaustion of domestic remedies and concludes that there has been a violation of Article 13 in conjunction with Article 11 of the Convention."

Case law applications

***Alekseyev v. Russia*, 21 October 2010,**
nos. 4916/07, 25924/08 and 14599/09

Principal facts

This case concerned the refusal by the Moscow city authorities to authorise a march protesting against discrimination on grounds of sexual orientation (see above).

Decision of the Court

In addition to the violation of Article 11 (freedom of assembly and association) – see above – and that of Article 14 (prohibition of discrimination) – see above – the Court found a violation of Article 13 (right to an effective remedy) taken in conjunction with Article 11. Its reasoning may be summarised as follows.

The Court observed that there was no binding rule obliging the authorities to give their decision on the holding of marches before the date on which they were planned. Accordingly, Mr Alekseyev had lacked an effective remedy enabling him to obtain adequate redress for his grievances. There had therefore been a violation of Article 13 (§97-100).

***Genderdoc-M v. Republic of Moldova*,**
12 June 2012, no. 9106/06

This case concerns the Chisinau local authority's refusal to permit the holding of a demonstration in defence of LGBTI persons.

Besides the violations of Articles 11 (freedom of assembly and association) and 14 (prohibition of discrimination) – see above, the Court held that the applicant association, the organiser of the planned demonstration, had suffered a violation of Article 13 in conjunction with Article 11 in that there was no effective procedure which would have enabled it to obtain a final decision before the scheduled date of the demonstration. The Court in fact noted that in the instant case, despite a maximum time of five days prescribed by Moldovan law, the applicant association only obtained a definite reply a year and a half after lodging its request.

***Lashmankin and Others v. Russia*,**

7 February 2017, nos. 57818/09, 51169/10, 4618/11, 19700/11, 31040/11, 47609/11, 55306/11, 59410/11, 7189/12, 16128/12, 16134/12, 20273/12, 51540/12, 64243/12 and 37038/13.

Principal facts

Twenty-three applicants from different regions of Russia alleged that local authorities had imposed severe restrictions, without any proper justification, on peaceful assemblies they had planned on various subjects and at different times unrelated to each other, generally aimed at publicly protesting against alleged cases of corruption, ineffective governance and repression of civil liberties and against discrimination towards certain groups. Indeed, some demonstrations were aimed at promoting the rights of homosexuals. Among various demonstrations, a gay pride march and meeting in the centre of St Petersburg was planned on 26 June 2010 and on the same day, a picket in four different administrative districts of St Petersburg. However, the authorities refused to approve any location, time and manner of conduct for the planned meetings.

In some cases where they proposed alternative locations, times or manner of conduct, the applicants argued that these proposals did not meet the purpose of the assembly, for example because the alternative locations were not in the city centre, far from any government officers and with limited passage of people, that is, the demonstrators could not have been seen and heard by the target audiences there. In other cases, the authorities repeatedly refused to approve any location, time and date suggested by the applicants, without proposing any other suitable solution and relying, in the applicants' view, on insufficient or disproportionate grounds. In one case, the authorities decided to approve the time and place of one of the rallies, but, according to the applicant(s), they ensured that the applicants would not receive the decision in time for the meeting to actually take place. Some applicants complained about the general ban on holding public meetings in the vicinity of court buildings. Others criticised the automatic and inflexible application of the time limits for notification of public events, without taking into account that it was impossible to comply with such time limits because of public holidays or the spontaneous nature of the event. Lastly, several applicants deplored the very radical security measures during their public rally, and complained in particular that the square where the event was held had been fenced off by police vans to make it invisible to the public. In most cases, the applicants argued that these refusals meant that they could not hold their rallies at all, as it would have constituted an offence. In some cases however, the applicant(s) held their rally as initially planned. All these rallies were reportedly obstructed or completely interrupted by the authorities; the applicant(s) were then arrested and charged with an administrative offence. In many cases, the applicant(s) concerned brought an action before the courts to challenge the decision not to approve the location, time or manner of conduct of a public gathering planned by them.

In almost every case, their requests were rejected, both at first instance and on appeal, because the courts considered that the refusals to approve the location, time or manner of conduct of these events were lawful and properly justified.

Among other things, the applicants complained before the Court of a breach of their right to freedom of assembly (see above) and the lack of an effective remedy (set out here).

Decision of the Court

On the issue of the right to an effective remedy, the European Court unanimously held that there had been a violation of Article 13 (right to an effective remedy) in conjunction with Article 11 (freedom of assembly and association).

According to the Court, Russian law imposed time limits on organisers of public events to give notice of their plans for demonstrations. On the other hand, the authorities were not obliged by

any time frame to make their final decision before the date scheduled for a public event. The judicial remedy available to the organisers of public events, which was an ex post facto remedy, could not provide an adequate redress in respect of the alleged violations of the Convention.

Moreover, the scope of judicial review was limited to examining the lawfulness of the proposal to change the location, date and time or manner of conduct of a public event, and the courts, as they were not required by law to address the issue of proportionality, did not do so in practice. For a more detailed argument, see paragraphs 342–361.

The applicants were therefore deprived of an effective remedy which would have allowed them to obtain an enforceable judicial decision on the authorities' refusal to approve the location, date and time or manner of conduct of a public event before its planned date.

Section 9. Family life

It emerges from the relevant case law in the field of family life of gays and lesbians that the European Convention guarantees the same right for all couples, regardless of their sexual orientation, to a residence permit on family grounds when the members of the couple are dual nationals, on the one hand, and to the exercise of parental rights when they are the father or mother of a child, on the other hand.

§ 1 – The same right for all couples, regardless of their sexual orientation, to a residence permit on family grounds

It is often difficult for foreign nationals who are members of bi-national same-sex couples to obtain a right of residence from states. This complication causes very painful situations for many same-sex couples who may be separated from each other as a result and forced to live in two different countries. The judgments in *Pajić v. Croatia* of 23 February 2016 and *Taddeucci and McCall v. Italy* of 30 June 2016 are intended to advance the legal protection of gay and lesbian persons and their partners with regard to immigration within the member states of the European Convention on Human Rights.

In both cases, the impossibility for a bi-national same-sex couple to obtain a residence permit on family grounds was found by the European Court of Human Rights to constitute discrimination in violation of Article 14 of the Convention (in conjunction with Article 8).

It is important to note, from the standpoint of legal technique, that the Court has used both "facets" – to quote a term used by the Court[118] – of the principle of non-discrimination as it emerges from the case law under Article 14. As the European Commission on Human Rights stated in the *Thlimmenos* case: "the right not to be discriminated against in the enjoyment of the rights guaranteed under the Convention was violated not only when States treated differently persons in analogous situations without providing an objective and reasonable justification, but also when States, without an objective and reasonable justification, failed to treat differently persons whose situations were different"[119].

Indeed, under its first "facet", the principle of non-discrimination mainly requires the absence of any difference in treatment or its reduction in a reasonable proportion; under its second "facet", it requires this very difference in treatment, but only in order to restore, indirectly, an identical treatment.

In the *Pajić v. Croatia* judgment, the Court declared that the difference in treatment made between unmarried same-sex couples and unmarried different-sex couples was in breach of Article 14 of

[118] Grand Chamber, Thlimmenos v. Greece, 6 April 200, § 44.

[119] EComHR, Thlimmenos, 4 December 1998, § 49 (Reports of judgments and decisions 2000-IV, p. 328).

the Convention; whereas in the *Taddeucci and McCall v. Italy* judgment, it was the identical treatment of unmarried same-sex couples and unmarried different-sex couples that was found to be in breachof the same Article 14 of the Convention. In the first case, the Court found direct discrimination, which, by its very nature, was explicit; in the second case, it denounced indirect discrimination, which, by definition, was implicit.

***Pajić v. Croatia*,**
23 February 2016, n°. 68453/13

Principal facts

The applicant, Danka Pajić, is a national of Bosnia and Herzegovina who was born in 1973 and lives in Brčko (Bosnia and Herzegovina). In December 2011, she applied for a residence permitin Croatia on the grounds of family reunification with her partner, Ms D.B., who was living in Sisak (Croatia). She submitted in particular that she wanted to live with D.B., with whom she had been in a relationship for two years, and that she wanted to establish a household and start a business with her. In the course of the proceedings, the Sisak Police Department found that the two women had been in a relationship since October 2009 and that they had been travelling regularly to see each other. Ms Pajić's request was dismissed by the Police Department on the grounds that the requirements under the Aliens Act for the issuance of a residence permit had not been met. Mrs Pajić unsuccessfully appealed this decision to the Ministry of the Interior and brought the case before the Zagreb Administrative Court, arguing that she had been discriminated against in comparison with different-sex couples, who, unlike her, could obtain a residence permit on the grounds of family reunification under the Aliens Act. The Administrative Court dismissed her appeal, finding in particular that, given the limited legal effects of same-sex unions, the possible existence of such a union did not constitute a basis for family reunification. Ms Pajić lodged a constitutional appeal against this decision, which the Constitutional Court rejected in May 2013.

Relying on Article 14 (prohibition of discrimination) taken in conjunction with Article 8 (right to respect for private and family life) of the European Convention on Human Rights, the applicant complained that she had been discriminated against on the grounds of her sexual orientation.

Decision of the Court

The Court found the violation of Article 14 (prohibition of discrimination) taken in conjunction with Article 8 (right to respect for private and family life) of the European Convention on Human Rights. Its reasoning was as follows:

"70. It [...] notes that the case at issue concerns the applicant's complaint that she was discriminated against on the grounds of her sexual orientation in obtaining a residence permit for family reunification with her partner D.B. in comparison to unmarried different-sex couples. In particular, whereas the possibility of obtaining a residence permit for family reunification was open to unmarried different-sex couples, it was excluded for same-sex couples since their relationship was not covered by the term "family member" under section 56 § 3 of the Aliens Act and the term "other relative" under paragraph 4 of the same section of the Aliens Act.

71. Thus, the initial question to be addressed by the Court is whether the applicant's situation is comparable to that of unmarried different-sex couples applying for a residence permit for family reunification in Croatia. In making this assessment, the Court will bear in mind

that in proceedings originating in an individUal application it has to confine itself, as far as possible, to an examination of the concrete case before it (see, for example, Schalk and Kopf, [···]). Having said so, and in view of the applicant's specific complaint, the CoUrt considers that there is no need for it to examine whether the applicant was in a sitUation which is relevantly similar to that of a spoUse in a married different-sex coUple applying for family reunification.

72. The CoUrt observes that in the Croatian legal system an extramarital relationship is defined as an Union between an Unmarried woman and man which has lasted for at least three years, or less if a child was born of the union. At the relevant time this definition was provided Under the Family Act whereas the applicable Aliens Act, in defining the scope of the term "family" Under section 56, only made reference to an "extramarital relationship". At the same time, same-sex Union was defined as a union between two persons of the same sex who are not married, or in an extramarital relationship or other same-sex Union, which has lasted for at least three years and which is based on the principles of eqUality of partners, mUtUal respect and assistance as well as the emotional bonds of partners (see paragraph 22 above). The Aliens Act made no reference to a same-sex Union with regard to the possibility of obtaining a residence permit for family reunification.

73. It follows from the above that by recognising both extramarital relationships of different-sex coUples and same-sex coUples the Croatian legal system recognised in general the possibility that both categories of coUples are capable of forming stable committed relationships (see, in this respect, Schalk and Kopf, [···]; and Vallianatos and Others, [···]). In any case, a partner in a same-sex relationship, as the applicant, who applied for a residence permit for family reunification so he or she coUld pUrsUe the intended family life in Croatia is in a comparable sitUation to a partner in a different-sex extramarital relationship as regards the same intended manner of making his or her family life possible.

74. The CoUrt notes, however, that the relevant provisions of the Aliens Act expressly reserved the possibility of applying for a residence permit for family reunification to different-sex coUples, married or living in an extramarital relationship. Accordingly, by tacitly exclUding same-sex coUples from its scope, the Aliens Act in qUestion introdUced a difference in treatment based on the sexUal orientation of the persons concerned [···].

75. With regard to the Government's argument that the applicant was not in a comparable sitUation to different-sex coUples living in an extramarital relationship given that she had not been in a relationship with D.B. for a period of three years, the CoUrt firstly notes that when dismissing the applicant's action the Administrative CoUrt did not carry oUt any investigation into the circUmstances of the case nor did it deal with the qUestion of the relevance of the period in which the applicant was in a relationship with D.B. for its decision concerning her reqUest for family reunification. Instead, it relied on the legal impossibility argument alone, finding that it was not possible under the limitations imposed by the Aliens Act to grant the applicant's reqUest. It also follows from the decision of the Ministry that the legal impossibility of obtaining a residence permit for family reunification bya partner in a same-sex relationship was at the centre of the domestic authorities' considerations [···].

76. Moreover, the CoUrt notes that already by the time the applicant's case reached the stage of the proceedings before the Administrative CoUrt, the applicant's relationship with D.B. had

lasted more than three years. Nevertheless, as already noted above, the Administrative Court did not consider it pertinent to examine the relevant factual aspects of the applicant's case as it relied on the legal impossibility of obtaining a residence permit for family reunification by a partner in a same-sex relationship. This accordingly prevents the Court from speculating what would be the possible Administrative Court's decision if it had considered that the family reunification of same-sex couples was possible under the relevant domestic law.

77. The Court therefore dismisses the Government's argument and finds that the applicant was affected by the difference in treatment based on sexual orientation introduced by the Aliens Act.

78. It remains to be seen whether this had an objective and reasonable justification.

(iii) Whether there was objective and reasonable justification

79. The Court notes at the outset that the right of an alien to enter or to settle in a particular country is not guaranteed by the Convention. Where immigration is concerned, Article 8 or any other Convention provision cannot be considered to impose on a State a general obligation to, for instance, authorise family reunion in its territory [...]. Whereas the applicant does not seem to contest this, the Government rely on it as their central argument.

80. However, the present case concerns compliance with Article 14 in conjunction with Article 8 of the Convention, with the result that immigration control measures, which may be found to be compatible with Article 8 § 2, including the legitimate aim requirement, may nevertheless amount to unjustified discrimination in breach of Article 14 read in conjunction with Article 8. Indeed, it is the Court's well-established case-law that although Article 8 does not include a right to settle in a particular country or a right to obtain a residence permit, the State must nevertheless exerciseits immigration policies in a manner which is compatible with a foreign national's human rights, in particular the right to respect for his or her private or family life and the right not to be subjectto discrimination [...]. Even in cases in which the State that has gone beyond its obligations under Article 8 in creating a right – a possibility open to it under Article 53 of the Convention – it cannot, in the application of that right, take discriminatory measures within the meaning of Article 14 [...].

81. Accordingly, once the Court has found a difference in treatment, as the one created in the case at issue by the Aliens Act, it is then for the respondent Government to show that the difference in treatment could be justified. Such justification must be objective and reasonable or, in other words, it must pursue a legitimate aim and there must be a reasonable relationship of proportionality between the means employed and the aim sought to be realised.

82. In cases in which the margin of appreciation afforded to States is narrow, as is the position where there is a difference in treatment based on sex or sexual orientation, the principle of proportionality does not merely require the measure chosen to be suitable in principle for achievement of the aim sought. It must also be shown that it was necessary, in order to achieve that aim, to exclude certain categories of people – in this instance persons in a same-sex relationship – from the scope of application of the relevant domestic provisions at issue (see Vallianatos and Others, [...], § 85). This equality requirement holds true in the immigration cases as well where States are otherwise allowed a wide margin of appreciation.

83. The Court observes that the competent domestic authorities did not advance any such "justification", nor did the Government adduce any particularly convincing and weighty reasons to justify the difference in treatment between same-sex and different-sex couples in obtaining the family reunification (see X and Others v. Austria [...] § 151; and Karner [...] § 41).

84. Instead, the relevant provisions of the Aliens Act provided for a blanket exclusion of persons living in a same-sex relationship from the possibility of obtaining family reunification, which

cannot be considered compatible with the standards under the Convention [...]. Indeed, as already noted above, a difference in treatment based solely or decisively on considerations regarding the applicant's sexual orientation would amount to a distinction which is not acceptable under the Convention [...].

85. Lastly, the Court would emphasise once more that the present case does not concern the question whether the applicant's family reunification request should have been granted in the circumstances of the case. It concerns the question whether the applicants were discriminated against on account of the fact that the domestic authorities considered that such a possibility was in any case legally impossible. Accordingly, in light of the reasons adduced above, the Court considers that the difference of treatment of the applicant's situation in question is incompatible with the provisions of Article 14 taken in conjunction with Article 8 of the Convention.

86. The Court therefore finds that there has been a violation of Article 14 taken in conjunction with Article 8 of the Convention."

Taddeucci and McCall v. Italy

30 June 2016, n°. 51362/09

Principal facts

The applicants, Roberto Taddeucci and Douglas McCall, are Italian and New Zealand nationals, born in 1965 and 1958. They are a homosexual couple and live in Amsterdam. They complained of discrimination based on their sexual orientation. Mr Taddeucci and Mr McCall lived in New Zealand as an unmarried couple until December 2003, when they decided to settle in Italy. During their first period of residence in Italy, Mr McCall was granted a temporary student's residence permit. He applied for a residence permit on family grounds. On 18 October 2004, the Livorno chief of police dismissed his request on the ground that the statutory criteria were not fulfilled. Mr Taddeucci and Mr McCall lodged an appeal under Legislative Decree n°. 286 of 1998, requesting that Mr McCall be granted a residence permit on family grounds. On 4 July 2005, the Civil Court of Florence granted their application, considering that Article 30 of Legislative Decree n°. 286 of 1998 should be construed to mean that the same-sex partner was a member of the Italian national's family and was thus eligible for a residence permit. The Minister of Internal Affairs appealed. In a judgment rendered on 12 May 2006, the Florence Court of Appeal allowed the appeal. It indicated that the New Zealand authorities had recognised Mr Taddeucci and Mr McCall the status of "unmarried cohabiting partners" and not that of "members of the same family". According to the Court of Appeal, the Italian legal system gave a different scope and meaning to those two legal concepts. The Court of Appeal held that New Zealand law was incompatible with Italian public policy on the grounds that it regarded same-sex couples as cohabiting partners and that the law could be construed as conferring on such persons the status of family members with a view to issuing them with a residence permit. Mr Taddeucci and Mr McCall appealed on points of law. The Court of Cassation dismissed their appeal, stating that under Article 29 of Legislative Decree n°. 286 of 1998, the concept of "family member" included only spouses, minor children, dependent adult children and dependent relatives. It also pointed out that the Constitutional Court had ruled out the possibility of extending to cohabiting partners the protection granted to members of the legitimate family. Finally, it considered that Article 8 (right to respect for private and family life) and Article 12 (right to marry) of the Convention left states a wide margin of appreciation in such matters.

Relying on Article 14 (prohibition of discrimination) taken in conjunction with Article 8 (right to respect for private and family life), Mr Taddeucci and Mr McCall alleged that the refusal by the Italian authorities to grant Mr McCall a residence permit on family grounds amounted to discrimination based on their sexual orientation.

Decision of the Court

The Court found the violation of Article 14 (prohibition of discrimination) taken in conjunction with Article 8 (right to respect for private and family life) of the European Convention on Human Rights. Its reasoning was as follows.

> *"i. Whether there was a difference in treatment between persons in similar situations or equalreatment of persons in significantly different situations*

81. According to the Court's well-established case-law, in order for an issue to arise under Article 14 there must be a difference in treatment of persons in relevantly similar situations (see Hämäläinen, cited above, § 108), or an issue will arise when States fail to treat differently persons whose situations are significantly different (see *Thlimmenos*, cited above, § 44 in fine). On the latter point the Court reiterates that Article 14 does not prohibit a member State from treating groups differently in order to correct "factual inequalities" between them; indeed in certain circumstances a failure to attempt to correct inequality through different treatment may in itself give rise to a breach of the Article (see *Case "relating to certain aspects of the laws on the use of languages in education in Belgium"* (merits), 23 July 1968, § 10, Series A n°. 6; *Stec and Others v. the United Kingdom* [GC], n^{os}. 65731/01 and 65900/01, § 51, ECHR 2006-VI; and *Muñoz Diaz v. Spain*, n°. 49151/07, § 48, ECHR 2009). Furthermore, the Court has already accepted in previous cases that where a general policy or measure has disproportionately prejudicial effects on a particular group, it is not excluded that this may be considered as discriminatory notwithstanding that it is not specifically aimed or directed at that group and there is no discriminatory intent. Such a situation may amount to "indirect discrimination". This is only the case, however, if such policy ormeasure has no "objective and reasonable" justification (see, among other authorities, *Baio v. Denmark* [GC], n°. 38590/10, § 91, 26 May 2016; *S.A.S. v. France* [GC], n°. 43835/11, § 161, ECHR 2014 (extracts); *D.H. and Others v. the Czech Republic* [GC], n°. 57325/00, § 184, ECHR 2007-IV; and *Hugh Jordan v. the United Kingdom*, n°. 24746/94, § 154, 4 May 2001).

82. The Court finds that in the instant case it does not appear that the applicants, an unmarried homosexual couple, were treated differently from an unmarried heterosexual couple. As domestic law recognises only a "spouse" as a "family member" and not a cohabitant ... it is reasonable to assume that, like the second applicant, a heterosexual partner who was not an EU national could also have been refused a residence permit sought for family reasons in Italy. Indeed, as pointed out by the Court of Cassation (see paragraph 22 above), the non-eligibility of unmarried partners for the residence permit in question concerned both same-sex couples and opposite-sex couples. That was, moreover, undisputed by the applicants.

83. That said, the applicants' situation cannot, however, be regarded as analogous to that of an unmarried heterosexual couple. Unlike the latter, the applicants do not have the possibility of contracting marriage in Italy. They cannot therefore be regarded as "spouses" under Italian law. Accordingly, as a result of a restrictive interpretation of the concept of "family member" only homosexual couples faced an insurmountable obstacle to obtaining a residence permit for family reasons. Nor could they obtain a form of legal recognition other than marriage, given that at the material time the Italian legal system did not provide for the possibility for homosexual or heterosexual couples in a stable relationship to enter into a civil partnership or a registered partnership certifying their status and guaranteeing them certain essential rights. The Court refers, further, to its observation in *Oliari and Others* (cited above, § 170) that, despite developments in the relevant domestic case-law (set out by the parties in the present case in paragraphs 64, 66 and 69 above), the situation of same-sex couples in Italy remained uncertain in certain areas. In any event, the Court observes that the Government have not argued that the developments in question have gone as far as recognising, in the field of immigration, that members of a stable and long-term homosexual partnership have a status analogous to that of a "spouse".

84. The Court also notes that the applicants had obtained the status of an unmarried couple in New Zealand (see paragraph 8 above) and that, once they had moved to a State recognising same-sex marriage (the Netherlands), they had decided to marry (see paragraph 25 above). Accordingly, their situation cannot be compared to that of a heterosexual couple who, for personal reasons, do not wish to contract a marriage or a civil partnership.

85. All the foregoing considerations lead the Court to conclude that, with regard to eligibility for a residence permit for family reasons, the applicants – a homosexual couple – were treated in the same way as persons in a significantly different situation from theirs, namely, heterosexual partners who had decided not to regularise their situation.

86. It remains to be determined whether the failure to apply different treatment in the instant case was justifiable under Article 14 of the Convention.

ii. Whether there was objective and reasonable justification

α) General principles

87. The Court reiterates that differences in treatment in analogous situations or comparable treatment in different situations are discriminatory if they are not based on objective and reasonable justification, that is, if they do not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realised (see, *mutatis mutandis*, *Hämäläinen*, cited above, § 108). Furthermore, the prohibition of discrimination enshrined in Article 14 of the Convention is meaningful only if, in each particular case, the applicant's personal situation in relation to the criteria listed in that provision is taken into account exactly as it stands. To proceed otherwise would render Article 14 devoid of substance (see *Andrejeva v. Latvia* [GC], n°. 55707/00, § 91, ECHR 2009).

88. The Contracting States enjoy a certain margin of appreciation in assessing whether and to what extent differences in treatment are justified (see, *mutatis mutandis*, *Burden v. the United Kingdom* [GC], n°. 13378/05, § 60, ECHR 2008, and *Schalk and Kopf*, cited above, § 96). The scope of the margin of appreciation will vary according to the circumstances, the subject matter and its background; in this respect, one of the relevant factors may be the existence or non-existence of common ground between the laws of the Contracting States (see *Petrovic v. Austria*, 27 March 1998, § 38, Reports 1998-II, and *Hämäläinen*, cited above, § 109).

89. The Court reiterates that sexual orientation is a concept covered by Article 14. It has repeatedly held that, just like differences based on sex, differences based on sexual orientation require particularly serious reasons by way of justification or, as is sometimes said, "particularly convincing and weighty reasons" (see *X and Others v. Austria*, cited above, § 99; see, for example, *Smith and Grady v. the United Kingdom*, n^{os}. 33985/96 and 33986/96, § 90, ECHR 1999-VI; *Lustig-Prean and Beckett v. the United Kingdom*, n^{os}. 31417/96 and 32377/96, § 82, 27 September 1999; *L. and V. v. Austria*, n^{os}. 39392/98 and 39829/98, § 45, ECHR 2003-I; *E.B. v. France*, cited above, § 91; *Karner*, cited above § 37; and *Vallianatos and Others*, cited above, § 77), particularly where rights falling within the scope of Article 8 are concerned. Differences based solely on considerations of sexual orientation are unacceptable under the Convention (see *Salgueiro da Silva Mouta v. Portugal*, n°. 33290/96, § 36, ECHR 1999-IX; *E.B. v. France*, cited above, § § 93 and 96; and *X and Others v. Austria*, cited above, § 99).

90. Lastly, with regard to the burden of proof in this sphere under Article 14 of the Convention, the Court has established that once the applicant has shown the existence of comparable treatment in significantly different situations it is for the Government to show that such an approach was justified (see, *mutatis mutandis*, *D.H. and Others*, cited above, § 177).

β) Application of those principles to the present case

91. The Court must first determine whether, in the context of the proceedings regarding an application for a residence permit for family reasons, the fact that the applicants were not treated differently from heterosexual couples who had not regularised their situation pursued a legitimate aim. If it did the Court will examine whether there was a reasonable relationship of proportionality between the means employed and the aim sought to be realised (see, *mutatis mutandis*, *Thlimmenos*, cited above, § 46).

92. The Court observes that, in order to justify treating unmarried homosexual and heterosexual couples similarly in the context of granting a residence permit for family reasons, the Government relied, in substance, on the margin of appreciation enjoyed by the States in protecting the traditional family and deciding whether civil partnerships or registered partnerships should be available to homosexual couples, and in determining the exact nature of the status conferred (see paragraphs 43, 45, 46, 47 and 65 above).

93. Although protection of the traditional family may, in some circumstances, amount to a legitimate aim under Article 14, the Court considers that, regarding the matter in question here – granting a residence permit for family reasons to a homosexual foreign partner – it cannot amount to a "particularly convincing and weighty" reason capable of justifying, in the circumstances of the present case, discrimination on grounds of sexual orientation (see, *mutatis mutandis*, *Vallianatos and Others*, cited above, § 92).

94. The Court observes that in the present case it is not required to examine in abstracto the question whether the Italian State was obliged to provide for a form of legal recognition for same-sex couples at the time when the second applicant was refused the residence permit by the Livorno chief of police (18 October 2004) or indeed when that decision was confirmed in the following judicial proceedings ending with the Court of Cassation's judgment deposited with the registry on 17 March 2009 (see, *mutatis mutandis*, *Vallianatos and Others*, cited above, § 78). Having regard to the manner in which the applicants' complaint was formulated, the Court will confine itself to assessing whether, in the specific context of the refusal to grant the second applicant a residence permit, there was objective and reasonable justification for the decisions of the Italian authorities given that the application of the provisions of Legislative Decree n°. 286 of 1998 prevented the applicants from pursuing their family life and their stable and committed relationship in Italy. Admittedly, Italian law did not treat unmarried heterosexual couples differently from unmarried homosexual couples (see paragraph82 above), and restricted the concept of "family members" to heterosexual married partners. However, applying the same restrictive rule under Legislative Decree n°. 286 of 1998 to heterosexual couples who had not regularised their situation and to homosexual couples,with the sole aim of protecting the traditional family (see paragraph 93 above), subjected theapplicants to discriminatory treatment. Without any objective and reasonable justification theItalian State failed to treat heterosexual couples differently and take account of their ability to obtain legal recognition of their relationship and thus satisfy the requirements of domesticlaw for the purposes of granting a residence permit for family reasons, an option that wasnot available to the applicants (see *Thlimmenos*, cited above, § 44).

95. The Court also observes that it is precisely the lack of any possibility for homosexual couples to enter into a form of legal recognition of their relationship which placed the applicants in a different situation from that of unmarried heterosexual couples (see paragraph 83 above).

Even supposing that at the relevant time the Convention did not require the Government to make provision for same-sex persons in a stable and committed relationship to enter into a civil union or registered partnership certifying their status and guaranteeing them certain essential rights, that does not in any way affect the finding that, unlike a heterosexual couple, the second applicant had no legal means in Italy of obtaining recognition of his status as "family member" of the first applicant and accordingly obtaining a residencepermit for family reasons.

96. The Court notes that the Government have not indicated any other legitimate aims capable of justifying the discrimination complained of by the applicants. Accordingly, it considers that, in the context of the proceedings that the applicants had brought with a view to obtaining a residence permit for family reasons, the fact that they were not treated differently from unmarried heterosexual couples, who alone had access to a form of regularisation of their partnership, had no objective and reasonable justification. In the Court's view, the restrictive interpretation applied to the second applicant of the concept of "family member" did not duly take account of the personal situation of the applicants and, in particular, of their inability to obtain a legal form of recognition of their relationship from the Italian authorities (see, in particular, the case-law cited in paragraph 87 above).

97. The Court also notes that the Government did not dispute the assertion by the ICJ or ILGA-Europe or NELFA that there was a "significant trend" around the world towards recognising the status of same-sex partners as "family members" and recognising their right to live together (see paragraph 77 above) or the comparative-law survey carried out by ECSOL concluding that there was an emerging European consensus recognising, for the purpose of immigration rights, same-sex relations as "family life" (see paragraph 79 above). In that connection it observes that the "relevant European documents" show ... that both the European Parliament and the Parliamentary Assembly of the Council of Europe have found a restrictive interpretation, by the member States, of the concept of "family member" in immigration matters to be problematical.

γ) *Conclusion*

98. In the light of the foregoing, the Court considers that, at the material time, by deciding to treat homosexual couples – for the purposes of granting a residence permit for family reasons – in the same way as heterosexual couples who had not regularised their situation the State infringed the applicants' right not to be discriminated against on grounds of sexual orientation in the enjoyment of their rights under Article 8 of the Convention.

99. There has accordingly been a violation of Article 14 of the Convention taken in conjunction with Article 8."

§ 2 – The same right for all parents, regardless of sexual orientation, to exercise parental rights

The following section concerns the exercise of existing parental rights, and not the question of the creation of parental rights through adoption (the adoption issue is dealt with further on, see below). It emerges from the relevant case law that the European Convention guarantees homosexual and heterosexual parents the same right to be awarded custody of children and, in the same spirit, places the same obligation on both with respect to the payment of maintenance.

A | The same right for all parents, regardless of sexual orientation, to be awarded custody of children

Salgueiro da Silva Mouta v. Portugal,
21 December 1999, n°. 33290/96

Principal facts

The applicant, João Manuel Salgueiro da Silva Mouta, a Portuguese national, was born in 1961 and lived in Queluz (Portugal). In violation of an agreement signed at the time of their divorce, the applicant was refused access by his ex-wife (C.D.S.) to their daughter (M.), who, he alleged, was living with her maternal grandparents.

He applied for custody of the child, which was granted to him in 1994 by the Lisbon Family Affairs Court. M. lived with her father until 1995, when according to the applicant, she was abducted by her mother.

Following an appeal, the mother was awarded custody while the applicant was granted access rights, which he alleged he was unable to exercise. In its judgment, the Lisbon Court of Appeal awarded custody of M. to her mother for two reasons: the child's interests and the fact that the applicant was homosexual and was living with another man (L.G.C.). It stated in particular that "it cannot be argued that an environment of this kind is the healthiest and best suited to a child's psychological, social and mental development, especially given the dominant model in our society [···]. The child should live in a family environment, a traditional Portuguese family, which is certainly not the set-up her father has decided to enter into, since he is living with another man as if they were man and wife. It is not our task here to determine whether homosexuality is or is not an illness or whether it is a sexual orientation towards persons of the same sex. In both cases it is an abnormality and children should not grow up in the shadow of abnormal situations; such are the dictates of human nature and let us remember that it is [the applicant] himself who acknowledged this when [···] he stated that he had definitively left the marital home to go and live with a boyfriend, a decision which is not normal according to common criteria".

Decision of the Court

The Court found that there had been a violation of Article 8 taken in conjunction with Article 14. The main points in its reasoning were as follows:

"21. The applicant complained that the Lisbon Court of Appeal had based its decision to award parental responsibility for their daughter, M., to his ex-wife rather than to himself exclusively on the ground of his sexual orientation. He alleged that this constituted a violation of Article 8 of the Convention [...] in conjunction with Article 14.

The Government disputed that allegation. [...]

The Court notes at the outset that the judgment of the Court of Appeal in question, in so far as it set aside the judgment of the Lisbon Family Affairs Court of 14 July 1994 which had awarded parental responsibility to the applicant, constitutes an interference with the applicant's right to respect for his family life and thus attracts the application of Article 8. The Convention institutions have held that this provision applies to decisions awarding custody to one or other parent after divorce or separation (see the *Hoffmann v. Austria* judgmentof 23 June 1993, Series A n°. 255-C, p. 58, § 29; see also *Irlen v. Germany*, application n°. 12246/86, Commission decision of 13 July 1987, *Decisions and Reports* 53, p. 225). [...]

26. The Court reiterates that in the enjoyment of the rights and freedoms guaranteed by the Convention, Article 14 affords protection against different treatment, without an objective and reasonable justification, of persons in similar situations (see the *Hoffmann* judgment cited above, p. 58, § 31).

It must be determined whether the applicant can complain of such a difference in treatment and, if so, whether it was justified.

27. The Government disputed the allegation that in the instant case the applicant and M.'s mother had been treated differently. They argued that the Lisbon Court of Appeal's decision had been mainly based on the fact that, in the circumstances of the case, the child's interests would be better served by awarding parental responsibility to the mother.

28. The Court does not deny that the Lisbon Court of Appeal had regard above all to the child's interests when it examined a number of points of fact and of law which could have tipped the scales in favour of one parent rather than the other. However, the Court observes that in reversing the decision of the Lisbon Family Affairs Court and, consequently, awarding parental responsibility to the mother rather than the father, the Court of Appeal introduced a new factor, namely that the applicant was a homosexual and was living with another man.

The Court is accordingly forced to conclude that there was a difference of treatment between the applicant and M.'s mother which was based on the applicant's sexual orientation, a concept which is undoubtedly covered by Article 14 of the Convention. [...]

29. In accordance with the case-law of the Convention institutions, a difference of treatment is discriminatory within the meaning of Article 14 if it has no objective and reasonable justification, that is if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realised (see the *Karlheinz Schmidt v. Germany* judgment of 18 July 1994, Series A n°. 291 B, pp. 32-33, § 24). [...]

34. The Court notes that the Lisbon Family Affairs Court gave its decision after a period in which the applicant, his ex-wife, their daughter M., L.G.C. and the child's maternal grandparents had been interviewed by court psychologists. The court had established the facts and had had particular regard to the experts' reports in reaching its decision.

The Court of Appeal, ruling solely on the basis of the written proceedings, weighed the facts differently from the lower court and awarded parental responsibility to the mother. It considered, among other things, that "custody of young children should as a general rule be awarded to the mother unless there are overriding reasons militating against this. The Court of Appeal further considered that there were insufficient reasons for taking away from the mother the parental responsibility awarded her by agreement between the parties.

However, after that observation the Court of Appeal added "Even if that were not the case ... we think that custody of the child should be awarded to the mother" (*ibid.*). The Court of Appeal then took account of the fact that the applicant was a homosexual and was living with another man in observing that "The child should live in ... a traditional Portuguese family" and that "It is not our task here to determine whether homosexuality is or is not an illness or whether it is a sexual orientation towards persons of the same sex. In both cases it is an abnormality and children should not grow up in the shadow of abnormal situations" (*ibid.*).

35. It is the Court's view that the above passages from the judgment in question, far from being merely clumsy or unfortunate as the Government maintained, or mere obiter dicta, suggest, quite to the contrary, that the applicant's homosexuality was a factor which was decisive in the final decision. That conclusion is supported by the fact that the Court of Appeal, when ruling on the applicant's right to contact, warned him not to adopt conduct which might make the child realise that her father was living with another man "in conditions resembling those of man and wife".

36. The Court is therefore forced to find, in the light of the foregoing, that the Court of Appeal made a distinction based on considerations regarding the applicant's sexual orientation, a distinction which is not acceptable under the Convention (see, *mutatis mutandis*, judgment cited above, p. 60, § 36).

The Court cannot therefore find that a reasonable relationship of proportionality existed between tJ. M. v. the United Kingdom, he means employed and the aim pursued; there has accordingly been a violation of Article 8 taken in conjunction with Article 14."

B | The same maintenance obligations for all parents regardless of sexual orientation

***J. M. v. the United Kingdom*,**
28 September 2010, n°. 37060/06

Principal facts

The applicant, J.M., a British citizen, was the mother of two children born in 1991 and 1993. After divorcing from her husband, she left the marital home. Under the United Kingdom legislation on child maintenance, her ex-husband was regarded as the parent with care and the applicant as the non-resident parent, obliged in that capacity to contribute financially to the children's upbringing. The applicant had been living with a woman since 1998. The amount of child support payable by her was set in September 2001 on the basis of the regulations then in force, which provided that a non-resident parent who had formed a new relationship – whether or not he or she had remarried – could obtain a reduction of the amount of child support payable by him or her, but not if he or she was living in a same-sex relationship. Noting that there was a significant difference between the amount of child support payable by her – about £47 per week – and the sum she would have had to pay if she had been living with a man – about £14 per week – the applicant lodged a complaint.

She won her case in three different courts, but the House of Lords found against her in a judgment delivered by a majority of its members in 2006. The applicant's complaint based on Article 8 of the Convention was dismissed, particularly insofar as it concerned the right to respect for family life. Two of the majority judges considered that the applicant's situation did not fall within the ambit of Article 8 owing to the lack of a sufficiently strong link between the provisions complained of and the applicant's relationship with her partner and that, in any event, the legislation which been applicable up to 2004 – the year in which the Civil Partnership Act had put an end to the impugned difference of treatment – remained within the limits of the United Kingdom's margin of appreciation. The other two majority judges stated that the Strasbourg case law applicable at the material time did not recognise same-sex relationships as constituting family life within the meaning of Article 8. The majority rejected the argument that the applicant's case came within the ambit of Article 1 of Protocol N°. 1. Taking the view that this provision was primarily concerned with the expropriation of assets for a public purpose and not with the enforcement of a personal obligation of the absent parent, they considered that it was artificial to view child support payments as a deprivation of the absent parent's possessions.

J.M. alleged that the assessment of her maintenance obligation by the authorities constituted discrimination on the grounds of her sexual orientation. She relied on Article 14 (prohibition of discrimination), arguing that this provision taken in conjunction with Article 8 (right to respect for private and family life) and/or Article 1 of Protocol No 1 (protection of property) applied to her situation.

Decision of the Court

The Court considered that the case fell naturally within the scope of Article 1 of Protocol N°. 1. The sums payable by the applicant towards the upkeep of her children constituted "contributions"

(in the same way as social benefits or taxes) since their payment was required by the relevant legislative provisions and enforced through the medium of the Child Support Agency. Article 14 therefore applied to the situation complained of by J.M.[120].

The Court held that it was not necessary to consider whether the case also fell within the ambit of Article 8 of the Convention.

Under Article 14 taken in conjunction with Article 1 of Protocol N°. 1, the Court considered that the applicant's sexual orientation was the only point of difference between her situation and that of a non-resident parent who has formed a new relationship with a person of the opposite sex. After noting that only particularly convincing and weighty reasons can justify a difference of treatment based on such a ground and that states have a narrow margin of appreciation in this area, the Court highlighted the following aspects:

"55. The Court considers that the applicant can, for the purposes of Article 14, compare her situation to that of an absent parent who has formed a new relationship with a person of the opposite sex. The only point of difference between her and such persons is her sexual orientation; in all other relevant respects they are similar (see, a contrario, Carson, § § 84-90). Her maintenance obligation towards her children was assessed differently on account of the nature of her new relationship. The difference in treatment at issue in the present case derives from sexual orientation, a ground that falls within the scope of Article 14 (E.B., § 50). It remains to be determined whether particularly convincing and weighty reasons existed for this difference of treatment.

56. The Government have argued that the situation was justified by the differences that existed at the material time between the overall sets of benefits and burdens for same-sex and opposite-sex couples, married or unmarried. The Court considers this more an explanation of the situation in domestic law at that time than a weighty reason that would prevent the difference of treatment at issue in this case from falling foul of Article 14. Bearing in mind the purpose of the regulations, which is to avoid placing an excessive financial burden on the absent parent in their new circumstances, the Court perceives no reason for treating the applicant differently. It is not readily apparent why her housing costs should have been taken into account differently than would have been the case had she formed a relationship with a man (see P.M., cited above, § 28).

57. The Government have also argued that the situation complained of fell within the United Kingdom's margin of appreciation at the time, and, as Lord Walker held, up until the passage of the Civil Partnership Act, which did away with the impugned difference in treatment. Since the Court has concluded that sufficient justification was lacking in 2001-2002, it follows that the reforms introduced by the Civil Partnership Act some years later, however laudable, have no bearing on the matter.

58. The Court therefore concludes that there has been a violation of Article 14 of the Convention in conjunction with Article 1 of Protocol N°. 1 in this case."

The Court further considered that the reform introduced a few years later by the 2004 Civil Partnership Act, however laudable, had not altered this aspect.

[120] In excluding the facts of the case from the scope of Article 1 of Protocol N°. 1 in the context of a complaint of discrimination, the House of Lords had given an excessively narrow interpretation of that provision. The Court pointed out that, particularly in the context of entitlement to social security benefits, a claim may fall within the ambit of Article 1 of Protocol N°. 1 so as to attract the protection of Article 14 of the Convention even in the absence of any deprivation of, or other interference with, the existing possessions of the applicant. At the material time the legal obligation on the non-resident parent to pay child maintenance to the parent with care constituted interference with the applicant's right to peaceful enjoyment of her possessions.

Chapter 2. Fields falling wholly or partially within the national margin of appreciation

Broadly speaking, in cases concerning gays and lesbians, there are two fields in which the European Court of Human Rights notes a lack of consensus among the Convention's Contracting States: marriage and adoption.

On closer inspection, however, the state of the law is less clear-cut than that.

The issue of adoption is in fact a field which is still left partly to the discretion of states. It is indeed important to make a distinction according to whether adoption takes place inside or outside marriage: the national margin of appreciation of the state being, respectively, broad in the first case and narrow in the second.

Legal Union is also an issue that is only left partially to the discretion of states. Again, a distinction must be made between the legal Union of marriage (i.e. marriage as such) and legal Unions outside marriage (i.e. the different forms of partnerships or civil pacts, etc.). On the one hand, the legal Union of marriage remains a field which is left fully to the discretion of states, the Convention being interpreted as not guaranteeing a right to marriage for persons of the same sex. On the other hand, legal Unions outside marriage now constitute a field beyond the discretion of states, since the Court has interpreted the Convention as guaranteeing the right to a legal Union outsidemarriage for same-sex couples.

The institution of marriage thus represents the hard core of state sovereignty in this area. Outside marriage, on the other hand, a common European law is beginning to take shape.

Section 1. Adoption: a field left partly to the discretion of states: a right to the same rules on adoption outside marriage for all persons wishing to adopt, regardless of sexual orientation

Generally speaking, there are three procedures whereby lesbians and gays can adopt a child. The first is adoption by a single person (single-parent adoption); the second is second-parent adoption, which is where one member of the couple adopts the child of the other, the aim being for each member of the couple to have legally recognised parental status; and the third is joint adoption by both members of the couple.

At the beginning of 2013, of the 39 Council of Europe member states studied, 11 give same-sex couples access to second-parent adoption – Belgium, Denmark, Finland, Germany, Iceland, the Netherlands, Norway, Slovenia, Spain, Sweden and the United Kingdom (not including Northern Ireland). The majority (24) of the 39 states restrict second-parent adoption to married couples. Ten member states – Belgium, Iceland, the Netherlands, Portugal, Romania, Russia, Slovenia, Spain, Ukraine and the United Kingdom (not including Northern Ireland) – extend second-parent adoption to unmarried couples, but only six of them make no distinction between heterosexual and homosexual couples in this regard. The other four (Portugal, Romania, Russia and Ukraine) – like Austria – restrict this form of adoption to unmarried heterosexual couples and deny this possibility to unmarried homosexual couples. The other states have found different solutions to the problem of second-parent adoption, such as opening up this possibility to married couples and registered partners (the solution adopted in Germany and Finland, for example) and denying it to unmarried couples, whether homosexual or heterosexual[121].

[121] Council of Europe Commissioner for Human Rights, Discrimination on grounds of sexual orientation and gender identity in Europe, Council of Europe Publishing, June 2011. Data updated by the Court in 2013; see X. and Others v. Austria, 9 February 2013, §56-57.

The Court has been instrumental in harmonising the rules on adoption outside marriage at European level on the basis of the principle of non-discrimination guaranteed by Article 14: the rules must now be the same for homosexuals and for heterosexuals as regards both single-parent and second-parent adoption. In other words, the Court recognises, in the case of single-parent adoption, the right to equal treatment of single persons wishing to adopt, regardless of their sexual orientation, and, likewise in the case of second-parent adoption, the right to equal treatment of unmarried couples wishing to adopt, regardless of their sexual orientation.

§ 1 – Single-parent adoption: the right to identical treatment of single persons wishing to adopt, regardless of their sexual orientation

There have been spectacular changes in the case law relating to adoption by single gays and lesbians. As the Court has stated, in the field of adoption, "generally, the law seems to be in a transitional stage".

But whereas in 2002 the Court asserted that it was necessary for states to retain a broad margin of appreciation, in 2008 it decided to restrict that margin. Whereas in 2002, by virtue of the Fretté v. France judgment of 26 February 2002 (application n°. 36515/97), it was possible for states which permitted adoption by single persons to restrict that possibility to single heterosexuals and to exclude single homosexuals[122], since 2008 the Court has held that such a difference of treatment is discriminatory and that single homosexuals have the same right to adoption as single heterosexuals. In the 2008 E.B. v. France judgment, the Court dealt with the same issue as in the 2002 Fretté v. France judgment but adopted a diametrically opposed solution, marking an important reversal of precedent. The solution adopted in the E.B. judgment now constitutes the positive law.

E.B. v. France,
22 January 2008, application n°. 43546/02

The E.B. v. France judgment established that where a state recognises the right of single persons to adopt children, that right must apply equally to everyone regardless of sexual orientation. It is important to note that the state's obligation of non-discrimination is conditional: it only applies if the state recognises the right of single persons to adopt. The Convention does not in itself guarantee any right of adoption for single persons (whatever their sexual orientation).

Principal facts

E.B., a French national aged 45, was a nursery school teacher. She had been living since 1990 with another woman, R., a psychologist.

The application concerned the French authorities' refusal of authorisation to adopt, which the applicant alleged was based on her sexual orientation.

In February 1998 the applicant made an application to the Jura Social Services Department for authorisation to adopt a child. During the adoption procedure she mentioned her sexual orientation and her relationship with her partner, Ms R.

On the basis of reports submitted by a social worker and a psychologist, the board responsible for considering applications for authorisation to adopt gave an unfavourable opinion in November 1998. Shortly after, the president of the council for the département of Jura issued a decision refusing authorisation. Following an appeal by the applicant, he confirmed his decision in March

[122] For a summary of the solution adopted in this case, see below paragraph 70 of the E.B. v. France judgment of 22 January 2008.

1999. The reason given for both his decisions was the absence of "identificational markers" due to the lack of a paternal role model or referent and the ambivalence of the position of the applicant's partner in relation to the adoption procedure.

Following an application by the applicant, the Besançon Administrative Court set aside both decisions of the president of the council on 24 February 2000. The département of Jura appealed. The Nancy Administrative Court of Appeal set aside the lower court's judgment on 21 December 2000; it found that the refusal of authorisation was not founded on the applicant's choice of lifestyle and that there had therefore been no violation of Articles 8 and 14 of the Convention.

The applicant appealed on points of law, arguing inter alia that her application for authorisation to adopt had been rejected on the grounds of her sexual orientation. On 5 June 2002 the Conseil d'Etat dismissed E.B.'s appeal on the ground that, among other things, the administrative court of appeal had not based its decision on a position of principle concerning the applicant's sexual orientation, but had taken into account the needs and interests of the child.

Relying on Article 14 of the Convention taken in conjunction with Article 8, the applicant alleged that at every stage of her application for authorisation to adopt she had suffered discriminatory treatment that had been based on her sexual orientation and had interfered with her right to respect for her private life.

Decision of the Court

The Court found by a small majority (10 votes to 7) that there had been a violation of Article 14 taken in conjunction with Article 8. It argued as follows:

"70. The Court observes that in *Fretté v. France* (cited above) the Chamber held that the decisions to reject the application for authorisation had pursued a legitimate aim, namely to protect the health and rights of children who could be involved in an adoption procedure (§ 38). With regard to whether a difference in treatment was justified, and after observing that there was no common ground between the legal systems of the Contracting States, the Chamber found it quite natural that the national authorities should enjoy a wide margin of appreciation when they were asked to make rulings on such matters, subject to review by the Court (§ 41). Having regard to the competing interests of the applicant and children who were eligible for adoption, and to the paramountcy of the latter's best interests, it noted that the scientific community was divided over the possible consequences of a child being adopted by one or more homosexual parents, that there were wide differences in national and international opinion and that there were not enough children to adopt to satisfy demand (§ 42). Taking account of the broad margin of appreciation to be left to States in this area and to the need to protect children's best interests to achieve the desired balance, the Chamber considered that the refusal to authorise adoption had not infringed the principle of proportionality and that, accordingly, the justification given by the Government appeared objective and reasonable and the difference in treatment complained of was not discriminatory within the meaning of Article 14 of the Convention (§ § 42 and 43).

71. The Court notes that the present case also concerns the question of how an application for authorisation to adopt submitted by a homosexual single person is dealt with; it nonetheless differs in a number of respects from the above-cited case of *Fretté*. The Court notes in particular that whilst the ground relating to the lack of a referent of the other sex features in both cases, the domestic administrative authorities did not – expressly at least – refer to E.B.'s "choice of lifestyle" (see *Fretté*, cited above, § 32). Furthermore, they also mentioned the applicant's qualities and her child-raising and emotional capacities, unlike in *Fretté* where the applicant was deemed to have had difficulties in envisaging the practical consequences of the upheaval

occasioned by the arrival of a child (§ § 28 and 29). Moreover, in the instant case the domestic authorities had regard to the attitude of E.B.'s partner, with whom she had stated that she was in a stable and permanent relationship, which was a factor that had not featured in the application lodged by Mr Fretté.

72. In the instant case the Court notes that the domestic administrative authorities, and then the courts that heard the applicant's appeal, based their decision to reject her application for authorisation to adopt on two main grounds.

73. With regard to the ground relied on by the domestic authorities relating to the lack of a paternal or maternal referent in the household of a person seeking authorisation to adopt, the Court considers that this does not necessarily raise a problem in itself. However, in the circumstances of the present case it is permissible to question the merits of such a ground, the ultimate effect of which is to require the applicant to establish the presence of a referent of the other sex among her immediate circle of family and friends, thereby running the risk of rendering ineffective the right of single persons to apply for authorisation. The point is germane here because the case does not concern an application for authorisation to adopt by a – married or unmarried – couple, but by a single person. In the Court's view, that ground might therefore have led to an arbitrary refusal and have served as a pretext for rejecting the applicant's application on grounds of her homosexuality.

74. The Court observes, moreover, that the Government, on whom the burden of proof lay (see, mutatis mutandis, *Karner v. Austria*, n°. 40016/98, §§ 41-42, ECHR 2003 IX), were unable to produce statistical information on the frequency of reliance on that ground according to the – declared or known – sexual orientation of the persons applying for adoption, which alone could provide an accurate picture of administrative practice and establish the absence of discrimination when relying on that ground.

75. In the Court's view, the second ground relied on by the domestic authorities, based on the attitude of the applicant's partner, calls for a different approach. Although she was the long-standing and declared partner of the applicant, Ms R. did not feel committed by her partner's application to adopt. The authorities, which constantly remarked on this point – expressly and giving reasons – concluded that the applicant did not provide the requisite safeguards for adopting a child.

76. It should first be noted that, contrary to the applicant's submissions, the question of the attitude of her partner, with whom she stated that she was in a stable and lasting relationship, is not without interest or relevance in assessing her application. It is legitimate for the authorities to ensure that all safeguards are in place before a child is taken into a family. Accordingly, where a male or female applicant, although unmarried, has already set up home with a partner, that partner's attitude and the role he or she will necessarily play ona daily basis in the life of the child joining the home set-up require a full examination in the child's best interests. It would moreover be surprising, to say the least, if the relevant authorities, having been informed of the existence of a de facto couple, pretended to be unaware of that fact when assessing the conditions in which the child would be given a home and his future life in that new home. The legal status of a person seeking to adopt is not incompatible with an examination of his or her actual situation and the subsequent finding of not one but two adults in the household.

77. The Court notes, moreover, that Article 4 of the Decree of 1 September 1998 [...] requires the president of the council for the relevant *département* to satisfy himself that the conditionsin which the applicant is proposing to provide the child with a home meet the needs of an adopted child from a family, child-rearing and psychological perspective. The importance of

these safeguards – of which the authorities must be satisfied before authorising a person to adopt a child – can also be seen in the relevant international instruments, be it the United Nations Convention on the Rights of the Child of 20 November 1989, the Hague Convention of 29 May 1993 or the draft European Convention on the Adoption of Children [...].

78. In the Court's view, there is no evidence to establish that the ground in question was based on the applicant's sexual orientation. On the contrary, the Court considers that this ground, which has nothing to do with any consideration relating to the applicant's sexual orientation, is based on a simple analysis of the known, de facto situation and its consequences for the adoption of a child.

79. The applicant cannot therefore be deemed to have been discriminated against on the ground of her sexual orientation in that regard.

80. Nonetheless, these two main grounds form part of an overall assessment of the applicant's situation. For this reason, the Court considers that they should not be considered alternatively, but concurrently. Consequently, the illegitimacy of one of the grounds has the effect of contaminating the entire decision.

81. With regard to the administrative phase, the Court observes that the president of the council for the *département* did not base his decision exclusively or principally on the second ground, but on "all" the factors involved – that is, both grounds – without it being possible to consider that one of them was predominant or that one of them alone was sufficient to make him decide to refuse authorisation [...].

82. With regard to the judicial phase, the Nancy Administrative Court of Appeal noted that the decision was based on two grounds: the lack of a paternal referent and the ambivalence of the commitment of each member of the household. It added that the documents in the file and the conclusions reached after examining the application showed that the applicant's lifestyle did not provide the requisite safeguards for adopting a child, but disputed that the president of the council for the *département* had refused authorisation on the basis of a position of principle regarding her choice of lifestyle, namely, her homosexuality [...].

83. Subsequently, the *Conseil d'Etat* held that the two grounds on which the applicant had been refused authorisation to adopt were in keeping with the statutory provisions. It also held that the reference to the applicant's "lifestyle" could be explained by the documents in the file submitted to the tribunals of fact, which showed that the applicant was, at the time of her application, in a stable homosexual relationship, but that this could not be construed as a decision based on a position of principle regarding her sexual orientation or as any form of discrimination [...].

84. The Court therefore notes that the administrative courts went to some lengths to rule that although regard had been had to the applicant's sexual orientation, it had not been the basis for the decision in question and had not been considered from a hostile position of principle.

85. However, in the Court's opinion the fact that the applicant's homosexuality featured to such an extent in the reasoning of the domestic authorities is significant. Besides their considerations regarding the applicant's "lifestyle", they above all confirmed the decision of the president of the council for the *département*. The Court points out that the latter reached his decision in the light of the opinion given by the adoption board whose various membershad expressed themselves individually in writing, mainly recommending, with reasons in support of that recommendation, that the application be refused on the basis of the twogrounds in question. It observes that the manner in which certain opinions were expressed was indeed revealing in that the applicant's homosexuality was a determining factor. In particular,the Court notes that in his opinion of 12 October 1998 the psychologist from the children's

welfare service recommended that authorisation be refused, referring to, among other things, an "unusual attitude [on the part of the applicant] to men in that men are rejected" [...].

86. The Court observes that at times it was her status as a single person that was relied on as a ground for refusing the applicant authorisation to adopt, whereas the law makes express provision for the right of single persons to apply for authorisation to adopt. This emerges particularly clearly from the conclusions of the psychologist who, in her report on her interviews with the applicant of 28 August 1998, stated, with express reference to the applicant's case and not as a general comment – since she prefaces her remark with the statement that she is not seeking to diminish the applicant's confidence in herself or to insinuate that she would be harmful to a child – that "all the studies on parenthood show that a child needs both its parents" (see paragraph 11 above). On 28 October 1998 the adoption board's representative from the Family Council for the association of children currently or formerly in State care recommended refusing authorisation on the ground that an adoptive family had to be composed "of a mixed couple (man and woman)" [...].

87. Regarding the systematic reference to the lack of a "paternal referent", the Court disputes not the desirability of addressing the issue, but the importance attached to it by the domestic authorities in the context of adoption by a single person. The fact that it is legitimate for this factor to be taken into account should not lead the Court to overlook the excessive reference to it in the circumstances of the present case.

88. Thus, notwithstanding the precautions taken by the Nancy Administrative Court of Appeal, and subsequently by the *Conseil d'Etat*, to justify taking account of the applicant's "lifestyle", the inescapable conclusion is that her sexual orientation was consistently at the centre of deliberations in her regard and omnipresent at every stage of the administrative and judicial proceedings.

89. The Court considers that the reference to the applicant's homosexuality was, if not explicit, at least implicit. The influence of the applicant's avowed homosexuality on the assessment of her application has been established and, having regard to the foregoing, was a decisive factor leading to the decision to refuse her authorisation to adopt (see, *mutatis mutandis*, *Salgueiro da Silva Mouta*, cited above, § 35).

90. The applicant therefore suffered a difference in treatment. Regard must be had to the aim behind that difference in treatment and, if the aim was legitimate, to whether the different treatment was justified.

91. The Court reiterates that, for the purposes of Article 14, a difference in treatment is discriminatory if it has no objective and reasonable justification, which means that it does not pursue a "legitimate aim" or that there is no "reasonable proportionality between the means employed and the aim sought to be realised" (see, inter alia, *Karlheinz Schmidt*, cited above, § 24; *Petrovic*, cited above, § 30; and *Salgueiro da Silva Mouta*, cited above, § 29). Where sexual orientation is in issue, there is a need for particularly convincing and weighty reasons to justify a difference in treatment regarding rights falling within Article 8 (see, mutatis mutandis, *Smith and Grady v. the United Kingdom*, nos. 33985/96 and 33986/96, § 89, ECHR 1999-VI; *Lustig-Prean and Beckett v. the United Kingdom*, nos. 31417/96 and 32377/96, § 82, 27 September 1999; and *S.L. v. Austria*, no. 45330/99, § 37, ECHR 2003-I).

92. In that connection the Court observes that the Convention is a living instrument, to be interpreted in the light of present-day conditions (see, inter alia, *Johnston and Others*, cited above, § 53).

93. In the Court's opinion, if the reasons advanced for such a difference in treatment were based solely on considerations regarding the applicant's sexual orientation this would amount to discrimination under the Convention (see *Salgueiro da Silva Mouta*, cited above, § 36).

94. The Court points out that French law allows single persons to adopt a child (see paragraph 49 above), thereby opening up the possibility of adoption by a single homosexual, which is not disputed. Against the background of the domestic legal provisions, it considers that the reasons put forward by the Government cannot be regarded as particularly convincing and weighty such as to justify refusing to grant the applicant authorisation.

95. The Court notes, lastly, that the relevant provisions of the Civil Code are silent as to the necessity of a referent of the other sex, which would not, in any event, be dependent on the sexual orientation of the adoptive single parent. In this case, moreover, the applicant presented, in the terms of the judgment of the *Conseil d'Etat*, "undoubted personal qualities and an aptitude for bringing up children", which were assuredly in the child's best interests, a key notion in the relevant international instruments (see paragraphs 29–31 above).

96. Having regard to the foregoing, the Court cannot but observe that, in rejecting the applicant's application for authorisation to adopt, the domestic authorities made a distinction based on considerations regarding her sexual orientation, a distinction which is not acceptable under the Convention (see *Salgueiro da Silva Mouta*, cited above, § 36). [...]

98. There has accordingly been a breach of Article 14 of the Convention taken in conjunction with Article 8."

§ 1 – Second-parent adoption: the right to identical treatment of unmarried couples wishing to adopt, regardless of sexual orientation

It should first be pointed out that the judicial solution described below concerns so-called second-parent adoption, in other words the situation where one member of the couple adopts the child of the other without the first parent losing his or her legal rights, the aim being for each member of the couple to have legally recognised parental status. Second-parent adoption – also known as "co-parent" adoption – should not be confused with joint adoption by both members of the couple (in which both are unrelated to the child).

Since 2013, the Court has held that where a state permits second-parent adoption in the case of a person living as a member of an unmarried couple, a difference of treatment based on the sexual orientation of the person wishing to adopt is discriminatory.

***X. and others v. Austria*,**
19 February 2013, application n°. 19010/07

Principal facts

The applicants are two Austrian nationals ("the first applicant" and "the third applicant") born in 1967. They live in a stable lesbian relationship together with the son of one of them ("the second applicant"). The latter was born out of wedlock in 1995 and his mother has sole custody of him. The applicants live together and the two women jointly care for the child.

Wishing to create a legal relationship between the first applicant and the child without severing the relationship with his mother, they concluded an adoption agreement in February 2005 and submitted it to the competent district court for approval. Being aware that the relevant provisions of the Civil Code could be understood to exclude the adoption of the child of one partner of a homosexual couple by the other partner without severing the relationship with the natural parent, the applicants requested the Constitutional Court to declare those provisions unconstitutional as discriminating against them on account of their sexual orientation. The Constitutional Court rejected the request as inadmissible in June 2005, pending the decision of the district court.

In October 2005, the district court refused to approve the adoption agreement, holding that the Civil Code envisaged that in the case of an adoption by one person the adopting parent replaced the natural parent of the same sex, thus severing the child's relationship with him or her. In the case at hand, the child's adoption by the first applicant would sever his relationship with his mother, not with his father.

The applicants' appeal was dismissed by the regional court in February 2006. In addition to the considerations of the district court, it observed that Austrian law, while not giving a precise definition of the term "parents", plainly envisaged two people of different sex.

Where, as in the present case, a child had both parents there was no need to replace one of them by an adoptive parent. In that connection, the court noted on the basis of the file that the child had regular contacts with his father. It did not deal with the question whether, as alleged by the applicants, there were grounds for overriding the father's refusal to consent to the adoption. In September 2006, the Supreme Court dismissed the applicants' appeal on points of law, holding that the adoption of a child by the female partner of his or her mother was legally impossible. It considered that the relevant provisions of the Civil Code did not disclose any appearance of being unconstitutional.

Relying on Article 14 taken in conjunction with Article 8, the applicants complained that they were being discriminated against on the grounds of the first and third applicants' sexual orientation. They submitted that there was no reasonable and objective justification for allowing second-parent adoption in the case of different-sex couples – married or not – and denying this possibility to same-sex couples.

Decision of the Court

Applying Article 14 taken in conjunction with Article 8, the Court compares the applicants' legal situation from the point of view of parental adoption with that of both unmarried and married heterosexual couples and held that Article 14 taken in conjunction with Article 8 had been violated in the first case and not in the second. The first comparison – between unmarried couples – will be considered now; the second – between married and unmarried couples – will be considered later in the section on marriage (see below).

The Court acknowledges that the applicants' situation is comparable to that of an unmarried heterosexual couple in which one partner wishes to adopt the other's child.

Austrian law allows second-parent adoption in the case of unmarried heterosexual couples. However, second-parent adoption is legally impossible for a homosexual couple because, under the relevant provisions of the Civil Code, the adopting parent replaces the biological parent of the same sex.

As the first applicant was a woman, her adoption of her partner's child could only sever the child's legal relationship with his mother. Adoption could therefore not serve to create a parent-child relationship between the first applicant and the child in addition to the relationship with his mother.

The difference in treatment between the first and third applicants and an unmarried different-sex couple in which one partner sought to adopt the other partner's child was based on their sexual orientation.

"136. [...] [T]he Court notes that there is no obligation under Article 8 of the Convention to extend the right to second parent adoption to unmarried couples [...]. Nonetheless, Austrian law allows second-parent adoption in unmarried different-sex couples. The Court therefore has to examine whether refusing that right to (unmarried) same-sex couples serves a legitimate aim and is proportionate to that aim."

According to the domestic courts and the Government, Austrian adoption law seeks to recreate the situation found in a biological family.

"137. [...] [T]he domestic courts and the Government relied on the protection of the traditional family, based on the tacit assumption that only a family with parents of different sex could adequately provide for a child's needs.

138. The Court has accepted that the protection of the family in the traditional sense is, in principle, a weighty and legitimate reason which might justify a difference in treatment (see *Karner*, cited above, § 40, and *Kozak*, cited above, § 98). It goes without saying that the protection of the interests of the child is also a legitimate aim. It remains to be ascertained whether, in the circumstances of the case, the principle of proportionality was adhered to. [...]

140. In cases in which the margin of appreciation is narrow, as is the position where there is a difference in treatment based on sex or sexual orientation, the principle of proportionality does not merely require the measure chosen to be suitable in principle for achievement of the aim sought. It must also be shown that it was necessary, in order to achieve that aim, to exclude certain cate-gories of people, in this instance persons living in a homosexual relationship, from the scope of application of the provisions at issue (see *Karner*, cited above, § 41, and *Kozak*, cited above, § 99)."

The Austrian government had not provided any evidence proving that it would be harmful to the child to be raised by a lesbian or gay couple or to have two legal mothers or two legal fathers.

"142. [...] The Government did not adduce any specific argument, any scientific studies or any other item of evidence to show that a family with two parents of the same sex could in no circumstances adequately provide for a child's needs. [...].

144. The Court would add that the Austrian legislation appears to lack coherence. Adoption by one person, including one homosexual, is possible. If he or she has a registered partner, the latter has to consent [...]. The legislature therefore accepts that a child may grow up in a family based on a same-sex couple, thus accepting that this is not detrimental to the child. [...]

145. The Court finds force in the applicants' argument that de facto families based on a same-sex couple exist but are refused the possibility of obtaining legal recognition and protection. The Court observes that in contrast to individual adoption or joint adoption, which are usually aimed at creating a relationship with a child previously unrelated to the adopter, second-parent adoption serves to confer rights vis-à-vis the child on the partner of one of the child's parents. The Court itself has often stressed the importance of granting legal recognition to de facto family life (see *Wagner and J.M.W.L. v. Luxembourg*, n°. 76240/01, § 119, 28 June 2007; see also, in the context of second-parent adoption, *Eski*, cited above, § 39, and *Emonetand Others*, cited above, § § 63-64).

146. All the above considerations – the existence of de facto family life between the applicants, the importance of having the possibility of obtaining legal recognition thereof, the lack of evidence adduced by the Government in order to show that it would be detrimental to the child to be brought up by a same-sex couple or to have two mothers and two fathers for legal purposes, and especially their admission that same-sex couples may be as suited for second-parent adoption as different-sex couples – cast considerable doubt on the proportionality of the absolute prohibition on second-parent adoption [...]. Unless any other particularly convincing and weighty reasons militate in favour of such an absolute prohibition, the considerations adduced so far would seem rather to weigh in favour of allowing the courts to carry out an examination of each individual case. This would also appear to be more in keeping with the best interests of the child, which is a key notion in the relevant international instruments [...].

149. Furthermore, and solely in order to respond to the Government's assertion that no European consensus exists, it has to be borne in mind that the issue before the Court is not the general question of same-sex couples' access to second-parent adoption, but the difference in treatment between unmarried different-sex couples and same-sex couples in respect of this type of adoption [...]. Consequently, only those ten Council of Europe member States which allow second-parent adoption in unmarried couples may be regarded as a basis for comparison. Within that group, six States treat heterosexual couples and same-sex couples in the same manner, while four adopt the same position as Austria [...]. The Court considers that the narrowness of this sample is such that no conclusions can be drawn as to the existence of a possible consensus among Council of Europe member States."

In conclusion, the Court found that the Government had failed to give convincing reasons to show that excluding second-parent adoption in a same-sex couple, while allowing that possibility in an unmarried different sex couple, was necessary for the protection of the family in the traditional sense or for the protection of the interests of the child. The distinction was therefore discriminatory.

Section 2. Legal union, a field left partly to the discretion of states

The question of legal recognition of same-sex relationships has undergone significant evolution. This field is no longer left wholly to the discretion of states. The issue of legal union is now partly a matter of common European law. A distinction must be made between the legal union of marriage (i.e. marriage as such) and legal unions outside marriage (i.e. the various forms of registered partnerships, civil pacts, etc.). On the one hand, the legal union of marriage remains a field left fully to the discretion of states, the Convention being interpreted as not guaranteeing the right to marriage to persons of the same sex. On the other hand, legal unions outside marriage are now a field beyond the discretion of states, since the Court has interpreted the Convention as guaranteeing the right to a legal union outside marriage for same-sex couples. The institution of marriage thus represents the hard core of state sovereignty.

§ 1 – Legal unions outside marriage: a field beyond the discretion of states: the emergence of a right to a legal union outside marriage

An increasing number of European countries have adopted a form of legal union outside marriage (such as registered partnerships, civil unions or other) for same-sex couples: Denmark (1989), Norway (1993), Sweden (1995), Iceland (1996), Spain (1998), the Netherlands (1998), France (1999), Belgium (2000), Germany (since 2001, the cohabitation agreement has granted same-sex couples similar rights as marriage, except in tax matters), Portugal (2001), Finland (2002), the United Kingdom (2005), Andorra (2005), Switzerland (2007), Hungary (since 2007[123]), the Czech Republic (2006), Luxembourg (2010), Slovenia (2010), Ireland (2010), Austria (2010), Liechtenstein (2011), Malta (2014), Croatia (2014), Estonia (2014), Greece (2015), Cyprus (2015), Italy (2016).

Under the European Convention on Human Rights, the legal recognition of same-sex couples through a legal union outside marriage (such as registered partnership, civil union or other) took place in two stages.

During the first stage, this legal recognition of same-sex couples was of a relative nature. Indeed, the Grand Chamber of the Court ruled in 2013, in the *Vallianatos and Others v. Greece* judgment,

[123] In Hungary, the status of "cohabiting partner" makes it possible to obtain a credit, claim rights to inheritance and benefit from tax deductions.

that when a state establishes a registered or civil partnership or pact for different-sex couples, it cannot exclude same-sex couples who have also the right to benefit from them. The legal ground for such recognition was then the principle of equality or non-discrimination set out in Article 14 of the Convention, read in conjunction with Article 8 (or Article 1 of Protocol N°. 12). On this basis, homosexual couples could only claim such recognition if it existed for heterosexual couples. The right to equal treatment has thus made it possible to align the rights of same-sex couples with those of different-sex couples.

During the second stage, this legal recognition of same-sex couples became more or less autonomous. Indeed, by a chamber judgment delivered in 2015 in *Oliari and Others v. Italy*, the Court sanctioned a state for failing to provide for any official recognition or effective legal protection of same-sex couples. The legal ground was, this time, the one set out in Article 8, safeguarding the right to respect for family life, taken in isolation: this entails a positive obligation on the part of the state to introduce the possibility for same-sex couples to obtain a legal recognition of their relationship. Since states are free to refuse them the legal union of marriage itself, states must therefore provide for a minimum partnership or civil union (outside marriage) in order to protect their relationship. Henceforth, the European Convention on Human Rights guarantees an autonomous right to the recognition and protection of same-sex couples through a legal union outside marriage.

We will thus examine, in turn, the contributions of the *Oliari and Others v. Italy* chamber judgment of 2015 and those of the *Vallianatos and Others v. Greece* Grand Chamber judgment of 2013. Althoughthe *Vallianatos* judgment was rendered by a more authoritative formation and at an earlier date thanthe *Oliari* judgment, we can consider that the case law resulting from the *Oliari* judgment lays down the principle and that the case law resulting from the *Vallianatos* judgment has become a corollary to it.

In fact, the *Oliari* judgment lays down the principle of legal recognition outside marriage in itself for same-sex couples. The *Vallianatos* judgment, for its part, affirms a right to equal access to legal unions outside marriage for all couples, regardless of their sexual orientation, whether they are different-sex or same-sex couples.

A | A right to recognition and protection of same-sex couples through a legal union outside marriage

Oliari and Others v. Italy, *21 July 2015, nos. 18766/11 and 36030/11*

Principal facts

The applicant, J.M., a British citizen, was the mother of two children born in 1991 and 1993. After divorcing from her husband, she left the marital home. Under the United Kingdom legislation on child maintenance, her ex-husband was regarded as the parent with care and the applicant as the non-resident parent, obliged in that capacity to contribute financially to the children's upbringing. The applicant had been living with a woman since 1998. The amount of child support payable by her was set in September 2001 on the basis of the regulations then in force, which provided that a non-resident parent who had formed a new relationship – whether or not he or she had remarried – could obtain a reduction of the amount of child support payable by him or her, but not if he or she was living in a same-sex relationship. Noting that there was a significant difference between the amount of child support payable by her – about £47 per week – and the sum she would have had to pay if she had been living with a man – about £14 per week – the applicant lodged a complaint.

She won her case in three different courts, but the House of Lords found against her in a judgment delivered by a majority of its members in 2006. The applicant's complaint based on Article 8 of

the Convention was dismissed, particularly insofar as it concerned the right to respect for family life. Two of the majority judges considered that the applicant's situation did not fall within the ambit of Article 8 owing to the lack of a sufficiently strong link between the provisions complained of and the applicant's relationship with her partner and that, in any event, the legislation which been applicable up to 2004 – the year in which the Civil Partnership Act had put an end to the impugned difference of treatment – remained within the limits of the United Kingdom's margin of appreciation. The other two majority judges stated that the Strasbourg case law applicable at the material time did not recognise same-sex relationships as constituting family life within the meaning of Article 8. The majority rejected the argument that the applicant's case came within the ambit of Article 1 of Protocol N°. 1. Taking the view that this provision was primarily concerned with the expropriation of assets for a public purpose and not with the enforcement of a personal obligation of the absent parent, they considered that it was artificial to view child support payments as a deprivation of the absent parent's possessions.

J.M. alleged that the assessment of her maintenance obligation by the authorities constituted discrimination on the grounds of her sexual orientation. She relied on Article 14 (prohibition of discrimination), arguing that this provision taken in conjunction with Article 8 (right to respect for private and family life) and/or Article 1 of Protocol No 1 (protection of property) applied to her situation.

"165. The Court reiterates that it has already held that same-sex couples are just as capable as different-sex couples of entering into stable, committed relationships, and that they are in a relevantly similar situation to a different-sex couple as regards their need for legal recognition and protection of their relationship (see *Schalk and Kopf*, § 99, and *Vallianatos*, § § 78 and81, both cited above). It follows that the Court has already acknowledged that same-sex couples are in need of legal recognition and protection of their relationship.

166. That same need, as well as the will to provide for it, has been expressed by the Parliamentary Assembly of the Council of Europe, which recommended that the Committee of Ministers call upon member States, among other things, "to adopt legislation making provision for registered partnerships" as long as fifteen years ago, and more recently by the Committee of Ministers (in its Recommendation CM/Rec(2010)5) which invited member States, where national legislation did not recognise nor confer rights or obligations on registered same-sex partnerships, to consider the possibility of providing same-sex couples with legal or other means to address the practical problems related to the social reality in which they live.

167. The Court notes that the applicants in the present case, who are unable to marry, have been unable to have access to a specific legal framework (such as that for civil unions or registered partnerships) capable of providing them with the recognition of their status and guaranteeing to them certain rights relevant to a couple in a stable and committed relationship.

168. The Court takes note of the applicants' situation within the Italian domestic system. As regards registration of the applicants' same-sex unions with the "local registers for civil unions", the Court notes that where this is possible (that is in less than 2% of existing municipalities) this action has merely symbolic value and is relevant for statistical purposes; it does not confer on the applicants any official civil status, and it by no means confers any rights on same-sex couples. It is even devoid of any probative value (of a stable union) before the domestic courts.

169. The applicants' current status in the domestic legal context can only be considered a "de facto" union, which may be regulated by certain private contractual agreements of limited scope. As regards the mentioned cohabitation agreements, the Court notes that while providing for some domestic arrangements in relation to cohabitation such private agreements fail to provide for some basic needs which are fundamental to the regulation of a relationship between a couple

in a stable and committed relationship, such as, inter alia, the mutual rights and obligations they have towards each other, including moral and material support, maintenance obligations and inheritance rights (compare *Vallianatos*, § 81 in fine, and *Schalk and Kopf*, § 109, both cited above). The fact that the aim of such contracts is not that of the recognition and protection of the couple is evident from the fact that they are open to anyone cohabiting, irrespective of whether they are a couple in a committed stable relationship. Furthermore, such a contract requires the persons to be cohabiting; however, the Court has already accepted that the existence of a stable union is independent of cohabitation (see *Vallianatos*, § § 49 and 73). Indeed, in the globalised world of today various couples, married or in a registered partnership, experience periods during which they conduct their relationship at long distance, needing to maintain residence in different countries, for professional or other reasons. The Court considers that that fact in itself has no bearing on the existence of a stable committed relationship and the need for it to be protected. It follows that, quite apart from the fact that cohabitation agreements were not even available to the applicants before December 2013, such agreements cannot be considered as giving recognition and the requisite protection to the applicants' unions.

170. Further, it has not been proved that the domestic courts could issue a statement of formal recognition, nor has the Government explained what would have been the implications of such a statement. While the national courts have repeatedly upheld the need to ensure protection for same sex-unions and to avoid discriminatory treatment, currently, in order to receive such protection the applicants, as with others in their position, must raise a number of recurring issues with the domestic courts and possibly even the constitutional Court, to which the applicants have no direct access (see *Scoppola v. Italy* (n°. 2) [GC], n°. 10249/03, § 70, 17 September 2009). From the case-law brought to the Court's attention, it transpires that while recognition of certain rights has been rigorously upheld, other matters in connection with same-sex unions remain uncertain, given that, as reiterated by the Government, the courts make findings on a case-by-case basis. The Government also admitted that protection of same-sex unions received more acceptance in certain branches than in others. In this connection it is also noted that the Government persistently exercise their right to object to such claims (see, for example, the appeal against the decision of the Tribunal of Grosseto) and thus they show little support for the findings on which they are hereby relying.

171. As indicated by the ARCD the law provides explicitly for the recognition of a same-sex partner in very limited circumstances. It follows that even the most regular of "needs" arising in the context of a same-sex couple must be determined judicially, in the uncertain circumstances mentioned above. In the Court's view, 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, especially in an overburdened justice system such as the one in Italy, 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.

172. It follows from the above that the current available protection is not only lacking in content, in so far as it fails to provide for the core needs relevant to a couple in a stable committed relationship, but is also not sufficiently stable – it is dependent on cohabitation, as well as the judicial (or sometimes administrative) attitude in the context of a country that is not bound by a system of judicial precedent (see *Torri and Others v. Italy*, (dec.), n^os^. 11838/07and 12302/07, § 42, 24 January 2012). In this connection the Court reiterates that coherence of administrative and legal practices within the domestic system must be regarded as an important factor in the assessment carried out under Article 8.

173. In connection with the general principles mentioned in paragraph 161 above, the Court observes that, it also follows from the above examination of the domestic context that there exists a conflict between the social reality of the applicants, who for the most part live their relationship openly in Italy, and the law, which gives them no official recognition on the territory. In the Court's view an obligation to provide for the recognition and protection of same-sex unions, and thus to allow for the law to reflect the realities of the applicants' situations, would not amount to any particular burden on the Italian State be it legislative, administrative or other. Moreover, such legislation would serve an important social need – as observed by the ARCD, official national statistics show that there are around one million homosexuals (or bisexuals), in central Italy alone.

174. In view of the above considerations, the Court considers that in the absence of marriage, same-sex couples like the applicants have a particular interest in obtaining the option of entering into a form of civil union or registered partnership, since this would be the most appropriate way in which they could have their relationship legally recognised and which would guarantee them the relevant protection – in the form of core rights relevant to a couple in a stable and committed relationship – without unnecessary hindrance. Further, the Court has already held that such civil partnerships have an intrinsic value for persons in the applicants' position, irrespective of the legal effects, however narrow or extensive, that they would produce (see *Vallianatos*, cited above, § 81). This recognition would further bring a sense of legitimacy to same-sex couples.

175. The Court reiterates that in assessing a State's positive obligations regard must be had to the fair balance that has to be struck between the competing interests of the individual and of the community as a whole. Having identified above the individuals' interests at play, the Court must proceed to weigh them against the community interests.

176. Nevertheless, in this connection the Court notes that the Italian Government have failed to explicitly highlight what, in their view, corresponded to the interests of the community as a whole. They however considered that "time was necessarily required to achieve a gradual maturation of a common view of the national community on the recognition of this new form of family". They also referred to "the different sensitivities on such a delicate and deeply felt social issue" and the search for a "unanimous consent of different currents of thought and feeling, even of religious inspiration, present in society". At the same time, they categorically denied that the absence of a specific legal framework providing for the recognition and protection of same-sex unions attempted to protect the traditional concept of family, or the morals of society. The Government instead relied on their margin of appreciation in the choice of times and the modes of a specific legal framework, considering that they were better placed to assess the feelings of their community.

177. As regards the breadth of the margin of appreciation, the Court notes that this is dependent on various factors. 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 member States, 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. In this connection the Court has already held that States enjoy a certain margin of appreciation as regards the exact status conferred by alternative means of recognition and the rights and obligations conferred by such a union or registered partnership (see *Schalk and Kopf*, cited above, § § 108-09). Indeed, the instant case concerns solely the general need for legal recognition and the core protection of the applicants as same-sex couples. The Court considers the latter to be facets of an individual's existence and identity to which the relevant margin should apply.

178. In addition to the above, of relevance to the Court's consideration is also the movement towards legal recognition of same-sex couples which has continued to develop rapidly in Europe since the Court's judgment in *Schalk and Kopf*. To date a thin majority of CoE States (twenty-four out of forty seven) have already legislated in favour of such recognition and the relevant protection. The same rapid development can be identified globally, with particular reference to countries in the Americas and Australasia. The information available thus goes to show the continuing international movement towards legal recognition, to which the Court cannot but attach some importance (see, *mutatis mutandis*, *Christine Goodwin*, § 85, and *Vallianatos*, § 91, both cited above).

179. Turning back to the situation in Italy, the Court observes that while the Government is usually better placed to assess community interests, in the present case the Italian legislature seems not to have attached particular importance to the indications set out by the national community, including the general Italian population and the highest judicial authorities in Italy.

180. The Court notes that in Italy the need to recognise and protect such relationships has been given a high profile by the highest judicial authorities, including the Constitutional Court and the Court of Cassation. Reference is made particularly to the judgment of the Constitutional Court n°. 138/10 in the first two applicants' case, the findings of which were reiterated in a series of subsequent judgments in the following years (see some examples at paragraph 45 above). In such cases, the Constitutional Court, notably and repeatedly called for a juridical recognition of the relevant rights and duties of homosexual unions (see, inter alia, paragraph 16 above), a measure which could only be put in place by Parliament.

181. The Court observes that such an expression reflects the sentiments of a majority of the Italian population, as shown through official surveys. The statistics submitted indicate that there is amongst the Italian population a popular acceptance of homosexual couples, as well as popular support for their recognition and protection.

182. Indeed, in their observations before this Court, the same Italian Government have not denied the need for such protection, claiming that it was not limited to recognition which moreover they admitted was growing in popularity amongst the Italian community

183. Nevertheless, despite some attempts over three decades the Italian legislature has been unable to enact the relevant legislation.

184. In this connection the Court recalls that, although in a different context, it has previously held that "a deliberate attempt to prevent the implementation of a final and enforceable judgment and which is, in addition, tolerated, if not tacitly approved, by the executive and legislative branch of the State, cannot be explained in terms of any legitimate public interest or the interests of the community as a whole. On the contrary, it is capable of undermining the credibility and authority of the judiciary and of jeopardising its effectiveness, factors which are of the utmost importance from the point of view of the fundamental principles underlying the Convention (see *Broniowski v. Poland* [GC], n°. 31443/96, § 175, ECHR 2004 V). While the Court is aware of the important legal and factual differences between Broniowski and the present case, it nevertheless considers that in the instant case, the legislature, be it willingly or for failure to have the necessary determination, left unheeded the repetitive calls by the highest courts in Italy. Indeed the President of the Constitutional Court himself in the annual report of the court regretted the lack of reaction on behalf of the legislator to the Constitutional Court's pronouncement in the case of the first two applicants. The Court considers that this repetitive failure of legislators to take account of Constitutional Court pronouncements or the recommendations therein relating to consistency with the Constitution

over a significant period of time, potentially undermines the responsibilities of the judiciary and in the present case left the concerned individuals in a situation of legal uncertainty which has to be taken into account.

185. In conclusion, in the absence of a prevailing community interest being put forward by the Italian Government, against which to balance the applicants' momentous interests as identified above, and in the light of domestic courts' conclusions on the matter which remained unheeded, the Court finds that the Italian Government have overstepped their margin of appreciation and failed to fulfil their positive obligation to ensure that the applicants have available a specific legal framework providing for the recognition and protection of their same-sex unions.

186. To find otherwise today, the Court would have to be unwilling to take note of the changing conditions in Italy and be reluctant to apply the Convention in a way which is practical and effective.

187. There has accordingly been a violation of Article 8 of the Convention."

B | A right of equal access to legal unions outside marriage for all couples, regardless of sexual orientation

While the solution adopted in the *Oliari and Others v. Italy* judgment – previously mentioned – is legally based on Article 8 (right to respect for family life) of the Convention, taken in isolation, the one adopted in the *Vallianatos and Others v. Greece* judgment – which will be referredto below – is based on the principle of equality or non-discrimination set out in Article 14 ofthe Convention read together with Article 8 (or Article 1 of Protocol N°. 12). The Court found discriminatory the exclusion by Greek law of same-sex couples from the "cohabitation pact", which is open to different-sex couples.

***Vallianatos and Others v. Greece*,**
7 November 2013, n^os^. 29381/09 and 32684/09

Principal facts

The first application (n°. 29381/09) was filed by two Greek nationals, Grigoris Vallianatos and Nikolaos Mylonas, who were born in 1956 and 1958 respectively, and the second application (n°. 32684/09) was lodged by six Greek nationals, C.S., E. D., K.T., M.P., A.H. and D.N., and by the association Synthessi – Information, Awareness-raising and Research, a legal entity based in Athens. Mr Vallianatos and Mr Mylonas live together as a couple, C. S. and E.D. have lived together as a couple for a long time, as have K. T. and M. P., while A. H. and D. N. are in a relationship but do not live together for professional and social reasons. D.N. pays A. H.'s social security contributions. The seventh applicant is a non-profit association whose purpose includes moral and psychological support for gays and lesbians. On 26 November 2008, Law N°. 3719/2008, entitled "Reforms concerning the family, children and society", entered into force. This law made provision for an official form of partnership, the "cohabitation pact". According to Article 1 of that law, this pact could only be entered into by two adults of opposite sex.

Relying mainly on Article 14 (prohibition of discrimination) taken in conjunction with Article 8 (right to respect for private and family life), the applicants complained that the fact that the cohabitation pact was designed only for different-sex couples infringed their right to privateand family life and constituted an unjustified discrimination between different-sex couples and same-sex couples.

Decision of the Court

In a judgment delivered by the Grand Chamber, the Court found a violation of the principle of equality guaranteed by Article 14 (prohibition of discrimination) in conjunction with Article 8 (right to respect for private and family life) of the Convention following a reasoning which – by definition, where the legal ground chosen is the right to non-discrimination – was based on a comparison. This comparison was as follows.

"(α) Comparison of the applicants' situation with that of different-sex couples and existence of a difference in treatment

78. The first question to be addressed by the Court is whether the applicants' situation is comparable to that of different-sex couples wishing to enter into a civil union under Law n°. 3719/2008. The Court reiterates that same-sex couples are just as capable as different-sex couples of entering into stable committed relationships (see Schalk and Kopf, cited above, § 99). It therefore considers that the applicants are in a comparable situation to different-sex couples as regards their need for legal recognition and protection of their relationship (ibid.).

79. The Court further observes that section 1 of Law n°. 3719/2008 expressly reserves the possibility of entering into a civil union to two individuals of different sex. Accordingly, by tacitly excluding same-sex couples from its scope, the Law in question introduces a difference in treatment based on the sexual orientation of the persons concerned.

(β) *Legitimate aim and proportionality*

80. The Court observes that the Government relied chiefly on two sets of arguments to justify the legislature's choice not to include same-sex couples in the scope of Law n°. 3719/2008. Firstly, they contended that if the civil unions introduced by that Law were applied to the applicants, this would result for them in rights and obligations – in terms of their property status, the financial relations within each couple and their inheritance rights – for which they could already provide a legal framework under ordinary law, that is to say, on a contractual basis. Secondly, the Government argued that the legislation in question was designed to achieve several goals: protecting children born outside marriage, protecting single-parent families (as made clear in the explanatory report to the Law), responding to the wishes of parents to raise their children without being obliged to marry and, ultimately, strengthening the institutions of marriage and the family in the traditional sense.

81. As regards the first argument advanced by the Government, the Court is of the view that, even if it were to be considered valid, it does not take account of the fact that the civil partnerships provided for by Law n°. 3719/2008 as an officially recognised alternative to marriage have an intrinsic value for the applicants irrespective of the legal effects, however narrow or extensive, that they would produce. As the Court has already observed, same-sex couples are just as capable as different-sex couples of entering into stable committed relationships. Same-sex couples sharing their lives have the same needs in terms of mutual support and assistance as different-sex couples. Accordingly, the option of entering into a civil union would afford the former the only opportunity available to them under Greek law of formalising their relationship by conferring on it a legal status recognised by the State. The Court notes that extending civil unions to same-sex couples would allow the latter to regulate issues concerning property, maintenance and inheritance not as private individuals entering into contracts under the ordinary law but on the basis of the legal rules governing civil unions, thus having their relationship officially recognised by the State.

82. It is true that the Government's second main argument is that Law n°. 3719/2008 is designed to strengthen the legal status of children born outside marriage and to make it easier for

parents to raise their children without being obliged to marry. This aspect, it is argued, distinguishes different-sex couples from same-sex couples, since the latter cannot have biological children together.

83. The Court considers it legitimate from the standpoint of Article 8 of the Convention for the legislature to enact legislation to regulate the situation of children born outside marriage and also indirectly strengthen the institution of marriage within Greek society by promoting the notion, as explained by the Government, that the decision to marry would be taken purely on the basis of a mutual commitment entered into by two individuals, independently of outside constraints or of the prospect of having children (see paragraph 62 above). The Court accepts that protection of the family in the traditional sense is, in principle, a weighty and legitimate reason which might justify a difference in treatment (see *Karner*, § 40, and *Kozak*, § 98, both cited above). It goes without saying that the protection of the interests of the child is also a legitimate aim (see *X and Others v. Austria*, cited above, § 138). It remains to be ascertained whether the principle of proportionality was respected in the present case.

84. The Court reiterates the principles established in its case-law. The aim of protecting the family in the traditional sense is rather abstract and a broad variety of concrete measures may be used to implement it (see *Karner*, § 41, and *Kozak*, § 98, both cited above). Also, given that the Convention is a living instrument, to be interpreted in present-day conditions (see, among other authorities, *Tyrer v. the United Kingdom*, 25 April 1978, § 31, Series A n°. 26,and *Christine Goodwin v. the United Kingdom* [GC], n°. 28957/95, § 75, ECHR 2002-VI), the State, in its choice of means designed to protect the family and secure respect for familylife as required by Article 8, must necessarily take into account developments in society andchanges in the perception of social and civil-status issues and relationships, including the fact that there is not just one way or one choice when it comes to leading one's family or private life (see *X and Others v. Austria*, cited above, § 139).

85. In cases in which the margin of appreciation afforded to States is narrow, as is the position where there is a difference in treatment based on sex or sexual orientation, the principle of proportionality does not merely require the measure chosen to be suitable in principle for achievement of the aim sought. It must also be shown that it was necessary, in order to achieve that aim, to exclude certain categories of people – in this instance persons living in a homosexual relationship – from the scope of application of the provisions in issue (see *Karner*, § 41, and *Kozak*, § 99, both cited above). According to the case-law cited above, the burden of proof in this regard is on the respondent Government. It is therefore for the Greek Government to show in the instant case that it was necessary, in pursuit of the legitimate aims which they invoked, to bar same-sex couples from entering into the civil Unions provided for by Law n°. 3719/2008 (see, to similar effect, *X and Others v. Austria*, cited above, § 141).

86. The Court notes that the legislation in question does not merely provide for measures aimed at regulating the social realities and attaining the objectives referred to by the Government (see paragraph 80 above). It is designed first and foremost to afford legal recognition to a form of partnership other than marriage, referred to as "civil Unions". This emerges clearly from the content and structure of the Law. Section 1 defines a civil Union as a "contract between two different-sex adults governing their life as a couple". Furthermore, the subsequent sections are not confined to regulating the status of children born outside marriage, but deal with the living arrangements of couples who have entered into a civil Union. Sections 6 and 7, for instance, refer to the financial relations between the parties and the maintenance obligations on dissolution of the union. Section 11, meanwhile, provides that when one partner dies the surviving partner is entitled to inherit (see paragraph 16 above).

87. The Court notes in that regard that in its report on the draft legislation the National Human Rights Commission observed that it was not made clear why exactly the bill had been given the title "Reforms concerning the family, children and society", when it actually provided fora new legal form of non-marital partnership (see paragraph 22 above). In view of the foregoingthe Court considers that, notwithstanding its title and the declared intentions of the legislature, Law n°. 3719/2008 was primarily aimed at affording legal recognition to a new form of non-marital partnership.

88. In any event, even assuming that the legislature's intention was to enhance the legal protection of children born outside marriage and indirectly to strengthen the institution of marriage, the fact remains that, by enacting Law n°. 3719/2008, it introduced a form of civil partnership, known as "civil unions", which excluded same-sex couples while allowing different-sex couples, whether or not they had children, to regulate numerous aspects of their relationship.

89. On this point the Court notes firstly that the Government's arguments focus on the situation of different-sex couples with children, without justifying the difference in treatment arising out of the legislation in question between same-sex and different-sex couples who are not parents. Secondly, the Court is not convinced by the Government's argument that the attainment through Law n°. 3719/2008 of the goals to which they refer presupposes excluding same-sex couples from its scope. It would not have been impossible for the legislature to include some provisions dealing specifically with children born outside marriage, while at the same time extending to same-sex couples the general possibility of entering into a civil union. The Court points out in that connection that the explanatory report on the legislation in issue offers no insight into the legislature's decision to limit civil unions to different-sex couples (see paragraph 10 above). It further notes that the National Human Rights Commission considered the bill to be discriminatory since it did not apply to same-sex couples (see paragraphs 23-24 above) and that the Scientific Council of Parliament adopted a similar position (see paragraph 13 above).

90. Lastly, the Court observes that under Greek law, as the Government themselves pointed out (see paragraph 64 above), different-sex couples, unlike same-sex couples, could have their relationship legally recognised even before the enactment of Law n°. 3719/2008, whether fully on the basis of the institution of marriage or in a more limited form under the provisions of the Civil Code dealing with de facto partnerships. Consequently, same-sex couples would have a particular interest in entering into a civil union since it would afford them, unlike different-sex couples, the sole basis in Greek law on which to have their relationship legally recognised.

91. In addition, the Court would point to the fact that, although there is no consensus among the legal systems of the Council of Europe member States, a trend is currently emerging with regard to the introduction of forms of legal recognition of same-sex relationships. Nine member States provide for same-sex marriage. In addition, seventeen member States authorise some form of civil partnership for same-sex couples. As to the specific issue raised by the present case (see paragraph 75 above), the Court considers that the trend emerging in the legal systems of the Council of Europe member States is clear: of the nineteen States which authorise some form of registered partnership other than marriage, Lithuania and Greece arethe only ones to reserve it exclusively to different-sex couples (see paragraphs 25 and 26above). In other words, with two exceptions, Council of Europe member States, when they optto enact legislation introducing a new system of registered partnership as an alternative tomarriage for unmarried couples, include same-sex couples in its scope. Moreover, this trend is reflected in the relevant Council of Europe materials. In that regard the Court refers particularly to Resolution 1728(2010) of the Parliamentary Assembly of the Council of Europe and to Committee of Ministers Recommendation CM/Rec(2010)5 (see paragraphs 28-30 above).

92. The fact that, at the end of a gradUal evolUtion, a coUntry finds itself in an isolated position as regards one aspect of its legislation does not necessarily imply that that aspect conflicts with the Convention (see *F. v. Switzerland*, 18 December 1987, § 33, Series A n°. 128). Nevertheless,in view of the foregoing, the CoUrt considers that the Government have not offered convincingand weighty reasons capable of jUstifying the exclUsion of same-sex coUples from the scopeof Law n°. 3719/2008. Accordingly, it finds that there has been a violation of Article 14 of the Convention taken in conjUnction with Article 8 in the present case."

This identical treatment of different-sex and same-sex coUples has not only concerned access to legal Unions oUtside marriage, it has also concerned sitUations or legal interests arising oUtof them in matters of reunification or residence on family groUnds. ThUs, in the *Pajić v. Croatia* jUdgment of 23 February 2016, the CoUrt recognised an identical right to family reunification for Unmarried coUples regardless of their sexUal orientation (see above: "Family life"), and in the *Taddeucci and McCall v. Italy* jUdgment of 30 JUne 2016, an identical right to obtain a residence permit on family groUnds (see above: "Family life").

§ 2 – The legal union of marriage: a field left wholly to the discretion of states: the non-recognition of the right to same-sex marriage

Under the case law of the CoUrt, the right to marry is guaranteed by the EUropean Convention on HUman Rights only for coUples consisting of a man and a woman, and not for same-sex coUples.

In other words, the recognition or non-recognition of same-sex marriage is a matter left wholly to the discretion of states.

ConseqUently, the introdUction of certain differences of treatment between married coUples and civil partnerships, and hence indirectly between married different sex-coUples and same-sex registered partnerships, is also a matter for the discretion of states.

A | The option for states to recognise the right to same-sex marriage or not

The principle established by the *Schalk and Kopf* judgment

***Schalk and Kopf v. Austria*,**
24 JUne 2010, n°. 30141/04

Principal facts

The applicants, Horst Michael Schalk and Johann Franz Kopf, both of AUstrian nationality, born in 1962 and 1960 respectively, were a same-sex coUple living in Vienna.

In September 2002 they reqUested the office competent for these matters to proceed with the formalities to enable them to contract marriage. The Vienna MUnicipal Office refUsed their reqUest on the groUnd that marriage coUld only be contracted between two persons of opposite sex. They lodged an appeal with the Vienna Regional Governor, who Upheld the decision in April 2003.

In a sUbseqUent constitUtional complaint, the applicants alleged in particUlar that the legal impossibility for them to get married constitUted a violation of their right to respect for private and family life and of the principle of non-discrimination. In December 2003, the ConstitUtional CoUrt dismissed this complaint, holding in particUlar that neither the AUstrian ConstitUtion nor the EUropean Convention on HUman Rights reqUired that the concept of marriage as being geared

to the fUndamental possibility of parenthood shoUld be extended to relationships of a different kind and that the protection enjoyed by same-sex relationships Under the Convention did not give rise to an obligation to change the law of marriage.

On 1 JanUary 2010 the Registered Partnership Act came into force in AUstria. Its pUrpose was to provide same-sex coUples with a formal mechanism for recognising and giving legal effect to their relationships. AlthoUgh, for the most part, this Act gave registered partners the same rights and obligations as married persons, some differences remained. For example, the adoption of a child by registered partners, the adoption by one registered partner of the other's child and recoUrse to artificial insemination were prohibited.

Relying on Article 12 of the Convention, the applicants complained of the authorities' refUsal to allow them to marry. Under Article 14 taken together with Article 8 they also alleged that they were victims of discrimination on the groUnds of their sexUal orientation in that they had been refUsed the right to marry and had had no other possibility of secUring legal recognition of their relationship before the entry into force of the Registered Partnership Act.

Decision of the Court

The CoUrt allows states a wide margin of appreciation on the qUestion of whether or not to grant same-sex coUples the right to marry: on the one hand, non-recognition of a right to marry for same-sex coUples does not violate Article 12, which lays down the right to marry, and, on the other, the difference of treatment between same-sex coUples and opposite-sex coUples in this respect is therefore not regarded as being contrary to the principle of non-discrimination contained in Article 14 taken together with Article 8, which lays down the right to respect for private and family life".

Regarding the alleged violation of Article 12 of the Convention, the CoUrt adopted the following reasoning:

"49. According to the CoUrt's established case-law Article 12 secUres the fUndamental right of a man and woman to marry and to foUnd a family. The exercise of this right gives rise to personal, social and legal conseqUences. It is "sUbject to the national laws of the Contracting States", bUt the limitations thereby introdUced mUst not restrict or redUce the right in sUch a way or to sUch an extent that the very essence of the right is impaired (see *B. and L. v. the United Kingdom*, n°. 36536/02, § 34, 13 September 2005, and *F. v. Switzerland*, 18 December 1987, § 32, Series A n°. 128).

50. The CoUrt observes at the oUtset that it has not yet had an opportUnity to examine whether two persons who are of the same sex can claim to have a right to marry. However, certain principles might be derived from the CoUrt's case-law relating to transsexUals.

51. In a nUmber of cases the qUestion arose whether refUsal to allow a post-operative transsexUal to marry a person of the opposite sex to his or her assigned gender violated Article 12. In its earlier case-law the CoUrt foUnd that the attachment to the traditional concept of marriage which Underpins Article 12 provided sUfficient reason for the continUed adoption by the respondent State of biological criteria for determining a person's sex for the pUrposes of marriage. ConseqUently, this was considered a matter encompassed within the power of the Contracting States to regulate by national law the exercise of the right to marry (see *Sheffield and Horsham*, cited above, § 67; *Cossey v. the United Kingdom*, 27 September 1990, § 46, Series A n°. 184;see also *Rees v. the United Kingdom*, 17 October 1986, § § 49-50, Series A n°. 106).

52. In *Christine Goodwin* (cited above, § § 100-104) the CoUrt departed from that case-law: It considered that the terms Used by Article 12 which referred to the right of a man and woman to

marry no longer had to be understood as determining gender by purely biological criteria. In that context, the Court noted that there had been major social changes in the institution of marriage since the adoption of the Convention. Furthermore, it referred to Article 9 of the Charter of Fundamental Rights of the European Union, which departed from the wording of Article 12. Finally, the Court noted that there was widespread acceptance of the marriage of transsexuals in their assigned gender. In conclusion the Court found that the impossibility for a post-operative transsexual to marry in her assigned gender violated Article 12 of the Convention.

53. Two further cases are of interest in the present context: (*Parry v. the United Kingdom* (dec.), n°. 42971/05, ECHR 2006 XV, and *R. and F. v. the United Kingdom* (dec.), n°. 35748/05, 28 Novem- ber 2006). In both cases the applicants were a married couple, consisting of a woman and a maleto female post-operative transsexual. They complained inter alia under Article 12 of the Conven-tion that they were required to end their marriage if the second applicant wished to obtain fullegal recognition of her change of gender. The Court dismissed that complaint as being manifestlyill-founded. It noted that domestic law only permitted marriage between persons of opposite gender, whether such gender derived from attribution at birth or from a gender recognition procedure, while same-sex marriages were not permitted. Similarly, Article 12 enshrined the traditional concept of marriage as being between a man and a woman. The Court acknowledged that a number of Contracting States had extended marriage to same-sex partners, but went on to say that this reflected their own vision of the role of marriage in their societies and did not flow from an interpretation of the fundamental right as laid down by the Contracting States in the Convention in 1950. The Court concluded that it fell within the State's margin of appreciation how to regulate the effects of the change of gender on pre-existing marriages. In addition it considered that, should they chose to divorce in order to allow the transsexual partner to obtain full gender recognition, the fact that the applicants had the possibility to enter into a civil partnership contributed to the proportionality of the gender recognition regime complained of.

54. The Court notes that Article 12 grants the right to marry to "men and women". The French version provides "*l'homme et la femme ont le droit de se marier*". Furthermore, Article 12 grants the right to found a family.

55. The applicants argued that the wording did not necessarily imply that a man could only marry a woman and vice versa. The Court observes that, looked at in isolation, the wording of Article 12 might be interpreted so as not to exclude the marriage between two men or two women. However, in contrast, all other substantive Articles of the Convention grant rights and freedoms to "everyone" or state that "no one" is to be subjected to certain types of prohibited treatment.The choice of wording in Article 12 must thus be regarded as deliberate. Moreover, regard mustbe had to the historical context in which the Convention was adopted. In the 1950s marriage wasclearly understood in the traditional sense of being a union between partners of different sex.

56. As regards the connection between the right to marry and the right to found a family, the Court has already held that the inability of any couple to conceive or parent a child cannot be regarded as per se removing the right to marry (Christine Goodwin, cited above, § 98). However, this finding does not allow any conclusion regarding the issue of same-sex marriage.

57. In any case, the applicants did not rely mainly on the textual interpretation of Article 12. In essence they relied on the Court's case-law according to which the Convention is a living instrument which is to be interpreted in present-day conditions (see *E.B. v. France* [GC], n°. 43546/02, § 92, ECHR 2008 ..., and *Christine Goodwin*, cited above, §§ 74-75). In the applicants' contention Article 12 should in present-day conditions be read as granting same-sex couples access to marriage or, in other words, as obliging member States to provide for such access in their national laws.

58. The Court is not persuaded by the applicants' argument. Although, as it noted in *Christine Goodwin*, the institution of marriage has undergone major social changes since the adoption of the Convention, the Court notes that there is no European consensus regarding same-sex marriage. At present no more than six out of forty-seven Convention States allow same sex marriage.

59. As the respondent Government as well as the third-party Government have rightly pointed out, the present case has to be distinguished from *Christine Goodwin*. In that case (cited above, § 103) the Court perceived a convergence of standards regarding marriage of transsexuals in their assigned gender. Moreover, *Christine Goodwin* is concerned with marriage of partners who are of different gender, if gender is defined not by purely biological criteria but by taking other factors including gender reassignment of one of the partners into account.

60. Turning to the comparison between Article 12 of the Convention and Article 9 of the Charter of Fundamental Rights of the European Union (the Charter), the Court has already noted that the latter has deliberately dropped the reference to men and women (see *Christine Goodwin*, cited above, § 100). The commentary to the Charter, which became legally binding in December 2009, confirms that Article 9 is meant to be broader in scope than the corresponding articles in other human rights instruments. At the same time the reference to domestic law reflects the diversity of national regulations, which range from allowing same-sex marriage to explicitly forbidding it. By referring to national law, Article 9 of the Charter leaves the decision whether or not to allow same sex marriage to the States. In the words of the commentary: "... it may be argued that there is no obstacle to recognize same-sex relationships in the context of marriage. There is however, no explicit requirement that domestic laws should facilitate such marriages."

61. Regard being had to Article 9 of the Charter, therefore, the Court 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. Consequently, it cannot be said that Article 12 is inapplicable to the applicants' complaint. However, as matters stand, the question whether or not to allow same-sex marriage is left to regulation by the national law of the Contracting State.

62. In that connection the Court observes that marriage has deep-rooted social and cultural connotations which may differ largely from one society to another. The Court reiterates that it must not rush to substitute its own judgment in place of that of the national authorities, who are best placed to assess and respond to the needs of society (see *B. and L. v. the United Kingdom*, cited above, § 36).

63. In conclusion, the Court finds that Article 12 of the Convention does not impose an obligation on the respondent Government to grant a same-sex couple like the applicants access to marriage.

64. Consequently, there has been no violation of Article 12 of the Convention."

Regarding the alleged violation of Article 14 taken in conjunction with Article 8 of the Convention, the Court adopted the following reasoning:

"65. The applicants complained under Article 14 taken in conjunction with Article 8 of the Convention that they were discriminated against on account of their sexual orientation, since they were denied the right to marry and did not have any other possibility to have their relationship recognised by law before the entry into force of the Registered Partnership Act. [...]

97. On the one hand the Court has held repeatedly that, just like differences based on sex, differences based on sexual orientation require particularly serious reasons by way of justification (see Karner, cited above, § 37; L. and V. v. Austria, cited above, § 45; and Smith and Grady,

cited above, § 90). On the other hand, a wide margin is usually allowed to the State under the Convention when it comes to general measures of economic or social strategy (see, for instance, Stec and Others v. the United Kingdom [GC], n°. 65731/01, § 52, ECHR 2006 VI).

98. The scope of the margin of appreciation will vary according to the circumstances, the subject matter and its background; in this respect, one of the relevant factors may be the existence or non-existence of common ground between the laws of the Contracting States (see Petrovic, cited above, § 38).

99. While the parties have not explicitly addressed the issue whether the applicants were in a relevantly similar situation to different-sex couples, the Court would start from the premise that same-sex couples are just as capable as different-sex couples of entering into stable committed relationships. Consequently, they are in a relevantly similar situation to a different-sex couple as regards their need for legal recognition and protection of their relationship.

100. The applicants argued that they were discriminated against as a same-sex couple, firstly, in that they still did not have access to marriage and, secondly, in that no alternative means of legal recognition were available to them until the entry into force of the Registered Partnership Act.

101. Insofar as the applicants appear to contend that, if not included in Article 12, the right to marry might be derived from Article 14 taken in conjunction with Article 8, the Court is unable to share their view. It reiterates that the Convention is to be read as a whole and its Articles should therefore be construed in harmony with one another (see Johnston and Others, cited above, § 57). Having regard to the conclusion reached above, namely that Article 12 does not impose an obligation on Contracting States to grant same-sex couples access to marriage, Article 14 taken in conjunction with Article 8, a provision of more general purpose and scope, cannot be interpreted as imposing such an obligation either.

102. Turning to the second limb of the applicants' complaint, namely the lack of alternative legal recognition, the Court notes that at the time when the applicants lodged their application they did not have any possibility to have their relationship recognised under Austrian law. That situation obtained until 1 January 2010, when the Registered Partnership Act entered into force.

103. The Court reiterates in this connection that in proceedings originating in an individual application it has to confine itself, as far as possible, to an examination of the concrete case before it (see F. v. Switzerland, cited above, § 31). Given that at present it is open to the applicants to enter into a registered partnership, the Court is not called upon to examine whether the lack of any means of legal recognition for same-sex couples would constitute a violation of Article 14 taken in conjunction with Article 8 if it still obtained today.

104. What remains to be examined in the circumstances of the present case is whether the respondent State should have provided the applicants with an alternative means of legal recognition of their partnership any earlier than it did.

105. The Court cannot but note that there is an emerging European consensus towards legal recognition of same-sex couples. Moreover, this tendency has developed rapidly over the past decade. Nevertheless, there is not yet a majority of States providing for legal recognition of same-sex couples. The area in question must therefore still be regarded as one of evolving rights with no established consensus, where States must also enjoy a margin of appreciation in the timing of the introduction of legislative changes (see Courten, cited above; see also M.W. v. the United Kingdom (dec.), n°. 11313/02, 23 June 2009, both relating to the introduction of the Civil Partnership Act in the United Kingdom).

106. The Austrian Registered Partnership Act, which entered into force on 1 January 2010, reflects the evolution described above and is thus part of the emerging European consensus. Though not in the vanguard, the Austrian legislator cannot be reproached for not having introduced the Registered Partnership Act any earlier (see, mutatis mutandis, Petrovic, cited above, § 41).

107. Finally, the Court will examine the applicants' argument that they are still discriminated against as a same sex-couple on account of certain differences conferred by the status of marriage on the one hand and registered partnership on the other.

108. The Court starts from its findings above, that States are still free, under Article 12 of the Convention as well as under Article 14 taken in conjunction with Article 8, to restrict access to marriage to different-sex couples. Nevertheless the applicants appear to argue that if a State chooses to provide same-sex couples with an alternative means of recognition, it is obliged to confer a status on them which – though carrying a different name – corresponds to marriage in each and every respect. The Court is not convinced by that argument. It considers on the contrary that States enjoy a certain margin of appreciation as regards the exact status conferred by alternative means of recognition.

109. The Court observes that the Registered Partnership Act gives the applicants a possibility to obtain a legal status equal or similar to marriage in many respects. While there are only slight differences in respect of material consequences, some substantial differences remain in respect of parental rights. However, this corresponds on the whole to the trend in other member States. Moreover, the Court is not called upon in the present case to examine each and every one of these differences in detail. For instance, as the applicants have not claimed that they are directly affected by the remaining restrictions concerning artificial insemination or adoption, it would go beyond the scope of the present application to examine whether these differences are justified. On the whole, the Court does not see any indication that the respondent State exceeded its margin of appreciation in its choice of rights and obligations conferred by registered partnership.

110. In conclusion, the Court finds there has been no violation of Article 14 of the Convention taken in conjunction with Article 8."

Case law applications

Chapin and Charpentier v. France,
9 June 2016, n°. 40183/07

Principal facts

The applicants, Stéphane Chapin and Bertrand Charpentier, are French nationals who were born in 1970 and 1973 respectively and live in Plassac. In May 2004, Mr Chapin and Mr Charpentier filed a marriage application with the civil registry department of the municipal office of Bègles. The municipal civil registrar published the banns of marriage. The public prosecutor at the Bordeaux tribunal de grande instance served notice of his objection to the marriage to the Bègles municipal civil registrar and to Mr Chapin and Mr Charpentier. Despite this objection, the mayor of Bègles celebrated the marriage of the applicants and recorded it in the civil register. On 22 June 2004, the public prosecutor brought proceedings against Mr Chapin and Mr Charpentier before the Bordeaux tribunal de grande instance, seeking to have the marriage annulled. On 27 July 2004, the court annulled the applicants' marriage and ordered its judgment to be recorded in the margin of their birth certificates and marriage certificate. The Bordeaux Court of Appeal upheld the judgment. Mr Chapin and Mr Charpentier appealed on points of law. On 13 March 2007, the Court of Cassation dismissed their appeal.

Relying on Article 14 (prohibition of discrimination) taken in conjunction with Article 12 (right to marry) and Article 8 (right to respect for private and family life) respectively, Mr Chapin and Mr Charpentier contended that they had been discriminated against on grounds of their sexual orientation.

Decision of the Court

The Court held, on the one hand, that there had been no violation of Article 14, read in conjunction with Article 12; the reason for this being as follows.

"36. In *Schalk and Kopf* (§§ 58–63), the Court stated that, while there had been major social changes in the institution of marriage since the adoption of the Convention, there was no European consensus on the issue of same-sex marriage. It considered that Article 12 of the Convention applied to the applicants' complaints, but that the question whether or not to allow same-sex marriage was left to regulation by the national laws of the Contracting States. It observed that marriage has deep-rooted social and cultural connotations which may differ significantly from one society to another and recalled that it should not rush to substitute its own judgment in place of that of the national authorities that are best placed to assess and respond to the needs of society. It therefore found that Article 12 did not impose an obligation on the res- pondent government to grant a same-sex couple like the applicants access to marriage (see also *Gas and Dubois v. France*, n°. 25951/07, § 66 ECHR 2012).

37. The Court reiterated this conclusion in the recent judgments in *Hämäläinen* and *Oliari and Others* cited above. In the *Hämäläinen* judgment (§ 96), it recalled that Article 12 enshrined the traditional concept of marriage as being the union of a man and a woman and that, while a number of member states had indeed extended marriage to same-sex partners, this article could not be understood as imposing such an obligation on Contracting States.

38. In the *Oliari and Others* judgment (§§ 192–194), it stated that these findings remained pertinent despite the gradual evolution of states on the matter, with eleven Council of Europe member States now allowing same-sex marriage. The Court recalled that in *Schalk and Kopf* it had held that, just as Article 12, Article 14 taken in conjunction with Article 8, whose purpose and scope are more general, could not be interpreted as imposing on Contracting States the obligation to extend marriage to same-sex couples. Accordingly, it concluded that the same approach was applicable to Article 12 taken in conjunction with Article 14 and rejected this complaint as being manifestly ill-founded (§ 194).

39. The Court sees no reason to reach a different conclusion in the present case, given the short period of time since its judgments in the *Hämäläinen* and Oliari and Others cases. It also observes that, since the filing of the application, the Law of 17 May 2013 has granted access to marriage to same-sex couples and that the applicants are now free to marry.

It follows that in the present case there has been no violation of Article 12 in conjunction with Article 14 of the Convention."

On the other hand, the Court considered that there had been no violation of Article 14, read in conjunction with Article 8. Its reasoning was as follows.

"48. The Court recalls that States remain free under Article 14 taken in conjunction with Article 8 to grant access to marriage only to different-sex couples and that they enjoy a certain margin of appreciation as regards the exact status conferred by alternative means of legal recognition (*Schalk and Kopf*, cited above, § 108 and *Gas and Dubois*, cited above, § 66).

49. It points out that, while at the time of the events access to marriage under French law was not open to the applicants, they could nevertheless enter into a civil solidarity pact, provided for by Article 515-1 of the French Civil Code, which grants the partners a number of rights and obligations in tax, property and social matters.

50. In this respect, the situation differs from other cases in which the Court found a violation of Articles 8 and 14 in conjunction, namely the above-mentioned *Vallianatos* case, where the cohabitation pact was only open to different-sex couples under Greek law, and the *Oliari and Others* case, where Italian law did not provide any method of legal recognitionof same-sex couples.

51. Insofar as the applicants claim that there are differences between the regime of marriage and that of the civil solidarity pact, the Court reiterates that it is not called upon in the present case to rule on each and every one of these differences in detail (*Schalk and Kopf*, cited above, § 109). In any event, it observes, as it noted in that judgment, that these differences generally correspond to the trend in other member States and does not see any indication that the respondent State exceeded its margin of appreciation in its choice of rights and obligations conferred by the civil solidarity pact (ibidem).

    In addition, as recalled above (paragraph 39), the Law of 17 May 2013 has granted access to marriage to same-sex couples and the applicants are now free to marry.

52. Accordingly, the Court finds that there has been no violation of Article 8 of the Convention taken in conjunction with Article 14 in the present case."

B | The option for states to introduce, or not, certain differences of treatment between married couples and civil partnerships

Since the Convention places no obligation on states to open up marriage to gay and lesbian couples – neither under Article 12 nor under Article 14 taken in conjunction with Article 14 – the recognition or non-recognition of homosexual couples is a matter left entirely to the discretion of states, which are free, therefore, to afford legal recognition to same-sex couples in the form of either marriage or civil partnership. Where states decide to grant same-sex couples an alternative form of legal recognition, they enjoy a certain margin of appreciation under Article 14 to establish distinctions between married and unmarried couples, and hence – indirectly – between different-sex and same-sex couples.

Gas and Dubois v. France, *15 March 2012, nº. 25951/07*

It is in terms of these indirect consequences for same-sex couples that this case warrants consideration.

Principal facts

The applicants, Valérie Gas and Nathalie Dubois, both of French nationality, had been cohabiting in France since 1989. In September 2000 Nathalie Dubois gave birth in France to a daughter, A., who had been conceived in Belgium by means of artificial insemination by anonymous donor (AID). The child had no established paternity in accordance with Belgian law and was recognised by the mother on 9 October 2000. She had lived all her life in the applicants' shared home. In April 2002 Ms Gas and Ms Dubois entered into a civil partnership agreement.

On 3 March 2006 Ms Gas applied to the Nanterre *tribunal de grande instance* for asimple adoption order in respect of her partner's daughter; her partner had given her express consent before a notary. On 4 July 2004 the court dismissed the application on the following grounds: adoption

had been applied for under Article 365 of the Civil Code, which did not in itself prohibit adoption in such a case, but its effect would have been to transfer exclusive parental authority to Ms Gas, thus depriving Ms Dubois of parental authority. Article 365 allowed only one exception to this, when the person wishing to adopt was the parent's spouse. Yet Ms Gas was not married to Ms Dubois and, under French law, could not be, because French law recognised marriage only for opposite-sex couples, not same-sex couples[124]. The Versailles Court of Appeal upheld this finding: since the applicants would be unable to share parental responsibility as permitted by the Civil Code in the case of adoption by the spouse of the child's biological mother or father, the adoption would deprive Ms Dubois of all rights in relation to her child.

The applicants complained of the refusal of Ms Gas's application to adopt Ms Dubois's child. They maintained that this decision had infringed their right to private and family life in a discriminatory manner, in breach of Article 14 taken in conjunction with Article 8.

Decision of the Court

The Court held in a chamber judgment that the principle of non-discrimination guaranteed by the Convention had not been violated. Its reasoning was as follows. The Court considered that, where adoption by the second parent was concerned, the applicants could not be regarded as being in a comparable legal situation to that of married couples. Furthermore, the Court found no difference of treatment based on the applicants' sexual orientation because heterosexual couples in a civil partnership also met with a refusal when it came to simple adoption. In response to the applicants' argument that heterosexual couples in a civil partnership could get around this prohibition by marrying, the Court reiterated its conclusions concerning the opening up of marriage to same-sex couples (*Schalk and Kopf v. Austria*).

X and Others v. Austria, *19 February 2013, nº. 19010/07*

In this case concerning second-parent adoption, the facts of which have already been set out in detail (see above), two women living together in a stable lesbian relationship complained of the refusal of the Austrian courts to allow one partner to adopt the other's son without the legal ties between the mother and her child being severed.

The Court compares the legal regime applied to the applicants first with that applied to unmarried heterosexual couples and finds a violation of Article 14 taken in conjunction with Article 8 (this point has already been dealt with; see above). Secondly, it draws a comparison with the legal regime applied to married heterosexual couples (only heterosexual were allowed to marry under Austrian law at the time of the facts) and finds that there has been no violation of Article 14 taken in conjunction with Article 8 of the Convention. Its reasoning was as follows:

On this specific point the Court confirms the solution it adopted in its recent judgment in the *Gas et Dubois v. France* case, in which it held that the situation of a lesbian couple in which one partner wished to adopt the other's child without the legal ties between the mother and her child being severed was not comparable to that of a married couple. In other words, the difference of treatment between married and unmarried couples is regarded as justified and, hence, not discriminatory. The Court sees no reason to depart here from the solution reached in the judgment

[124] Article 365 of the Civil Code governs the transfer of parental responsibility in the event of simple adoption. Parental responsibility is transferred to the adoptive parent; the biological parent or parents thus cease to exercise parental responsibility, except where the adoptee is the child of the husband or wife, in which case the couple share parental responsibility. This exception does not apply to the parties in a civil partnership.

in question. This case therefore confirms that the criterion which it regards as objectively justified for allowing or refusing second-parent adoption is whether or not there is a marital bond. The issue at stake here is therefore not sexual orientation but marriage.

The Court reiterates that the Convention does not impose an obligation on Contracting States to grant same-sex couples access to marriage. Where a state chooses to provide same-sex couples with an alternative means of legal recognition, it enjoys a certain margin of appreciation as regards the exact status conferred. Furthermore, marriage confers a special status on those who enter into it and gives rise to social, personal and legal consequences. The Court concludesin the case in point that the applicants' situation is not comparable to that of a married couple. Consequently, there has been no violation of Article 14 taken together with Article 8 when the applicants' situation is compared with that of a married couple in which one spouse wishes to adopt the other spouse's child. In conclusion, the Court recognises the possibility of applying different regimes to married and unmarried couples in respect of adoption.

Sabine Boeckel
and Anja Gessner-Boeckel v. Germany,
7 May 2013, n°. 8017/11

This case concerns two women living together in a registered civil partnership, during which time one of them gave birth to a child. The child was adopted by her partner under a second-parent adoption procedure, thus allowing both partners to exercise parental authority in respect of the child. However, the rules for recording parental status on a child's birth certificate differ according to whether the child was born within a marriage between two persons of different sex or outside marriage within a civil partnership between two persons of the same sex, as in this case. The applicants complained under Article 8 (right to respect for private and family life) taken alone and in conjunction with Article 14 (prohibition of discrimination) of the refusal to record one of them as a parent on the birth certificate of the child to which the other had given birth during their partnership, although this possibility was open to the husband of the mother of a child born within marriage. The Court held that the applicants' situation was not relevantly similar to that of a married different-sex couple in respect of the entries made in a child's birth certificate and declared the application inadmissible on the grounds that it was manifestly ill-founded.

Aldeguer Tomás v. Spain,
14 June 2016, n°. 35214/09

In the *Aldeguer Tomás v. Spain* case of 14 June 2016, the dispute referred to the European Court of Human Rights concerned the refusal of the Spanish social security authorities to pay a survivor's pension to the surviving member of an unmarried same-sex couple, since the law legalising same-sex marriage in Spain was only implemented three years after the partner's death.

Thus, the legislation in force at the time did not allow them to get married. In the Court's view, the difference in treatment between married couples and couples in civil partnerships in the period prior to the entry into force of the law legalising same-sex marriage was not in breach of the Convention. More precisely, the legal consequences which resulted from this were also differentiated and did not constitute a violation of Article 14 taken in conjunction with Article 1 of Protocol N°. 1, as regards the granting, or not, of a survivor's pension.

2 The standard of protection afforded to transgender persons

Initially, in the 1980s, the European Court of Human Rights maintained that European states generally enjoyed a wide margin of appreciation with regard to the protection of transgender persons.Conversely, in the fields in which the Court notes differences of opinion between states, it tends to maintain a wider national margin of appreciation.

This position gradually became more nuanced, so that a distinction now needs to be drawn between matters in which states have gradually lost their wide margin of appreciation and those in which it has been maintained.

The wide national margin of appreciation was reduced first of all circumstantially starting in the early 1990s (the first finding of a violation dates back to 1992), then more extensively and decisively starting from the early 2000s (following an important judgment delivered in 2002) with regard to all matters concerning principally the recognition of gender reassignment and the possibility for transgender persons to marry.

On the other hand, Contracting States retain a wide margin of appreciation in all matters concerning, since 2006, the question of the establishment of a legal child–parent relationship with a non–biological child and, since 1997, that of the possible repercussions of the recognition of gender reassignment for non–recognition of the right to same–sex marriage.

Chapter 1. Fields governed by common European legal rules"

As it stands, European case law recognises a real right of transgender persons to legal recognition of their gender identity and the right to marry a person of the opposite sex (following gender reassign–ment). The first of these rights has been established circumstantially since the *B. v. France* judgment of 1992 and as a matter of principle since the famous *Goodwin v. United Kingdom* judgment of 2002. The second was not secured until 2002 by that same *Goodwin* judgment. On both these questions, the European Court of Human Rights now leaves the Contracting States a narrow margin of appreciation and offers transgender persons a standard of protection common to all European states.

This has not always been the case. Previously, since the 1986 *Rees v. United Kingdom* judgment and a series of cases decided on that basis (*Cossey* in 1990 and *Sheffield and Horsham* in 1998),the Court had refused to recognise either of these rights and granted Contracting States a wide margin of appreciation in these matters.

The previously cited *Goodwin* judgment sums up the Court's position during this earlier period:

"73. The Court recalls that it has already examined complaints about the position of transsexuals in the United Kingdom (see the *Rees v. the United Kingdom* judgment of 17 October 1986, Series A n°. 106, the *Cossey v. the United Kingdom* judgment, cited above; the *X., Y. and Z. v. the United Kingdom* judgment of 22 April 1997, *Reports of Judgments and Decisions* 1997-II,and the *Sheffield and Horsham v. the United Kingdom* judgment of 30 July 1998, Reports1998-V, p. 2011). In those cases, it held that the refusal of the United Kingdom Government toalter the register of births or to issue birth certificates whose contents and nature differed fromthose of the original entries concerning the recorded gender of the individual could not be considered as an interference with the right to respect for private life (the above-mentioned *Rees* judgment, p. 14, § 35, and *Cossey* judgment, p. 15, § 36). It also held that there was nopositive obligation on the Government to alter their existing system for the registration of births by establishing a new system or type of documentation to provide proof of current civil status. Similarly, there was no duty on the Government to permit annotations to the existing register of births, or to keep any such annotation secret from third parties (the above-mentioned *Rees* judgment, p. 17, § 42, and *Cossey* judgment, p. 15, § § 38-39). It was found in those cases that the authorities had taken steps to minimise intrusive enquiries (for example, by allowing transsexuals to be issued with driving licences, passports and other types of documents in their new name and gender). Nor had it been shown that the failure to accord general legal recognition of the change of gender had given rise in the applicants' own case histories to detriment of sufficient seriousness to override the respondent State's margin of appreciation in this area (the *Sheffield and Horsham* judgment cited above, p. 2028-29, § 59).

74. [...] In the present context the Court has, on several occasions since 1986, signalled its consciousness of the serious problems facing transsexuals and stressed the importance of keeping the need for appropriate legal measures in this area under review (see the Rees judgment, § 47; the *Cossey* judgment, § 42; the *Sheffield and Horsham* judgment, § 60)."

In the *Goodwin* judgment delivered in 2002, the Court abandoned the *Rees*, *Cossey* and *Sheffieldand Horsham* case law. Despite the persistence of differences of opinion between the ContractingStates on legal recognition of sex changes, the Court considered that "the unsatisfactory situationin which post-operative transsexuals live in an intermediate zone as not quite one gender or the other is no longer sustainable" and found that "the respondent Government can no longer claim that the matter falls within their margin of appreciation". Consequently, Article 8 of the Conventionnow places a positive obligation on Contracting States to give some form of legal recognitionto transgender persons' true gender identity and to allow them to marry a person of the oppositesex (following gender reassignment).

Section 1. The right to legal recognition of transgender persons' gender identity

In its principle, the right to recognition of gender reassignment was established by the famous *Christine Goodwin v. United Kingdom* judgment of 11 July 2002 and was prefigured by the *B. v.France* judgment of 1992. While states have some degree of latitude regarding the means to be em-ployed to permit recognition of gender reassignment[125], this nevertheless remains very circumscribed.Indeed, the Court has evolved a body of case law granting transgender persons a set of rights whichmay be regarded as corollaries of the general principle of legal recognition of transgender persons' gender identity. These rights concern – first of all – the conditions prior to legal recognition of gender reassignment, and – secondly – the scope or impact of this legal recognition.

[125] As indicated in § 83 of the Goodwin judgment, see below

§ 1 – The principle of legal recognition of gender reassignment established by the *Goodwin* judgment

***Christine Goodwin v. the United Kingdom*,**
11 July 2002, n°. 28957/95

Principal facts

The Court presented the facts of the case as follows:

"12. The applicant is a United Kingdom citizen born in 1937 and is a post-operative male to female transsexual.

13. The applicant had a tendency to dress as a woman from early childhood and underwent aversion therapy in 1963-64. In the mid-1960s, she was diagnosed as a transsexual. Though she married a woman and they had four children, her conviction was that her "brain sex" did not fit her body. From that time until 1984 she dressed as a man for work but as a woman in her free time. In January 1985, the applicant began treatment in earnest, attending appointments once every three months at the Gender Identity Clinic at the Charing Cross Hospital, which included regular consultations with a psychiatrist as well as on occasion a psychologist. She was prescribed hormone therapy, began attending grooming classes and voice training. Since this time, she has lived fully as a woman. In October 1986, she underwent surgery to shorten her vocal chords. In August 1987, she was accepted on the waiting list for gender re-assignment surgery. In 1990, she underwent gender re-assignment surgery at a National Health Service hospital. Her treatment and surgery was provided for and paid for by the National Health Service.

14. The applicant divorced from her former wife on a date unspecified but continued to enjoy the love and support of her children.

15. The applicant claims that between 1990 and 1992 she was sexually harassed by colleagues at work. She attempted to pursue a case of sexual harassment in the Industrial Tribunal but claimed that she was unsuccessful because she was considered in law to be a man. She did not challenge this decision by appealing to the Employment Appeal Tribunal. The applicant was subsequently dismissed from her employment for reasons connected with her health, but alleges that the real reason was that she was a transsexual.

16. In 1996, the applicant started work with a new employer and was required to provide her National Insurance ("NI") number. She was concerned that the new employer would be in a position to trace her details as once in the possession of the number it would have been possible to find out about her previous employers and obtain information from them. Although she requested the allocation of a new NI number from the Department of Social Security ("DSS"), this was rejected and she eventually gave the new employer her NI number. The applicant claims that the new employer has now traced back her identity as she began experiencing problems at work. Colleagues stopped speaking to her and she was told that everyone was talking about her behind her back.

17. The DSS Contributions Agency informed the applicant that she would be ineligible for a State pension at the age of 60, the age of entitlement for women in the United Kingdom. In April 1997, the DSS informed the applicant that her pension contributions would have to be continued until the date at which she reached the age of 65, being the age of entitlement for men, namely April 2002. On 23 April 1997, she therefore entered into an Undertaking with the DSS to pay direct the NI contributions which would otherwise be deducted by her employer as for all male employees. In the light of this Undertaking, on 2 May 1997, the DSS Contributions Agency issued the applicant with a Form CF 384 Age Exemption Certificate (see relevant domestic law and practice below).

18. The applicant's files at the DSS were marked "sensitive" to ensure that only an employee of a particular grade had access to her files. This meant in practice that the applicant had to make special appointments for even the most trivial matters and could not deal directly with the local office or deal with queries over the telephone. Her record continues to state her sex as male and despite the "special procedures" she has received letters from the DSS addressed to the male name which she was given at birth.

19. In a number of instances, the applicant stated that she has had to choose between revealing her birth certificate and foregoing certain advantages which were conditional upon her producing her birth certificate. In particular, she has not followed through a loan conditional upon life insurance, a re-mortgage offer and an entitlement to winter fuel allowance from the DSS. Similarly, the applicant remains obliged to pay the higher motor insurance premiums applicable to men. Nor did she feel able to report a theft of 200 pounds sterling to the police, for fear that the investigation would require her to reveal her identity."

Under these circumstances, the applicant complained of the lack of legal recognition of her new gender identity and the legal status accorded to transgender persons in the United Kingdom. She criticised in particular the fact that her inability to secure legal recognition of her gender identity had had prejudicial effects on various aspects of her private life, particularly in the sphere of employment, social security and pensions.

Decision of the Court

The Court considered the question of non-recognition of gender reassignment from the angle of compliance with Article 8 of the Convention guaranteeing the right to respect for private life. Its reasoning was as follows:

"1. *Preliminary considerations*

71. This case raises the issue whether or not the respondent State has failed to comply witha positive obligation to ensure the right of the applicant, a post-operative male to female transsexual, to respect for her private life, in particular through the lack of legal recognition given to her gender re-assignment.

72. The Court recalls that the notion of "respect" as understood in Article 8 is not clear cut, especially as far as the positive obligations inherent in that concept are concerned: having regard to the diversity of practices followed and the situations obtaining in the Contracting States, the notion's requirements will vary considerably from case to case and the margin of appreciation to be accorded to the authorities may be wider than that applied in other areas under the Convention. In determining whether or not a positive obligation exists, regard must also be had to the fair balance that has to be struck between the general interest of the community and the interests of the individual, the search for which balance is inherent in the whole of the Convention (*Cossey v. the United Kingdom* judgment of 27 September 1990, Series A n°. 184, p. 15, § 37). [...]

75. The Court proposes [...] to look at the situation within and outside the Contracting State to assess "in the light of present-day conditions" what is now the appropriate interpretation and application of the Convention (see the *Tyrer v. the United Kingdom* judgment of 25 April 1978, Series A n°. 26, § 31, and subsequent case-law).

2. *The applicant's situation as a transsexual*

76. The Court observes that the applicant, registered at birth as male, has undergone gender re-assignment surgery and lives in society as a female. Nonetheless, the applicant remains, for legal purposes, a male. This has had, and continues to have, effects on the applicant's life where sex is of legal relevance and distinctions are made between men and women, as,

inter alia, in the area of pensions and retirement age. For example, the applicant must continue to pay national insurance contributions until the age of 65 due to her legal status as male. However as she is employed in her gender identity as a female, she has had to obtain an exemption certificate which allows the payments from her employer to stop while she continues to make such payments herself. Though the Government submitted that this made due allowance for the difficulties of her position, the Court would note that she nonetheless has to make use of a special procedure that might in itself call attention to her status.

77. It must also be recognised that serious interference with private life can arise where the state of domestic law conflicts with an important aspect of personal identity (see, *mutatis mutandis*, *Dudgeon v. the United Kingdom* judgment of 22 October 1981, Series A n°. 45, § 41). The stressand alienation arising from a discordance between the position in society assumed by a post-operative transsexual and the status imposed by law which refuses to recognise the changeof gender cannot, in the Court's view, be regarded as a minor inconvenience arising from a formality.A conflict between social reality and law arises which places the transsexual in an anomalous position, in which he or she may experience feelings of vulnerability, humiliation and anxiety.

78. In this case, as in many others, the applicant's gender re-assignment was carried out by the national health service, which recognises the condition of gender dysphoria and provides, inter alia, re-assignment by surgery, with a view to achieving as one of its principal purposesas close an assimilation as possible to the gender in which the transsexual perceives that he orshe properly belongs. The Court is struck by the fact that nonetheless the gender re-assignment which is lawfully provided is not met with full recognition in law, which might be regarded as the final and culminating step in the long and difficult process of transformation which the transsexual has undergone. The coherence of the administrative and legal practices within the domestic system must be regarded as an important factor in the assessment carried outUnder Article 8 of the Convention. Where a State has authorised the treatment and surgery alleviating the condition of a transsexual, financed or assisted in financing the operations andindeed permits the artificial insemination of a woman living with a female-to-male transsexual (as demonstrated in the case of *X., Y. and Z. v. the United Kingdom*, cited above), it appearsillogical to refuse to recognise the legal implications of the result to which the treatment leads.

79. The Court notes that the unsatisfactory nature of the current position and plight of transse-xuals in the United Kingdom has been acknowledged in the domestic courts (see *Bellinger v. Bellinger*, [...]) and by the Interdepartmental Working Group which surveyed the situationin the United Kingdom and concluded that, notwithstanding the accommodations reachedin practice, transsexual people were conscious of certain problems which did not have to be faced by the majority of the population.

80. Against these considerations, the Court has examined the countervailing arguments of a public interest nature put forward as justifying the continuation of the present situation. It observes that in the previous United Kingdom cases weight was given to medical and scientific considerations, the state of any European and international consensus and the impact of any changes to the current birth register system.

3. *Medical and scientific considerations*

81. It remains the case that there are no conclusive findings as to the cause of transsexualism and, in particular, whether it is wholly psychological or associated with physical differentiation in the brain. The expert evidence in the domestic case of *Bellinger v. Bellinger* was found to indicate a growing acceptance of findings of sexual differences in the brain that are determined pre-natally, though scientific proof for the theory was far from complete. The Court considers

it more significant however that transsexualism has wide international recognition as a medical condition for which treatment is provided in order to afford relief (for example, the Diagnostic and Statistical Manual fourth edition (DSM–IV) replaced the diagnosis of transsexualism with "gender identity disorder"; see also the International Classification of Diseases, tenth edition (ICD–10)). The United Kingdom national health service, in common with the vast majority of Contracting States, acknowledges the existence of the condition and provides or permits treatment, including irreversible surgery. The medical and surgical acts which in this case rendered the gender re–assignment possible were indeed carried out under the supervision of the national health authorities. Nor, given the numerous and painful interventions involved in such surgery and the level of commitment and conviction required to achieve a change in social gender role, can it be suggested that there is anything arbitrary or capricious in the decision taken by a person to undergo gender re–assignment. In those circumstances, the ongoing scientific and medical debate as to the exact causes of the condition is of diminished relevance.

82. While it also remains the case that a transsexual cannot acquire all the biological characteristics of the assigned sex (S*heffield and Horsham*, cited above, p. 2028, § 56), the Court notes thatwith increasingly sophisticated surgery and types of hormonal treatments, the principal unchanging biological aspect of gender identity is the chromosomal element. It is known however that chromosomal anomalies may arise naturally (for example, in cases of as conditionswhere the biological criteria at birth are not congruent) and in those cases, some persons have to be assigned to one sex or the other as seems most appropriate in the circumstances of the individual case. It is not apparent to the Court that the chromosomal element, amongst all the others, must inevitably take on decisive significance for the purposes of legal attribution of gender identity for transsexuals (see the dissenting opinion of Thorpe LJ in *Bellinger v. Bellinger* [···]; and the judgment of Chisholm J in the Australian case, *Re Kevin*, [···]).

83. The Court is not persuaded therefore that the state of medical science or scientific knowledge provides any determining argument as regards the legal recognition of transsexuals.

4. *The state of any European and international consensus*

84. Already at the time of the *Sheffield and Horsham* case, there was an emerging consensus within Contracting States in the Council of Europe on providing legal recognition following gender re–assignment (see § 35 of that judgment). The latest survey submitted by Liberty in the present case shows a continuing international trend towards legal recognition. In Australia and New Zealand, it appears that the courts are moving away from the biological birth view of sex (as set out in the United Kingdom case of *Corbett v. Corbett*) and taking the view that sex, in the context of a transsexual wishing to marry, should depend on a multitude of factors to be assessed at the time of the marriage.

85. The Court observes that in the case of *Rees* in 1986 it had noted that little common ground existed between States, some of which did permit change of gender and some of which did not and that generally speaking the law seemed to be in a state of transition (see § 37). In the later case of *Sheffield and Horsham*, the Court's judgment laid emphasis on the lack ofa common European approach as to how to address the repercussions which the legal recognition of a change of sex may entail for other areas of law such as marriage, filiation, privacy or data protection. While this would appear to remain the case, the lack of such a common approach among forty–three Contracting States with widely diverse legal systems and traditions is hardly surprising. In accordance with the principle of subsidiarity, it is indeed primarily for the Contracting States to decide on the measures necessary to secure Convention rights within their jurisdiction and, in resolving within their domestic legal systems the practical problems created by the legal recognition of post–operative gender status, the Contracting

States must enjoy a wide margin of appreciation. The Court accordingly attaches less importance to the lack of evidence of a common European approach to the resolution of the legal and practical problems posed, than to the clear and uncontested evidence of a continuing international trend in favour not only of increased social acceptance of transsexuals but of legal recognition of the new sexual identity of post-operative transsexuals.

5. *Impact on the birth register system*

86. In the *Rees* case, the Court allowed that great importance could be placed by the Government on the historical nature of the birth record system. The argument that allowing exceptions to this system would undermine its function weighed heavily in the assessment.

87. It may be noted however that exceptions are already made to the historic basis of the birth register system, namely, in the case of legitimisation or adoptions, where there is a possibility of issuing updated certificates to reflect a change in status after birth. To make a further exception in the case of transsexuals (a category estimated as including some 2,000-5,000 persons in the United Kingdom according to the Interdepartmental Working Group Report, p. 26) would not, in the Court's view, pose the threat of overturning the entire system. Though previous reference has been made to detriment suffered by third parties who might be unable to obtain access to the original entries and to complications occurring in the field of family and succession law (see the Rees judgment, p. 18, § 43), these assertions are framed in general terms and the Court does not find, on the basis of the material before it at this time, that any real prospect of prejudice has been identified as likely to arise if changes were made to the current system.

88. Furthermore, the Court notes that the Government have recently issued proposals for reform which would allow ongoing amendment to civil status data. It is not convinced therefore that the need to uphold rigidly the integrity of the historic basis of the birth registration system takes on the same importance in the current climate as it did in 1986.

6. *Striking a balance in the present case*

89. The Court has noted above (paragraphs 76-79) the difficulties and anomalies of the applicant's situation as a post-operative transsexual. It must be acknowledged that the level of daily interference suffered by the applicant in *B. v. France* (judgment of 25 March 1992, Series A n°. 232) has not been attained in this case and that on certain points the risk of difficulties or embarrassment faced by the present applicant may be avoided or minimised by the practices adopted by the authorities.

90. Nonetheless, the very essence of the Convention is respect for human dignity and human freedom. Under Article 8 of the Convention in particular, where the notion of personal autonomy is an important principle underlying the interpretation of its guarantees, protection is given to the personal sphere of each individual, including the right to establish details of their identity as individual human beings (see, inter alia, *Pretty v. the United Kingdom*, n°. 2346/02, judgment of 29 April 2002, § 62, and *Mikulić v. Croatia*, n°. 53176/99, judgment of 7 February 2002, § 53, both to be published in ECHR 2002-...). In the twenty first century the right of transsexuals to personal development and to physical and moral security in the full sense enjoyed by others in society cannot be regarded as a matter of controversy requiring the lapse of time to cast clearer light on the issues involved. In short, the unsatisfactory situation in which post-operative transsexuals live in an intermediate zone as not quite one gender or the other is no longer sustainable. Domestic recognition of this evaluation may be found in the report of the Interdepartmental Working Group and the Court of Appeal's judgment of *Bellinger v. Bellinger* (see paragraphs 50, 52-53).

91. The Court does not underestimate the difficulties posed or the important repercussions which any major change in the system will inevitably have, not only in the field of birth registration, but also in the areas of access to records, family law, affiliation, inheritance, criminal justice, employment, social security and insurance. However, as is made clear by the report of the Interdepartmental Working Group, these problems are far from insuperable, to the extent that the Working Group felt able to propose as one of the options full legal recognition of the new gender, subject to certain criteria and procedures. As Lord Justice Thorpe observed in the *Bellinger* case, any "spectral difficulties", particularly in the field of family law, are both manageable and acceptable if confined to the case of fully achieved and post-operative transsexuals. Nor is the Court convinced by arguments that allowing the applicant to fall under the rules applicable to women, which would also change the date of eligibility for her state pension, would cause any injustice to others in the national insurance and state pension systems as alleged by the Government. No concrete or substantial hardship or detriment to the public interest has indeed been demonstrated as likely to flow from any change to the status of transsexuals and, as regards other possible consequences, the Court considers that society may reasonably be expected to tolerate a certain inconvenience to enable individuals to live in dignity and worth in accordance with the sexual identity chosen by them at great personal cost.

92. In the previous cases from the United Kingdom, this Court has since 1986 emphasised the importance of keeping the need for appropriate legal measures under review having regard to scientific and societal developments (see references at paragraph 73). Most recently in the *Sheffield and Horsham* case in 1998, it observed that the respondent State had not yet takenany steps to do so despite an increase in the social acceptance of the phenomenon of transsexualism and a growing recognition of the problems with which transsexuals are confronted (cited above, paragraph 60). Even though it found no violation in that case, the need to keep this area under review was expressly re-iterated. Since then, a report has been issued in April 2000 by the Interdepartmental Working Group which set out a survey of the current position of transsexuals in inter alia criminal law, family and employment matters and identified various options for reform. Nothing has effectively been done to further these proposals and in July 2001 the Court of Appeal noted that there were no plans to do so (see paragraphs 52-53). It may be observed that the only legislative reform of note, applying certain non-discrimination provisions to transsexuals, flowed from a decision of the European Court of Justice of 30 April 1996 which held that discrimination based on a change of gender was equivalent to discrimination on grounds of sex (see paragraphs 43-45 above).

93. Having regard to the above considerations, the Court finds that the respondent Government can no longer claim that the matter falls within their margin of appreciation, save as regards the appropriate means of achieving recognition of the right protected under the Convention. Since there are no significant factors of public interest to weigh against the interest of this individual applicant in obtaining legal recognition of her gender re-assignment, it reaches the conclusion that the fair balance that is inherent in the Convention now tilts decisively in favour of the applicant. There has, accordingly, been a failure to respect her right to private life in breach of Article 8 of the Convention."

Following the judgment delivered by the Grand Chamber of the Court in the Goodwin case, the United Kingdom introduced arrangements in July 2004 enabling transsexuals to apply for a certificate of recognition of their sex. This case law has been applied in other cases involving the United Kingdom, one judgment occurred on the same day as the Goodwin judgment (I. v. the United Kingdom of 11 July 2002), and another later on because of the unchanged legal status of transsexuals until July 2004 (Grant v. the United Kingdom of 23 May 2006).

Case law applications

I. v. United Kingdom,
11 July 2002, n°. 25680/94

Principal facts

The applicant, I., a British national born in 1955, is a post-operative male to female transsexual. The claimant, who used to work as a dental nurse, was unable to attend a nursing course because she had refused to present her birth certificate. It seems that she has not been working since 1988 and is receiving a disability pension due to ill-health. The applicant complained about the lack of legal recognition of her new gender identity and about the legal status of transsexuals in the United Kingdom.

Decision of the Court

In a unanimous judgment, the Court held that there had been a violation of Article 8. Its reasoning was basically as follows.

The applicant had undergone a gender reassignment surgery provided by the National Health Service and lived in society as a woman, but she remained a man in legal terms. This situation had repercussions on her life where sex was of legal relevance, such as in the area of pensions, retirement age, etc. A serious interference with private life can arise when a conflict between social reality and law places transsexual persons in an anomalous position in which they feel vulnerable, humiliated and anxious. The Court observed that no conclusive findings had been made concerning the causes of transsexualism, but it considered it more significant that it was widely recognised at international level that transsexualism constituted a medical condition warranting treatment. It was not convinced that the inability of transsexual persons to acquire all the biological characteristics of the new gender was of decisive importance. There was clear and undisputed evidence of a continuing international trend not only towards increased social acceptance of transsexuals but also towards legal recognition of the new gender identity of post-operative transsexuals. In view of the elements at its disposal, the Court found no real risk of prejudice to third parties resulting from any changes to the birth registration system following recognition of gender reassignment, and noted that the Government was in the meantime discussing proposals for reform of the registration system in order to allow ongoing amendment of civil status data.

While noting that the difficulties and anomalies of the applicant's situation as a post-operative transsexual did not attain the level of daily interference suffered by the applicant in the *B. v. France* case (judgment of 25 March 1992, Series A n°. 232), the Court emphasised that human dignity and freedom were the very essence of the Convention. Under Article 8 of the Convention in particular, where the notion of personal autonomy is an important principle underlying the interpretation of its guarantees, the personal sphere of each individual is protected, including the right of each individual to establish the details of their identity as human beings. In the twenty-first century, the right of transsexuals to personal development and to physical and moral integrity in the full sense enjoyed by their fellow citizens can no longer be regarded as a matter of controversy requiring time to achieve a clearer understanding of the issues at stake. National recognition of this assessment can be found in the report of the Interdepartmental Working Group on Transsexual People and in the Court of Appeal's judgment of *Bellinger v. Bellinger* (England and Wales Court of Appeal (Civil Division), 2001, n°. 1140).

The Court did not underestimate the important repercussions that any major change in the system would inevitably have, not only for birth registration, but also in areas such as access to registers, family law, filiation, inheritance, social security or insurance. However, the proposals of the Interdepartmental Working Group showed that these problems were far from insuperable. In fact, it had not been demonstrated that any change to the status of transsexuals was likely to

result in concrete or significant hardship or prejudice to the public interest. As for other possible consequences, the Court considered that society might reasonably be expected to accept certain disadvantages to enable individuals to live in dignity and respect, in accordance with the gender identity chosen by them at great personal cost. Since 1986, and most recently in 1998, the Court had reiterated the importance of keeping the need for appropriate legal measures under review with regard to scientific and societal developments, but nothing had actually been done by the respondent State. Having regard to the above considerations, the Court found that the respondent State could no longer invoke its margin of appreciation in this case, except as regards the appropriate means of ensuring recognition of the right protected under the Convention. The Court concluded that the concept of a fair balance inherent in the Convention now tilted decisively in favour of the applicant. Accordingly, there had been a failure to respect the interested party's right to private life in breach of Article 8.

Grant v. the United Kingdom,
23 May 2006, n°. 32570/03

Principal facts

The applicant is a post-operative male-to-female transsexual who was 68 years old in 2006. She has presented herself as a woman since 1963, her national social insurance card indicates that she is a woman and she paid contributions to the National Insurance scheme at the rate applicable to women until 1975, when the difference in male and female contribution rates was abolished. Starting from her sixtieth birthday in 1997, she applied for a state pension. Her application was rejected on the ground that she would only be entitled to a state pension at age sixty-five, the retirement age applicable to men. She appealed unsuccessfully against this decision. In 2002 she requested that her case be reopened in the light of the judgments of the European Court of Human Rights in the cases of *Christine Goodwin v. the United Kingdom* (application n°. 28975/95) and *I. v. the United Kingdom* (n°. 25680/94). She was granted leave to appeal but, on the advice of her lawyer, decided not to pursue it. On 5 September 2002, the Department for Work and Pensions refused to award her a state pension on the basis of the *Christine Goodwin* judgment. In December 2002, she reached the age of sixty-five and her pension payments began. In 2005 the applicant was issued a gender recognition certificate pursuant to the Gender Recognition Act 2004, which had come into force on 1 January 2004. From the date of issue of the certificate in question, social security benefits and retirement pensions are paid according to the gender acquired by the holder.

The applicant complained about the lack of legal recognition of her gender reassignment and the refusal to pay her a retirement pension at the age of 60 like other women. She relied in particular on Articles 8 (right to respect for private and family life) and 14 (prohibition of discrimination) of the Convention, and on Article 1 of Protocol N°. 1 to the Convention (protection of property).

Decision of the Court

The Court observed that Ms Grant was in a situation identical to that of Christine Goodwin. As a post-operative male-to-female transsexual, Ms Grant could claim to be the victim of a violation of her right to respect for her private life contrary to Article 8, as her gender reassignment had not been legally recognised. While it was true that the Government had had to take steps to comply with the *Christine Goodwin* judgment, which involved passing a new law, the process in question had no suspensive effect on the applicant's victim status. From the moment the *Christine Goodwin* judgmenthad been handed down, there was no longer any justification for the lack of recognition of the gender reassignment of post-operative transsexuals. At that time, the applicant could not in any way benefit from such recognition but, from the date of the judgment in question, she could therefore claim to be prejudiced by this state of affairs. On the other hand, her victim status ceased when the Gender Recognition Act 2004 came into force, thereby allowing her to obtain domestic recognition of her

new gender identity. Consequently, she could claim that she had been prejudiced by the lack of legal recognition of her re-assigned gender identity from the moment, after the *Christine Goodwin* judgment, when the British authorities had dismissed her request, namely as from 5 September 2002. This lack of recognition had breached the applicant's right to respect for her private life.

The Court noted that, under domestic law as it stood at the relevant time, the applicant was not entitled to a state pension at age 60 and that, accordingly, it might well be that no proprietary right arose capable of engaging Article 1 of Protocol N°. 1 taken alone. The Court did not consider it necessary to address that point. And even if the latter provision had been applicable, the Court held that the applicant's complaint fell essentially within the scope of Article 8 and that no separate issue arose in the context of Article 1 of Protocol N°. 1 taken alone or in conjunction with Article 14 of the Convention.

§ 2 – Conditions for the legal recognition of gender reassignment

European case law regulates the conditions of access to legal recognition of transgender persons' gender identity, in particular as regards the production and admission of medical evidence of transsexuality and the irreversibility or otherwise of the physical transformation it entails.

It follows from this case law that while the legal recognition of transgender persons' new gender identity may be subject to a prior diagnosis, it cannot be made conditional on sterilisation surgery or treatment.

A | Recognition may be subject to prior diagnosis

It follows from the case law of the European Court of Human Rights that the legal recognition of gender reassignment may be subject to a prior medical diagnosis (*Emilie Garçon v. France* of 6 April 2017).

If transgender persons can provide any submissions, arguments and evidence, particularly medical evidence, relating to their transsexuality, they are entitled to have them examined effectively and publicly before the courts, which must assess the genuine nature of their transgender identity. Failing this, the Court finds a violation of Article 6 § 1 of the Convention guaranteeing the right to a fair hearing and of Article 8 guaranteeing the right to respect for private life, owing to the repercussions of unfair judicial proceedings as regards the right to respect for gender identity, which is a fundamental aspect of private life (*Van Kück v. Germany* judgment of 12 June 2003 and *Schlumpf v. Switzerland* judgment of 8 January 2009).

On the other hand, if the competent courts consider that the evidence provided is incomplete or insufficient, they are entitled to order a medical examination without it being regarded as a violation of private life (A.P., Garçon and Nicot v. France of 6 April 2017).

1 – The production and admission of medical evidence of transsexuality before the competent courts

The cases of *A. P. and Emilie Garçon v. France* of 6 April 2017 presented below concerned two transgender persons of French nationality who wished to change their gender markers and forenames on their birth certificates and who were refused to do so by the courts of the respondent State. The applicants submitted, among other things, that the authorities had infringed their right to respect for private life by making recognition of gender identity conditional on proof that they actually suffered from a gender identity disorder in one case (*Emilie Garçon v. France, 6 April 2017, n°. 52471/13*) and in the other case on the obligation to undergo a medical examination (*A.P., Garçon and Nicot v. France of 6 April 2017, n°. 79885/12*).

Moreover, when courts are called upon to assess the medical necessity of gender reassignment surgery, a proper examination must be made of the submissions, arguments and evidence, particularly medical evidence, adduced by the parties with regard to the person's transsexuality. Failing this, the Court finds a violation of Article 6 § 1 of the Convention guaranteeing the right to a fair hearing and of Article 8 guaranteeing the right to respect for private life, owing to the repercussions of unfair judicial proceedings as regards the right to respect for gender identity, which is a fundamental aspect of private life (*Van Kück v. Germany* judgment of 12 June 2003 and *Schlumpf v. Switzerland* judgment of 8 January 2009).

A.P., Garçon and Nicot v. France

of 6 April 2017, nº. 52471/13

Principal facts

In this case, the person who lodged the complaint had been entered in the register of births as being male, under the name of Émile Garçon, but claimed that he had been aware from a very early age that he belonged to the female gender. He explained that, under social pressure, he had tried to hide his true nature and had married twice under the male identity entered on his birth certificate, but these marriages, from which he had children, had ended in divorce. He stated that he behaved as a woman, that he had been undergoing feminising hormone treatment since 2004 and that he had undergone genital reconstructive surgery. On 17 March 2009, he brought proceedings against the public prosecutor before the Créteil *tribunal de grande instance* to have his birth certificate rectified, the "male" marker replaced by the "female" marker and his male first names replaced by a female first name (Emilie). He referred to a certificate issued by a psychiatrist in 2004. This certificate indicated that he was a transgender person but it was not added to the case file. Since he had failed to demonstrate that he suffered from the alleged gender identity disorder, the Court held on 9 February 2010 that E. Garçon's claims ought to be dismissed. The Paris Court of Appeal upheld the judgment. On 13 February 2013, the Court of Cassation dismissed the appeal.

Relying in particular on Article 8 (right to respect for private life), Émilie Garçon argued that making legal recognition of transgender persons' gender identity conditional on proof that they "actually suffered from a gender identity disorder" amounted to labelling them as being mentally ill and hence to violating their dignity.

Decision of the Court

The Court held, by a majority, that there had been no violation of Article 8 of the Convention by making the correction of the gender markers and the change of E. Garçon's first name on his birth certificate conditional on the obligation to prove that he actually suffered from gender identity disorder. Its reasoning was as follows.

"138. The Court is mindful of the fact that the second applicant [Emilie Garçon] echoed the stance taken by the non-governmental organisations working to protect transgender rights, to the effect that transgenderism is not an illness and that addressing gender identities from the perspective of a psychological disorder adds to the stigmatisation of transgender persons. This is also the position of the CNCDH [*the National Consultative Commission on Human Rights, a French consultative body*[126]], which in its opinion of 27 June 2013 (see paragraphs63-65 above) stressed as follows: "Viewed in a judicial context, the requirement to attest to the existence of 'gender dysphoria' is problematic in so far as the wording itself appears to endorse the view that transgender identity is an illness, although gender identity disorders

[126] Editor's note

were removed from the list of psychiatric disorders [by Decree n°. 2010-125 of 8 February 2010]." The CNCDH added: "Asking transgender persons to demonstrate that they suffer from gender dysphoria, which is a requirement for the purposes of differential diagnosis strictly in the context of the medical procedures undergone by them, contributes in a judicial context to the stigmatisation of these persons and to a lack of understanding of transgender identity." It therefore recommended that this requirement no longer form part of the procedure for obtaining a change of gender in civil-status documents.

139. However, the Court observes that a psychiatric diagnosis features among the prerequisites for legal recognition of transgender persons' gender identity in the vast majority of the forty Contracting Parties which allow such recognition, with only four of them having enacted legislation laying down a recognition procedure which excludes such a diagnosis (see paragraph 72 above). Hence, there is currently near-unanimity in this regard. The Court also notes that "transsexualism" features in Chapter V of the World Health Organisation's International Classification of Diseases (ICD-10, n°. F64.0) entitled "Mental and behavioural disorders", under the category "Disorders of adult personality and behaviour", sub-category "Gender identity disorders". Furthermore, unlike the sterility condition, the requirement to obtain a prior psychiatric diagnosis does not directly affect individuals' physical integrity. Lastly, while the Commissioner for Human Rights of the Council of Europe (see paragraph 73 above) has stressed that the requirement to obtain a psychiatric diagnosis may hinder the exercise of individuals' fundamental rights, especially where it is designed to limit their legal capacity or impose medical treatment on them, the position of European and international fundamental rights organisations on this point seems less clear-cut than with regard to the sterility requirement.

140. The Court concludes from this that, even though an important aspect of the identity of transgender persons is at stake in the context of their gender identity (see paragraph 123 above), the Contracting Parties retain wide discretion in deciding whether to lay down such a requirement.

141. The Court also notes that the Government referred to the remarks made by the High Authority for Health to the effect that a diagnosis of gender dysphoria is required for the purposes of differential diagnosis, so that doctors can be sure, before administering hormone treatment or performing surgery, that the patient's suffering does not stem from other causes. In so far as the Government thereby seek to argue that the requirement of a prior psychiatric diagnosis is a means of ensuring that individuals who are not really transgender do not embark on irreversible medical reassignment treatment, their argument is not wholly persuasive as regards the situation of individuals who – like the second and third applicants – refuse to undergo treatment resulting in irreversible sterilisation. Nevertheless, the Court accepts that this requirement is aimed at safeguarding the interests of the persons concerned in that it is designed in any event to ensure that they do not embark unadvisedly on the process of legally changing their identity.

142. In that regard, moreover, the interests of the second and third applicants overlap to some extent with the general interest in safeguarding the principle of the inalienability of civil status, the reliability and consistency of civil-status records, and legal certainty, given that this requirement also promotes stability in changes of gender in civil-status documents.

143. Consequently, and especially in view of the wide margin of appreciation which they enjoyed, the Court considers that the French authorities, in refusing the second applicant's request to have the indication of gender on his birth certificate amended, on the grounds that he had not shown that he actually suffered from a gender identity disorder, struck a fair balance between the competing interests at stake.

144. In other words, the refUsal of the second applicant's reqUest on these groUnds does not disclose a failUre by France to comply with its positive obligation to secUre his right to respect for his private life. There has therefore been no violation of Article 8 of the Convention on this accoUnt in respect of the second applicant."

A.P., Garçon and Nicot v. France
of 6 April 2017, nº. 79885/12

Principal facts

On 11 September 2008, A. P. broUght proceedings against the PUblic ProsecUtor before the Paris *tribUnal de grande instance* to have it established that he was now a female and his namewas A. (a female forename). He sUbmitted foUr medical certificates in sUpport of his reqUest,one of which certified a gender reassignment sUrgery performed in Thailand on 3 JUly 2008. Inan interlocUtory jUdgment of 17 February 2009, the coUrt ordered an expert assessment covering physiological, biological and psychological aspects, as the docUments prodUced by the applicant were deemed incomplete and insUfficient to establish that he actUally had a gender identity disorder and that the change in his physical appearance was irreversible. A. P. refUsed to sUbmit to this examination because of its cost and the interference with his physical and moral integrity. By a jUdgment of 10 November 2009, the coUrt dismissed A. P.'s application. The Paris CoUrt of Appeal Upheld the coUrt's jUdgment in so far as it had dismissed the reqUest to change gender markers, bUt ordered that the forenames be changed. On 7 JUne 2012, the CoUrt of Cassation dismissed the appeal.

Relying in particUlar on Article 8 (right to respect for private life) and Article 3 (prohibition of inhUman or degrading treatment), A. P. complained that the correction of gender markers on his birth certificate was made conditional on the obligation to Undergo a medical examination. He argued that the medical examinations ordered by the domestic coUrts amoUnted, at least potentially, to degrading treatment.

Decision of the Court

The CoUrt held, by a majority, that the obligation for A. P. to Undergo a medical examination had not violated the Convention. Its argument was as follows.

"149. The CoUrt notes the first applicant's [A. P.] assertion that he was relying on Article 8 of the Convention taken in conjUnction with Article 3. As master of the characterisation to be given in law to the facts of the case, it considers it appropriate to examine the first applicant's allegations from the standpoint of Article 8 alone.

150. That being said, the CoUrt mUst take into consideration the fact that the first applicant, who opted to Undergo gender reassignment sUrgery abroad, argued in the domestic coUrts that he had thereby fUlfilled the conditions laid down by positive law in order to obtain a change in civil statUs. The expert assessment in qUestion, which had been aimed at establishing whether that claim was accUrate, had therefore been ordered by a jUdge as part of the taking of evidence, an area in which the CoUrt allows the Contracting Parties very considerable room for manoeuvre, provided that they do not act in an arbitrary manner.

151. It is for the domestic coUrts to assess the probative valUe of the evidence sUbmitted to them. In the present case the Paris tribUnal de grand instance, in its jUdgment of 17 February 2009 (see paragraph 17 above), gave precise reasons as to why it deemed the evidence prodUced by the first applicant to be insUfficient. It accordingly appointed experts specialising in three different bUt complementary fields and issUed them with a detailed remit. There is nothing to sUggest

that this decision was taken in an arbitrary manner. As pointed out by the Government, the court was thus ruling on the basis of the power of exclusive jurisdiction conferred on it by French law, as the Code of Civil Procedure authorises the first-instance judge to order any investigative measure "in any event where the judge does not have sufficient information to determine the case" (Article 144); these measures include expert assessments (Articles 232 and 263 et seq.).

152. These considerations lead the Court to conclude that, although the expert medical assessment that was ordered entailed an intimate genital examination of the first applicant, the extent of the resulting interference with the exercise of his right to respect for his private life should be qualified to a significant degree.

153. The Court therefore considers that, in rejecting the first applicant's request to have the indication of gender on his birth certificate altered, on the grounds that he had refused in principle to cooperate with the medical expert assessment that it had ordered, the domestic court – which under Article 11 of the Code of Civil Procedure was entitled to draw any inferences from such a refusal – struck a fair balance between the competing interests at stake.

154. In other words, this fact does not disclose a failure by France to comply with its positive obligation to secure the first applicant's right to respect for his private life. There has therefore been no violation of Article 8 of the Convention on this account in respect of the first applicant."

Van Kück v. Germany,
12 June 2003, n°. 35968/97

This case concerned the refusal by the German courts to order the reimbursement to a transgender person of expenses relating to her gender reassignment treatment and the manner in which they assessed the "medically necessity" of the gender reassignment measures.

Principal facts

The applicant, Ms Van Kück, lived in Berlin. Registered at birth in 1948 as male, she took the forenames Carola Brenda in December 1991. In 1992, she brought an action against a health insurance company, claiming reimbursement of expenses incurred for her hormone treatment and requesting a declaratory judgment to the effect that the company was liable to reimburse 50% of the expenses for her gender reassignment operation. The regional court dismissed these claims on the ground that the treatment and surgery in question could not reasonably be considered as necessary medical treatments: the evidence did not show conclusively that the treatment and operation would improve the applicant's state of health and she should first have undergone extensive psychotherapy. The court of appeal upheld this decision, adding that Ms Van Kück was not entitled to reimbursement because she had caused her condition herself. In this connection the court of appeal referred to the fact that the applicant had only started to take female hormones, without seeking a medical opinion, after discovering that, as a man, she was infertile. In the meantime she had undergone gender reassignment surgery. She subsequently applied unsuccessfully to the Constitutional Court.

Relying on Article 6 § 1 (right to a fair hearing) of the Convention, the applicant complained of the unfairness of the proceedings before the German courts. She also alleged a violation of Article 8 (right to respect for private life) and Article 14 (prohibition of discrimination) taken together with Articles 6 § 1 and 8.

Principal facts

The applicant, Ms Van Kück, lived in Berlin. Registered at birth in 1948 as male, she took the forenames Carola Brenda in December 1991. In 1992, she brought an action against a health insurance company, claiming reimbursement of expenses incurred for her hormone treatment and requesting

a declaratory judgment to the effect that the company was liable to reimburse 50% of the expenses for her gender reassignment operation. The regional court dismissed these claims on the ground that the treatment and surgery in question could not reasonably be considered as necessary medical treatments: the evidence did not show conclusively that the treatment and operation would improve the applicant's state of health and she should first have undergone extensive psychotherapy. The court of appeal upheld this decision, adding that Ms Van Kück was not entitled to reimbursement because she had caused her condition herself. In this connection the court of appeal referred to the fact that the applicant had only started to take female hormones, without seeking a medical opinion, after discovering that, as a man, she was infertile. In the meantime she had undergone gender reassignment surgery. She subsequently applied unsuccessfully to the Constitutional Court.

Relying on Article 6 § 1 (right to a fair hearing) of the Convention, the applicant complained of the unfairness of the proceedings before the German courts. She also alleged a violation of Article 8 (right to respect for private life) and Article 14 (prohibition of discrimination) taken together with Articles 6 § 1 and 8.

Decision of the Court

1) Article 6§1: the finding of a violation of the right to proper examination of submissions, arguments and evidence relating to transsexuality.

The applicant complained of the unfairness of the proceedings arising from the action for reimbursement of medical expenses brought by her before the German courts against a private insurance company. She complained in particular that they did not conduct a proper examination of the submissions, arguments and evidence adduced by the parties. In this connection she specifically criticised the assessment of the origins of her transsexuality and of the "medically necessity" of the gender reassignment measures. The Court found a violation of Article 6§1. It reached this conclusion after an argument in several stages, which were as follows:

"[a]. Assessment of the "medical necessity" of gender reassignment measures

53. The Court notes that, in the civil proceedings against her private health insurance company, the applicant, who changed her forenames after recognition of her transsexuality in court proceedings under the Transsexuals Act in 1991, claimed reimbursement of medical expenses in respect of gender reassignment measures, namely hormone treatment and gender reassignment surgery. In 1992 the Regional Court ordered an expert opinion on the questions of the applicant's transsexuality and the necessity of gender reassignment measures. The Regional Court and the Court of Appeal concluded that the expert had not clearly affirmed the medical necessity of gender reassignment surgery. In this respect, the Regional Court considered two points, namely, prior recourse to extensive psychotherapy as a less radical measure and the lack of a clear affirmation of the necessity of gender reassignment measures for medical purposes, the expert's recommendation being limited to an improvement in the applicant's social situation. The Court of Appeal endorsed the second aspect of the Regional Court's reasoning and concluded that, as there remained doubts, the applicant had failed to prove the medical necessity of the gender reassignment surgery.

54. The Court, bearing in mind the complexity of assessing the applicant's transsexuality and the need for medical treatment, finds that the Regional Court rightly decided to obtain an expert medical opinion on these questions. However, notwithstanding the expert's unequivocal recommendation of gender reassignment measures in the applicant's situation, the German courts concluded that she had failed to prove the medical necessity of these measures. In their understanding, the expert's finding that gender reassignment measures would improve the applicant's social situation did not clearly assert the necessity of such measures from

a medical point of view. The Court considers that determining the medical necessity of gender reassignment measures by their curative effects on a transsexual is not a matter of legal definition. In *Christine Goodwin*, the Court referred to the expert evidence in the Britishcase of *Bellinger v. Bellinger*, which indicated "a growing acceptance of findings of sexual differences in the brain that are determined pre-natally, although scientific proof for the theory was far from complete". The Court considered it more significant "that transsexualism has wide international recognition as a medical condition for which treatment is providedin order to afford relief".

55. In the present case, the German courts' evaluation of the expert opinion and their assessment that improving the applicant's social situation as part of psychological treatment did not meet the requisite condition of medical necessity does not seem to coincide with the above findings of the Court (see *Christine Goodwin*, cited above). In any case, it would have required special medical knowledge and expertise in the field of transsexualism. In this situation, the German courts should have sought further, written or oral, clarification from the expert Dr H. or from any other medical specialist.

56. Furthermore, considering recent developments (see *I. v. the United Kingdom* and *Christine Goodwin*, both cited above, § 62 and § 82, respectively), gender identity is one of the most intimate areas of a person's private life. The burden placed on a person in such a situation to prove the medical necessity of treatment, including irreversible surgery, appears therefore disproportionate.

57. In these circumstances, the Court finds that the interpretation of the term "medical necessity" and the evaluation of the evidence in this respect were not reasonable.

[b]. Assessment of the cause of the applicant's transsexuality

58. The Court of Appeal further based its decision on the consideration that, under the insurance conditions, the defendant was exempted from payment on the ground that the applicant had deliberately caused her transsexuality. In this respect, the Court of Appeal found that it was only after having had to recognise that, as a man, she was infertile that the applicant had decided to become a woman, and had forced this development by self-medication with female hormones.

59. The Court reaffirms its statement in *I. v. the United Kingdom* and *Christine Goodwin* (see paragraph 52 above) that, given the numerous and painful interventions involved in gender reassignment surgery and the level of commitment and conviction required to achieve a change in social gender role, it cannot be suggested that there is anything arbitrary or capricious in the decision taken by a person to undergo gender reassignment.

60. The Court observes at the outset that the applicant had obtained recognition of her transsexuality in court proceedings under the Transsexuals Act in 1991. Furthermore, she had undergone gender reassignment surgery at the time of the Court of Appeal's decision.

61. The Court notes that the issue of the cause of the applicant's transsexuality did not appear in the Regional Court's order for the taking of expert evidence and was not, therefore, covered by the opinion prepared by Dr H. The Court of Appeal did not itself take evidence from Dr H. on this question, nor did it examine the experts involved in the earlier proceedings in 1990 and 1991, respectively, as the applicant had requested. Rather, the Court of Appeal analysed personal data recorded in a case history which was contained in the opinion prepared by Dr O. in 1991 in the context of the proceedings under the Transsexuals Act. This opinion had been limited to the questions whether the applicant was a male-to-female transsexual nd had been for at least the last three years under the constraint of living according tothese tendencies, which were answered in the affirmative.

62. In the Court's opinion, the Court of Appeal was not entitled to take the view that it had sufficient information and medical expertise for it to be able to assess the complex question of whether the applicant had deliberately caused her transsexuality (see, *mutatis mutandis*, *H. v. France*, judgment of 24 October 1989, Series A n°. 162-A, pp. 25-26, § 70).

63. Moreover, in the absence of any conclusive scientific findings as to the cause of transsexualism and, in particular, whether it is wholly psychological or associated with physical differentiation in the brain (see again *I. v. the United Kingdom* and *Christine Goodwin*, loc. cit.),the approach taken by the Court of Appeal in examining the question whether the applicant had deliberately caused her condition appears inappropriate.

[c]. Conclusion

64. Having regard to the determination of the medical necessity of gender reassignment measures in the applicant's case and also of the cause of the applicant's transsexuality, the Court concludes that the proceedings in question, taken as a whole, did not satisfy the requirements of a fair hearing.

65. Accordingly, there has been a breach of Article 6 § 1 of the Convention."

2) Article 8: finding of a violation of the right to respect for gender identity (a fundamental aspect of private life) as a result of unfair judicial proceedings.

One significant aspect of the *Van Kück* case was the Court's decision to examine the same facts from the angle of Article 8, and not solely from that of Article 6§1. Indeed, the applicant also complained that the impugned judicial decisions infringed her right to respect for her private life within the meaning of Article 8 of the Convention. The Court found in favour of the applicant and held that there had been a violation of Article 8. Its reasoning was as follows:

"73.In the present case, the civil court proceedings touched upon the applicant's freedom to define herself as a female person, one of the most basic essentials of self-determination. The applicant complained in substance that, in the context of the dispute with her private health insurance company, the German courts, in particular the Berlin Court of Appeal, had failed to give appropriate consideration to her transsexuality.

74. The Court observes that the applicant's submissions under Article 8 § 1 are focused on the German courts' taking and evaluation of evidence as regards her transsexuality, a matter which has already been examined under Article 6 § 1. However, the Court points to the difference in the nature of the interests protected by Article 6, namely procedural safeguards, and by Article 8 § 1, ensuring proper respect for, inter alia, private life, a difference which justifies the examination of the same set of facts under both Articles (see *McMichael v. the United Kingdom*, judgment of 24 February 1995, Series A n°. 307-B, p. 57, § 91; *Buchberger v. Austria*, n°. 32899/96, § 49, 20 December 2001; and P., C. and *S. v. the United Kingdom*, n°. 56547/00, § 120, ECHR 2002-VI).

75. In the present case, the facts complained of not only deprived the applicant of a fair hearing as guaranteed under Article 6 § 1, but also had repercussions on a fundamental aspect of her right to respect for private life, namely her right to gender identity and personal development. In these circumstances, the Court considers it appropriate to examine under Article 8 also the applicant's submission that the German courts, in dealing with her claims for reimbursement of medical expenses, had failed to discharge the State's positive obligations.

76. The Court notes at the outset that the proceedings in question took place between 1992 and 1995 at a time when the condition of transsexualism was generally known [...]. In this connection,

the Court likewise notes the remaining uncertainty as to the essential nature and cause of transsexualism and the fact that the legitimacy of surgical intervention in such cases is sometimes questioned (see the Court's observations of 1992, 1998 and 2002 in *B. v. France*, in *Sheffield and Horsham*, in *I v. the United Kingdom*, and in *Christine Goodwin* [...]).

77. The Court has also previously held that the fact that the public health services did not delay the giving of medical and surgical treatment until all legal aspects of transsexuals had been fully investigated and resolved, benefited the persons concerned and contributed to their freedom of choice (see *Rees*, cited above, p. 18 § 45). Moreover, manifest determination has been regarded as a factor which is sufficiently significant to be taken into account, together with other factors, with reference to Article 8 (see *B. v. France*, cited above, p. 51, § 55).

78. In the present case, the central issue is the German courts' application of the existing criteria on reimbursement of medical treatment to the applicant's claim for reimbursement of the cost of gender reassignment surgery, not the legitimacy of such measures in general. Furthermore, what matters is not the entitlement to reimbursement as such, but the impact of the court decisions on the applicant's right to respect for her sexual self-determination as one of the aspects of her right to respect for her private life.

79. The Court notes that the Regional Court referred the applicant to the possibility of psychotherapy as a less radical means of treating her condition, contrary to the statements contained in the expert opinion.

80. Furthermore, both the Regional Court and the Court of Appeal, notwithstanding the expert's unequivocal recommendation, questioned the necessity of gender reassignment for medical reasons without obtaining supplementary information on this point.

81. The Court of Appeal also reproached the applicant with having deliberately caused her transsexuality. In evaluating her sexual identity and development, the Court of Appeal analysed her past prior to the taking of female hormones and found that she had onlyshown male behaviour and was thus genuinely male orientated. In doing so, the Court of Appeal, on the basis of general assumptions as to male and female behaviour, substituted its views on the most intimate feelings and experiences for those of the applicant, andthis without any medical competence. It thereby required the applicant not only to provethat this orientation existed and amounted to a disease necessitating hormone treatment and gender reassignment surgery, but also to show the 'genuine nature' of her transsexuality although, as stated above (see paragraph 75 above), the essential nature and cause of transsexualism are uncertain.

82. In the light of recent developments (see *I. v. the United Kingdom* and *Christine Goodwin*,cited above, § 62 and § 82, respectively), the burden placed on a person to prove the medical necessity of treatment, including irreversible surgery, in one of the most intimate areas of private life, appears disproportionate.

83. In this context, the Court notes that, at the relevant time, the applicant, in agreement with the doctor treating her, had undergone the gender reassignment surgery in question.

84. In the light of these various factors, the Court reaches the conclusion that no fair balance was struck between the interests of the private health insurance company on the one side and the interests of the individual on the other.

85. In these circumstances, the Court considers that the German authorities overstepped the margin of appreciation afforded to them under paragraph 2 of Article 8.

86. Consequently, there has been a violation of Article 8 § 1 of the Convention."

The position adopted by the Court in the *Van Kück* case was instructively summarised in the *Schlumpf v. Switzerland* judgment of 8 January 2009. It therefore seems instructive to reproduce its content[127].

"52. The effect of Article 6 § 1 is, inter alia, to place the "tribunal" under a duty to conduct a proper examination of the submissions, arguments and evidence adduced by the parties, without prejudice to its assessment of whether they are relevant to its decision (*Van der Hurk v. Netherlands*, judgment of 19 April 1994, Series A n°. 288, P. 19, §59).

53. The Court reiterates its finding in the aforementioned *Van Kück v. Germany* judgment that the decision on the necessity of a gender reassignment operation should be based on special medical knowledge and expertise in the field of transsexualism and that, in view of the special nature of the case, the German courts should have sought further written or oral clarification from the applicant's physician or from any other specialist (n°. 35968/97, §55, ECHR 2003-VII). In the same case, the Court held that it was disproportionate to require a transsexual to prove the medical necessity of such treatment (*ibid*, §56). It also noted that determining the medical necessity of gender reassignment measures by their curative effects on a transsexual was not a matter of legal definition (*ibid*, §54)."

Schlumpf v. Switzerland,
8 January 2009, n°. 29002/06

Principal facts

The applicant, Nadine Schlumpf, born in 1937, was a Swiss national living in Aarau (Switzerland). She was registered at birth under the name Max Schlumpf, of male sex.

The case concerned the applicant's health insurers' refusal to pay the costs of her gender reassignment operation on the ground that she had not complied with a two-year waiting period to allow for reconsideration. This was required by the case-law of the Federal Insurance Court as a condition for payment of the costs of such operations.

The applicant submitted that the psychological suffering caused by her gender identity disorder went back as far as her childhood and had repeatedly led her to the brink of suicide.In spite of everything, and although by the age of about 40 she was already certain of being transgender, she had accepted the responsibilities of a husband and father until her childrenhad grown up and her wife had died of cancer in 2002.

The applicant had decided in 2002 to correct her gender and from then on lived her daily life asa woman. She began hormonal therapy and psychiatric and endocrinological treatment in 2003.An expert medical report in October 2004 confirmed the diagnosis of male-female transsexualityand stated that the applicant satisfied the conditions for a gender reassignment operation. In November 2004 the applicant asked SWICA, her health insurers, to pay the costs of the gender reassignment operation, and supplied a copy of the expert report. On 29 November 2004 SWICA refused to reimburse the costs, noting that according to the case-law of the Federal Insurance Court the mandatory clause providing for reimbursement of the costs of a gender reassignment operation which health insurance policies were required to include applied only in cases of "true transsexualism", which could not be established until there had been an observation period of two years. On 30 November 2004 the applicant nevertheless successfully underwent the operation. In mid-December 2004 she again applied to SWICA, who again refused. In late January 2005

[127]The facts of the Schlumpf v. Switzerland case and the decision reached are set out immediately afterwards.

the applicant appealed unsuccessfully against that decision. She attempted to show that at the stage medical science had then reached it was possible to identify cases of "true transsexualism" without waiting for two years to elapse. She also proposed that the senior consultant at the Zurich Psychiatric Clinic be asked to give evidence in the context of a further investigation. On 14 February 2005 the applicant's civil status was modified to reflect her sex change and she was registered under the forename of Nadine.

In early April 2005 the applicant appealed to the cantonal insurance court and asked for a public hearing. When the cantonal insurance court informed her of the possibility of sending the case back to the health insurers for further investigation the applicant withdrew that request in the event of the case being remitted. However, she said that waiver would not apply if the case were to go to the Federal Insurance Court or the European Court of Human Rights. In June 2005, without holding a hearing, the cantonal insurance court set aside the health insurers' refusal to pay the costs of gender reassignment operation and remitted the case for further investigation and reconsideration.

In July 2005 SWICA appealed to the Federal Insurance Court, arguing that the cantonal insurance court had disregarded the Federal Court's case-law to the effect that costs could only be reimbursed after a period of two years and submitting in addition that the existence of an illness had not been established. In September 2005 the applicant explicitly asked the Federal Insurance Court for a public hearing and requested that it call expert witnesses to answer questions on gender reassignment operation. Her request was refused, among other reasons because the Federal Court considered that the relevant issues were legal questions, so that a public hearing wasnot necessary. It also reaffirmed the pertinence of the two-year observation period. It notedthat despite what various experts had submitted during the proceedings and the stage modern medical science had reached, caution was vital, given in particular the irreversibility of the operationand the need to avoid unjustified operations. The Federal Insurance Court noted that at thetime of the operation the applicant had been under psychiatric observation for less than two years and held that the health insurers had been justified in refusing to reimburse the costs.

Relying on Article 6 § 1 (right to a fair hearing), the applicant complained of an infringement of her right to a fair and public hearing. She further alleged that a fair balance had not been preserved between her interests and those of her health insurers, contrary to Article 8 (right to respect for private life).

Decision of the Court

The facts of the *Schlumpf* case being very similar to those of the *Van Kück v. Germany* case, the Court reached the same finding, namely that the actions of the domestic courts violatedboth the right to a hearing guaranteed by Article 6 § 1 and the right to respect for private life guaranteed by Article 8;

1) Article 6§1: finding of a violation of the right to proper examination of submissions, arguments and evidence relating to gender identity.

Regarding the right to a hearing, the Court argued as follows.

"54. In this case the applicant alleges a violation of her right to a fair hearing owing to the fact that the Federal, Insurance Court refused to hear the experts she had proposed. She submits that, as a result of that refusal, she was prevented from proving that the operation had to be carried out before the expiry of the two-year period. She further submits that this period, as stipulated in the case law of the Federal Insurance Court, adds a legal condition to the diagnosis of transsexualism, which is a purely medical question.

55. The Court notes that what is at issue in this case is the application of Articles 25 and 32 of the Health Insurance Act, which set out the conditions for the cost of treatment to be covered by health insurance. These articles require the presence of a medical condition and state that the services for which reimbursement is requested must be effective, appropriate and economical.

56. The case law of the Federal Insurance Court has added a further criterion in the case of sex-change operations, namely that a two-year observation period must first have elapsed. The main purpose of this observation period is to be certain that the case is one of 'true transsexualism'. Although the diagnosis of true transsexualism was not disputed in this case, the Federal Insurance Court, citing the applicant's failure to comply with the two-year period, did not allow her the opportunity to prove that the operation had to be carried out before the expiry of that period.

57. The Court [...] considers that it is disproportionate not to accept expert opinions, especially as it was not in dispute that the applicant was suffering from an illness. By refusing to allow the applicant to adduce such evidence, on the basis of an abstract rule which has its origin in two of its own earlier decisions, the Federal Insurance Court substituted its own view for that of the doctors and psychiatrists, even though the Court has previously ruled that determination of the need for gender reassignment measures is not a matter for judicial assessment (*Van Kück*, cited above, §54).

58. In the light of the foregoing, the Court considers that the applicant was not given a fair hearing before the Federal Insurance Court. There has accordingly been a violation of Article 6 § 1 of the Convention."

2) Article 8: the finding of a violation of the right to respect for gender identity (a fundamental aspect of private life) as a result of unfair judicial decisions.

As in the *Van Kück v. Germany* case, the Court concluded in the *Schlumpf v. Switzerland* casethat there had been a violation of Article 8. Its reasoning was as follows.

"105.The Court wishes to specify from the outset that the issue before it is not that of legal recognition of the applicant's sex change (*Christine Goodwin*, cited above, §76, and *L. v. Lithuania*, n°. 27527/03, §§56-60, ECHR 2007-, in which the Court found violations of Article 8), since the President of the Aarau District Court recognised her change of sexual identity on 14 February 2005. Changes were subsequently made in the civil status register. On the other hand, the applicant is complaining in substance that the Federal Court, at last instance, failed to take due account of the problems related to her transsexuality in the dispute between herself and the insurance company.

106. The Court notes that the applicant's claims under Article 8§1 concern the refusal to take into account certain items of evidence relating to her transsexuality, a point which has already been considered under Article 6§1. It emphasises, however, the difference in the nature of the interests protected by Article 6§1, which affords a procedural safeguard, and those protected by Article 8, which ensures respect for private life; that difference may justify the examination of the same set of facts under both articles (*McMichael v. the United Kingdom*, 24 February 1995, Series A n°. 307-B, p. 57, §91, *Buchberger v. Austria, n°. 32899/96, § 49, 20 December 2001, and P., C. and S. v. the United Kingdom*, n°. 56547/00, §120, ECHR 2002-VI).

107. In these circumstances, the Court considers it appropriate to examine under Article 8 also the applicant's submission that the manner in which the Federal Insurance Court treated her claim for reimbursement of her medical expenses violates the positive obligations incumbent on the state (see, *mutatis mutandis*, *Van Kück*, cited above, §75).

108. The Court wishes to point out that the central issue in the case is the manner in which the Federal Insurance Court applied the criteria governing the reimbursement of medical costs when called upon to decide the applicant's claim to be entitled to reimbursement of the costs of her sex-change operation (see, *mutatis mutandis*, *Van Kück*, cited above, §78).

109. The Court observes that, in this specific case, the Federal Insurance Court relied on a criterion established by its own case law, which has no basis in any law. This further condition means that the cost of the gender reassignment operation may only be reimbursed after a two-year observation period has elapsed. The Federal Insurance Court submits that this two-year period can be explained by the fact that it guarantees a balance between the interests of the person concerned and the public interest in avoiding unnecessary operations.

110. The Court is conscious of the problems faced by social insurance companies in their decisions concerning reimbursement of the cost of services. Neither does it underestimate the magnitude of the consequences of a sex-change operation – a costly and irreversible operation – for the person concerned, and, therefore, the interest of the insurance company and the applicant in avoiding any hasty decisions. That is the main – and legitimate – purpose of the two-year period. However, the Court reiterates what it already stated in 2002, namely that, given the numerous and painful interventions involved in such surgery and the level of commitment and conviction required to achieve a change in social gender role, it cannot be suggested that there is anything capricious in the decision taken by a person to undergo gender reassignment (see, *mutatis mutandis*, *Christine Goodwin*, cited above, §81).

111. The Court is also aware that it is, in the first instance, for the national authorities, and in particular the courts, to interpret and apply domestic law [...]. However, insofar as the Court is competent to review the proceedings before the domestic courts, it considers that excessively strict application of the two-year period may be contrary to Article 8 of the Convention.

112. In this connection, the Court reiterates the principle that the Convention protects not theoretical or illusory rights, but rights which are practical and effective (see the case law cited in paragraph 57 above). It follows that, to be considered legitimate, the arguments used to justify an interference must pursue the aims referred to in Article 8 § 2 in a practicaland effective manner. Being exceptions to the exercise of the right to respect for private and family life, they call for close and careful examination by the Court (Emonet and *Others v. Switzerland*, n°. 39051/03, §77, ECHR 2007...). In insisting on compliance with the two-year period, the Federal Court failed to conduct an analysis of the specific circumstances of the case and to weigh the different interests at stake. The Court considers that the domestic authorities should have taken the specialists' opinions into account in order to determine whether an exception to the two-year rule should be allowed, especially in view of the applicant's relatively advanced age and her interest in undergoing surgery rapidly.

113. Furthermore, the Court does not consider that it is required to give a final answer to the question of whether this two-year period is in line with current trends in theory and practice relating to gender reassignment. It is convinced, however, that, since 1988, the year in which the Federal Insurance Court delivered its two leading judgments, medicine has made progress in identifying 'true transsexualism' (in this connection, see *Christine Goodwin*, cited above, §§81 et seq. and §92), and the Federal Court failed to take account of this. Now, the Court has repeatedly emphasised the importance of a progressive approach in interpreting the Convention, in the light of present-day conditions (see, among others, *Tyrer v. the United Kingdom*, judgment of 25 April 1978, Series A n°. 26, p. 15, §31, *Marckx v. Belgium*, judgment of 13 June 1979, Series A n°. 31, p. 19, §41, *Airey v. Ireland*, judgment of 9 October 1979, Series A n°. 32, pp. 14 et seq., §26, *Vo v. France* [GC], n°. 53924/00, §82, ECHR 2004-VIII, and *Mamatkoulov and Askarov v. Turkey* [GC], n^os^. 46827/99 and 46951/99, §121, ECHR 2005-I).

114. The Court has previously held that the fact that medical services did not delay the giving of medical and surgical treatment until all legal aspects of transsexuals had been fully investigated and resolved, benefited the persons concerned and contributed to their freedom of choice (see *Rees*, cited above, p. 18 § 45). It has also held that the determination shown by these persons is a factor which is sufficiently significant to be taken into account, together with other factors, with reference to Article 8 (see *B. v. France*, cited above, p. 51, § 55, and *Van Kück*, cited above, §77). In this connection, the Court considers it important that the applicant's belated decision to undergo the operation was motivated exclusively by her respect for her children and her ex-wife, which led her to postpone the operation until her children had reached the age of majority and her ex-wife had died. In short, the effectof enforcing the two-year waiting period was to prolong the applicant's unsatisfactory situation (in a similar connection, see *Christine Goodwin*, cited above, §90).

115. Respect for the applicant's private life would have required consideration of the medical, biological and psychological realities expressed unequivocally in the opinions given by the medical experts, to avoid mechanical application of the two-year period. The Court concludes from this that, having regard to the applicant's very unusual circumstances – she was over 67 years old when she applied for reimbursement of the cost of the operation – and to the narrow margin of appreciation enjoyed by the respondent state on a question relating to one of the most intimate aspects of private life, a proper balance has not been struck between the interests of the insurance company and those of the applicant.

116. There has therefore been a violation of Article 8."

2 – The public nature of hearings to determine the necessity of gender reassignment surgery

***Schlumpf v. Switzerland*,**
8 January 2009, n°. 29002/06

Principal facts

In this same *Schlumpf v. Switzerland* judgment of 8 January 2009, the Court also found a violation of Article 6 in that it protects the right to a public hearing. Its argument reads as follows.

"62. The Court reiterates that the holding of court hearings in public constitutes a fundamental principle enshrined in Article 6 § 1 of the Convention. This public character protects litigants against the administration of justice in secret with no public scrutiny; it is also one of the means whereby confidence in the courts can be maintained. By rendering the administration of justice transparent, publicity contributes to the achievement of the aim of Article 6§1, namely a fair trial, the guarantee of which is one of the fundamental principles of any democratic society (see, among others, *Diennet v. France*, judgment of 26 September 1995, Series A n°. 325-A,pp. 14-15, §33, *Gautrin and Others v. France*, judgment of 20 May 1998, *Reports* 1998-III, pp. 1023-1024, §42, and *Hurter v. Switzerland*, n°. 53146/99, §26, 15 December 2005).

63. However, neither the letter nor the spirit of Article 6 § 1 prevents a person from waiving the entitlement to have his or her case heard in public. But a waiver must be made in an unequivocal manner and must not run counter to any important public interest (see, among others, *Håkansson and Sturesson v. Sweden*, judgment of 21 February 1990, Series A n°. 171-A, p. 20, §66, and *Schuler-Zgraggen v. Switzerland*, judgment of 24 June 1993, Series A n°. 263, pp. 19-20, §58).

64. Furthermore, a public hearing may not be necessary owing to the exceptional circums- tances of the case, for example when it raises no questions of fact or law which cannotbe resolved on the basis of the case-file and the parties' observations (*Döry v. Sweden*, n°. 28394/95, §37, 12 November 2002, *Lundevall v. Sweden*, n°. 38629/97, §34, 12 November 2002, *Salomonsson v. Sweden*, n°. 38978/97, §34, 12 November 2002; see also, *mutatis mutandis*, *Fredin v. Sweden (n°. 2)*, judgment of 23 February 1994, Series A n°. 283-A, pp.10-11, §§21-22, and *Fischer v. Austria*, judgment of 26 April 1995, Series A n°. 312, pp. 20-21, §44). This applies in particular to situations raising highly technical issues (*Schuler-Zgraggen*, cited above, pp. 19 et seq., §58, and Döry, cited above, §41).

65. The Court also reiterates the principle that a litigant normally has the right to a public hearing before at least one instance. The absence of a public hearing before a second or third instance may be justified by the particular features of the proceedings at issue, if the case has already been heard in public at first instance (*Luginbühl v. Switzerland* (dec.), n°. 42756/02, 17 January 2006). It follows that, save in exceptional circumstances which may justify the lack of a public hearing, Article 6 requires the person concerned to be given a public hearing before at least one instance (*Döry*, cited above, §39, *Lundevall*, cited above, §36, *Salomonsson*, cited above, §36, and *Helmers v. Sweden*, judgment of 29 October 1991, Series A n°. 212-A, p. 16, §36).

66. In the instant case, the Court considers that it first needs to be determined whether the with-drawal of the request before the cantonal insurance court is equivalent to a waiver on the applicant's part, as submitted by the Government.

67. In the Court's view, this cannot be the case given that, throughout the proceedings, the applicant stressed the need to consult experts and only withdrew her request for a public hearing before the cantonal court on the assumption that the case would be remitted for further investigation, which would necessarily have involved consulting experts. Furthermore, she expressly stated that the withdrawal of her request would not apply to any proceedings before the Federal Insurance Court. Under these circumstances, the applicant cannot be considered as having waived her right to a public hearing before the Federal Insurance Court.

68. The second question therefore arises of whether a public hearing was necessary in the instant case or whether, on the contrary, the proceedings concerned only points of law or were of such a technical nature that the experts' submissions could have been assessed more effectively in the context of a written procedure.

69. In the light of its findings relating to the right to a hearing (paragraphs [54]-58 above), the Court considers that the assessment of the necessity of a sex-change operation cannot be described as a purely legal matter. Moreover, the Court is of the opinion that assessment of the necessity of a sex-change operation is not so technical as to justify an exception to the right to be heard at a public hearing, especially as the parties' opinions differed as to the desirability of a waiting period. In addition, Article 112 of the Federal Judicature Act states explicitly that the President of the Federal Insurance Court has the right to order a hearing.

70. In the light of the foregoing, the Court considers that the applicant was not given a public hearing before the domestic courts. There has therefore been a violation of Article 6§1."

B | Recognition cannot be made conditional on the performance of a surgery or treatment involving sterilisation

European case law generally prohibits the requirement of sterility or sterilisation as a prior con-dition for gender reassignment.

Y.Y. v. Turkey,
10 March 2015, nº. 14793/08

Principal facts

The applicant Y.Y. is a Turkish national who was registered as a female at the time of the application. The applicant became aware from an early age that he felt he was male, in contradiction to his anatomical sex. On 30 September 2005, the applicant applied to the Mersin District Court for authorisation to undergo gender reassignment surgery. The court sent a request for information to the head doctor of the hospital where the applicant was being treated in the psychiatric department, in order to ascertain whether the latter was transsexual and whether gender reassignment was necessary for the preservation of his mental health. The court also asked whether Y.Y. was permanently unable to procreate. On 23 February 2006, a psychiatric report drawn up by the hospital concluded that Y.Y. was transgender and that, from a psychological viewpoint, it would be better for the applicant to live his life with a male identity. Another report established that Y.Y. had a female phenotype and was transgender. However, the court found that neither of these two reports answered its questions, namely whether gender reassignment was necessary for the preservation of the applicant's mental health and whether the applicant was permanently unable to procreate. One of the hospital's directors stated in April 2006 that the applicant was not permanently unable to procreate. On 27 June 2006, the District Court rejected the applicant's request for gender reassignment on the grounds that he was not permanently unable to procreate and therefore did not satisfy one of the requirements laid down in Article 40 of the Civil Code. The applicant appealed on points of law against this judgment. The Court of Cassation upheld the judgment and the applicant's lawyer filed an appeal for rectification of that decision, which the Court of Cassation rejected. On 5 March 2013, relying on Article 40 of the Civil Code, the applicant lodged a fresh application with the Mersin District Court for authorisation to undergo gender reassignment surgery. On 21 May 2013, the Mersin District Court granted the application and authorised the requested surgery. The court found it established that the applicant was transgender, that gender reassignment was necessary to preserve his mental health, that witness testimony had shown that the applicant lived as a man in every respect and suffered from his situation, such that the conditions set out in Article 40 § 2 of the Civil Code were met and that the request had to be granted.

Relying in particular on Article 8 (right to respect for private and family life), the applicant complained of a violation of his right to respect for his private life. He alleged that the discrepancy between his perception of himself as a man and his physiological constitution had been established by medical reports and he complained of the refusal by the domestic authorities to put an end to that discrepancy on the grounds that he was able to procreate. He criticised the content of Article 40 of the Civil Code in that its biological requirement of reproductive sterility could only be satisfied by undergoing voluntary sterilisation surgery. The inability for the persons concerned to have access to such surgery permanently deprives them of any possibility of gender reassignment.

Decision of the Court

In this case, the Chamber unanimously held that there had been a violation of Article 8 (right to respect for private and family life) of the European Convention. Its argument was as follows.

"61. The Court stresses at the outset that in the above-mentioned cases the complaints were submitted by post-operative transgender persons or those who had undergone certain surgical procedures with a view to gender reassignment. In the present case, however, at the time the application was lodged the applicant had not undergone surgery, as he had been refused authorisation by the courts to undergo gender reassignment surgery on the grounds that he was not permanently unable to procreate.

62. Hence, the present case concerns an aspect of the problems potentially facing transgender persons that differs from the aspects hitherto examined by the Court, namely the issue of the prior conditions that may be imposed on transgender persons in advance of the process of gender change and the compatibility of those conditions with Article 8 of the Convention. The criteria and principles developed in the case-law cited above were thus established in a very different context and cannot therefore be transposed unaltered to the present case. However, they may serve as a guide to the Court in assessing the circumstances of the case. [...]

65. The Court observes that the applicant's chief complaint concerned the refusal by the domestic courts of his request for access to gender reassignment surgery. Citing the judgments in *Pretty* (cited above, § 66), and *K.A. and A.D. v. Belgium* (nos. 42758/98 and 45558/99, § 83, 17 February 2005), he submitted that the principle of personal autonomy could be understoodto encompass the right to make choices about one's own body. In that connection the Court observes that, while Article 8 of the Convention cannot be interpreted as guaranteeing an unconditional right to gender reassignment surgery, it has previously held that transgenderism is recognised internationally as a medical condition which warrants treatment to assist the persons concerned (see *Christine Goodwin*, cited above, § 81). The health services of mostof the Contracting States recognise this condition and provide or permit treatment, including irreversible gender reassignment surgery.

66. The Court considers that the initial refusal of the applicant's request undeniably had repercussions on his right to gender identity and to personal development, a fundamental aspect of the right to respect for private life. That refusal therefore amounted to interference with the applicant's right to respect for his private life within the meaning of Article 8 § 1 of the Convention. [...]

100. According to the Court's settled case-law, an instance of interference will be considered "necessary in a democratic society" for a legitimate aim if it answers a "pressing social need", if it is proportionate to the legitimate aim pursued and if the reasons adduced by the national authorities to justify it are "relevant and sufficient" (see, among other authorities, *Nada v. Switzerland* [GC], n°. 10593/08, § 181, ECHR 2012, and *Animal Defenders International v. the United Kingdom* [GC], n°. 48876/08, § 105, ECHR 2013 (extracts)).

101. While it is for the national authorities to make the initial assessment in all these respects, the final evaluation of whether the interference is necessary remains subject to review by the Court for conformity with the requirements of the Convention. A margin of appreciation must be left to the competent national authorities in this assessment. The breadth of this margin varies and depends on a number of factors including the nature of the Convention right in issue, its importance for the individual, the nature of the interference and the object pursued by the interference. The margin will tend to be narrower where the right at stake is crucial to the individual's effective enjoyment of "intimate" or key rights. Accordingly, where a particularly important facet of an individual's existence or identity is at stake, the margin allowed to the State will be restricted. Where, however, there is no consensus within the member States of the Council of Europe, either as to the relative importance of the interest at stake or as to how best to protect it, the margin will be wider (see *S. and Marper v. the United Kingdom* [GC], nos. 30562/04 and 30566/04, §§ 101-02, ECHR 2008, and *Fernández Martínez*, cited above, § 125).

102. In the present case the Court observes that the proceedings before the domestic courts directly concerned the applicant's freedom to define his gender identity, one of the most basic essentials of self-determination (see *Van Kück*, cited above, § 73). In that regard it points out that it has repeatedly signalled its consciousness of the serious problems facing transgender persons and has stressed the importance of keeping the need for appropriate legal measures under review (see *Christine Goodwin*, cited above, § 74).

103. The Court reiterates that is of crucial importance that the Convention is interpreted and applied in a manner which renders its rights practical and effective, not theoretical and illusory. A failure by the Convention institutions to maintain a dynamic and evolutive approach would risk rendering it a bar to reform or improvement (see, among other authorities, *Stafford v. the United Kingdom* [GC], n°. 46295/99, § 68, ECHR 2002-IV).

104. In the context of the present case, the Court therefore considers it appropriate to take account of the development of international and European law, and of law and practice in the various Council of Europe member States, in order to assess the circumstances of the present case "in the light of present-day conditions" (for a similar approach, see, among other authorities, *Tyrer v. the United Kingdom*, 25 April 1978, § 31, Series A n°. 26).

105. In that regard the Court observes that the possibility for transgender persons to undergo gender reassignment treatment exists in many European countries, as does legal recognition of their new gender identity. It further notes that the regulations or practice applicable in a number of countries that recognise gender reassignment make legal recognition of the new preferred gender contingent, either implicitly or explicitly, on gender reassignment surgery and/or on the inability to procreate.

106. In its judgment in *Christine Goodwin* (cited above, § 85) the Court held that, in accordance with the principle of subsidiarity, it was primarily for the Contracting States to decide on the measures necessary to secure Convention rights to everyone within their jurisdiction and that, in resolving within their domestic legal systems the practical problems created by the legal recognition of post-operative gender status, the Contracting States had to be granted a wide margin of appreciation.

107. In the Court's view, the same is undoubtedly true in relation to the legal requirements governing access to medical or surgical procedures for transgender persons wishing to undergo the physical changes associated with gender reassignment.

108. However, the Court has previously held that it attaches less importance to the lack of evidence of a common European approach to the resolution of the legal and practical problems posed than to the existence of clear and uncontested evidence of a continuing international trend in favour not only of increased social acceptance of transgender persons but of legal recognition of the new gender identity of post-operative transgender persons (see *Christine Goodwin*, cited above, § 85).

109. It further reiterates that the right of transgender persons to personal development and to physical and moral security in the full sense enjoyed by others in society cannot be regarded as a matter of controversy requiring the lapse of time to cast clearer light onthe issues involved (see *Christine Goodwin*, cited above, § 90).

110. In that connection it emphasises that, in the Appendix to Recommendation CM/Rec (2010)5 on measures to combat discrimination on grounds of sexual orientation or gender identity, the Committee of Ministers of the Council of Europe stated that prior requirements, including changes of a physical nature, for legal recognition of a gender reassignment, should be regularly reviewed in order to remove abusive requirements ... Furthermore, in Resolution 1728 (2010) on discrimination on the basis of sexual orientation and gender identity, the Parliamentary Assembly of the Council of Europe called on the member States to address the specific discrimination and human rights violations faced by transgender persons and, in particular, to ensure in legislation and in practice their right to official documents that reflected the individual's preferred gender identity, without any prior obligation to undergo sterilisation or other medical procedures such as gender reassignment surgery or hormone therapy...

111. The Court also observes that some member States have recently amended their legislation or practice regarding access to gender reassignment treatment and the legal recognition of gender reassignment by abolishing the infertility/sterility requirement.

112. In that connection the Court considers it worthwhile to highlight the specific features of Turkish law in this sphere. In the majority of countries which require hormone treatment or gender reassignment surgery as a prior condition for legal recognition of a person's preferred gender, the individual's sterility or infertility is assessed after the medical or surgical procedure for gender reassignment. However, while Turkish law makes the amendment of the individual's civil status contingent upon physical change following gender reassignment surgery "carried out in conformity with the aim specified in the court authorisation and using those medical techniques", it is apparent from the impugned ruling of the Mersin District Court that in the present case the inability to procreate was a requirement which had be satisfiedin advance of the gender reassignment process, with the result that it determined the applicant's access to gender reassignment surgery.

113. On the basis of the evidence in the file, and in particular the witness statements of the applicant's family before the domestic courts, the Court observes that the applicant has for many years lived in society as a man. It is also apparent that he has received psychological counselling since adolescence and was diagnosed as transgender by a committee of experts in psychology, who also concluded that it was necessary for him to live henceforth with a male identity. In September 2005, when he applied to the courts for the first time for authorisation to undergo gender reassignment surgery, the applicant had thus already been engaged for many years in a process of gender transition; he was receiving psychological counselling and had for a long time been acting as a man in society.

114. Despite this situation, the domestic courts initially refused him the authorisation he needed in order to undergo the physical change to which he aspired. The Court reiterates in that regard that serious interference with private life can arise where the state of domestic law conflicts with an important aspect of personal identity (see *Christine Goodwin*, cited above, § 77).

115. Furthermore, the Court has previously held that it cannot be suggested that there is anything capricious in the decision taken by a person to undergo gender reassignment, given the numerous and painful interventions involved and the level of commitment and conviction required to achieve a change in social gender role (see *Christine Goodwin*, cited above, § 81, and *Schlumpf*, cited above, § 110).

116. In the present case the Court notes that the domestic courts justified their initial refusal to grant the applicant's request solely by reference to the fact that he retained his ability to procreate. It fails to see why persons wishing to undergo gender reassignment surgery should have to demonstrate that they are unable to procreate even before the physical process of gender change can be undertaken.

117. In that regard the Court notes, in view of the information provided by the parties, that domestic law makes provision for medical procedures with a view to voluntary sterilisation. In his observations of 25 October 2010 the applicant maintained that he did not have access to these procedures within the existing legal framework. He added that there were no legislative provisions laying down the procedure to be followed or the type of treatment he could undergo, and that there was therefore a legal vacuum in that regard. In his additional observations of 23 October 2013 the applicant's lawyer stated that his client, after lodging the present application with the Court, had resorted to hormone treatment without any judicial or medical supervision.

118. While maintaining that the domestic courts' refusal of the applicant's request on account of his ability to procreate had been in accordance with the law, the Government contended that neither the legislation complained of nor the detailed arrangements for its implementation required the applicant to undergo prior medical sterilisation or hormone therapy. However, the Court fails to see how, other than by undergoing a sterilisation operation, the applicant could have complied with the requirement of permanent infertility given that, in biological terms, he had the ability to procreate.

119. In any event, the Court does not deem it necessary to rule on the question of possible access by the applicant to medical treatment that would have enabled him to satisfy this requirement, since it considers that due respect for his physical integrity precluded any obligation for him to undergo this type of treatment.

120. Moreover, in the circumstances of the present case and in view of the manner in which the applicant's complaint was framed, it suffices for the Court to note that the applicant challenged, both in the domestic courts and in the Convention proceedings, the reference in the legislation to a permanent inability to procreate as a prior requirement for authorisation to undergo gender reassignment.

121. In the Court's view, this requirement appears wholly unnecessary in the context of the arguments advanced by the Government to justify the regulation of gender reassignment surgery. Accordingly, even assuming that the reason for the rejection of the applicant's initial request to undergo gender reassignment surgery was relevant, the Court considers that it cannot be regarded as sufficient. The interference with the applicant's right to respect for his private life arising from that rejection cannot therefore be considered "necessary" in a democratic society.

The fact that the Mersin District Court changed its approach, authorising the applicant in May 2013 to undergo gender reassignment surgery notwithstanding the medical findings to the effect that he was not permanently unable to procreate, undoubtedly supports this conclusion.

122. Accordingly, the Court considers that in denying the applicant for many years the possibility of undergoing gender assignment surgery, the State breached his right to respect for his private life. There has therefore been a violation of Article 8 of the Convention."

This Y.Y. judgment can therefore be interpreted as prohibiting in general terms the requirement of sterility or sterilisation as a prior condition for gender reassignment.

A.P., Garçon and Nicot v. France,
6 April 2017, nº. 79885/12

The judgment in A.P., *Garçon and Nicot v. France* confirms the Court's position that the recognitionof gender reassignment cannot be made conditional on undergoing a treatment or surgery involvingthe sterilisation of a transgender person or some other effect of this nature.

Principal facts

This case concerned three transgender persons of French nationality who wished to change their gender markers and forenames on their birth certificates and who were refused to do so by the courts of the respondent State.

On 11 September 2008, A. P. brought proceedings against the Public Prosecutor before the Paris *tribunal de grande* instance to have it established that he was now a female and his name was A.

(a female forename). He submitted four medical certificates in support of his request, one of which certified a gender reassignment surgery performed in Thailand on 3 July 2008. In an interlocutory judgment of 17 February 2009, the court ordered an expert assessment covering physiological, biological and psychological aspects. A. P. refused to submit to this examination because of its cost and the interference with his physical and moral integrity. By a judgment of 10 November 2009, the court dismissed A. P.'s application. The Paris Court of Appeal upheld the court's judgment in so far as it had dismissed the request to change gender markers, but ordered that the forenames be changed. On 7 June 2012, the Court of Cassation dismissed the appeal.

On 17 March 2009, E. Garçon brought proceedings against the Public Prosecutor before the Créteil TGI (*tribunal de grande instance*) to have it established that he was now a female and his namewas Emilie. He referred to a certificate issued by a psychiatrist in 2004. This certificate indicatedthat he was a transgender person but it was not added to the case file. Since he had failed to demonstrate that he suffered from the alleged gender identity disorder, the Court held on 9 February 2010 that E. Garçon's claims ought to be dismissed. The Paris Court of Appeal upheld the judgment. On 13 February 2013, the Court of Cassation dismissed the appeal.

On 13 June 2007, S. Nicot brought proceedings against the Public Prosecutor before the Nancy TGI to have it established that he was now a female and his name was Stéphanie. On 7 November 2008, the court stayed the proceedings and ordered that the medical documents relating to medical and surgical treatment undergone, proving the effectiveness of his gender reassignment, be added to the case file. S. Nicot refused to produce these documents. By a judgment rendered on 13 March 2009, the court therefore dismissed his application. The Nancy Court of Appeal upheld the judgment. On 13 February 2013, the Court of Cassation dismissed the appeal.

Relying on Article 8 (right to respect for private life), A. P., E. Garçon and S. Nicot complained in particular that the correction of the gender markers on their birth certificate was conditional on the irreversibility of the change in their appearance.

Decision of the Court

The Court found a violation of Article 8 (right to respect for private life) of the Convention in respect of the second and third applicants, on account of the obligation to establish the irreversible nature of the change in their appearance. The Court held, in particular, that making recognition of the gender identity of transgender persons conditional on sterilisation surgery or treatment which they do not wish to undergo amounts to making the full exercise of their right to respect for private life conditional on relinquishing full exercise of their right to respect for physical integrity. Its reasoning was as follows.

"126. The Court notes that, in order to obtain recognition of their identity, persons in the applicants' situation had no choice but to first undergo difficult medical treatment, or surgery, which, under French positive law as it existed at the time of the events in the present case, had to result in an irreversible change of appearance. As the Court pointed out above, this meant in all probability that they had to be sterilised. However, not all transgender persons wish to – or can – undergo treatment or surgery leading to such consequences, as illustrated by the example of the second and third applicants in the present case. The Court notes in that regard that in its opinion of 27 June 2013, cited above, the CNCDH stressed that some people who did not wish to have recourse to such treatment or operations nevertheless agreed to this constraint in the hope of securing a successful outcome in the proceedings concerning the amendment of their civil status (see paragraph 65 above).

127. Medical treatments and operations of this kind go to an individual's physical integrity, which is protected by Article 3 of the Convention (although this provision was not relied on by the second and third applicants) and by Article 8.

128. Hence, in different contexts, the Court has found a violation of these provisions in cases concerning the sterilisation of mentally competent adults who had not given their informed consent. In particular, it found that, since sterilisation concerns an essential human bodily function, it has implications for multiple aspects of individuals' integrity, including their physical and mental well-being and their emotional, spiritual and family life. It specified that, while it may be performed legitimately at the request of the person concerned, for instance as a means of contraception, or for therapeutic purposes where a case of medical necessity has been convincingly established, the situation is different where it is imposed on a mentally competent adult patient without his or her consent. In the Court's view, such a course of action is incompatible with respect for human freedom and dignity, which constitute one of the core principles of the Convention (see *Soares de Melo v. Portugal*, n°. 72850/14, §§ 109-11, 16 February 2016, and G.B. and *R.B. v. the Republic of Moldova*, n°. 16761/09, §§ 29-30 and 32, 18 December 2012).

129. More broadly, the Court has held that, in the sphere of medical assistance, even where the refusal to accept a particular treatment might lead to a fatal outcome, the imposition of medical treatment without the consent of a mentally competent adult patient would interfere with his or her right to physical integrity (see *V.C. v. Slovakia*, n°. 18968/07, § 105, ECHR 2011, and the cases cited therein: *Pretty*, cited above, § § 63 and 65; *Glass v. the United Kingdom*,n°. 61827/00, §§ 82-83, ECHR 2004-II; and *Jehovah's Witnesses of Moscow v. Russia*, n°. 302/02, § 135, 10 June 2010; see also *Soares de Melo*, cited above, § 109).

130. Medical treatment cannot be considered to be the subject of genuine consent when the fact of not submitting to it deprives the person concerned of the full exercise of his or her right to gender identity and personal development, which, as previously stated, is a fundamental aspect of the right to respect for private life (see *Van Kück*, cited above, § 75).

131. Making the recognition of transgender persons' gender identity conditional on sterilisation surgery or treatment – or surgery or treatment very likely to result in sterilisation – which they do not wish to undergo therefore amounts to making the full exercise of their right to respect for their private life under Article 8 of the Convention conditional on their relinquishing full exercise of their right to respect for their physical integrity as protected by that provision and also by Article 3 of the Convention.

132. The Court fully accepts that safeguarding the principle of the inalienability of civil status, ensuring the reliability and consistency of civil-status records and, more generally, ensuring legal certainty, are in the general interest. However, it notes that, on the basis of this interpretation of the general interest, French positive law as it stood at the material time presented transgender persons not wishing to undergo full gender reassignment with an impossible dilemma. Either they underwent sterilisation surgery or treatment – or surgery or treatment very likely to result in sterilisation – against their wishes, thereby relinquishing full exercise of their right to respect for their physical integrity, which forms part of the right to respect for private life under Article 8 of the Convention; or they waived recognition of their gender identity and hence full exercise of that same right. In the Court's view, this amounted to disrupting the fair balance which the Contracting Parties are required to maintain between the general interest and the interests of the persons concerned.

133. The Court reiterates in that regard its finding in *Y.Y. v. Turkey* (cited above, § 119), to the effect that due respect for the physical integrity of the applicant (a transgender person whose request to undergo gender reassignment surgery was refused on the grounds that he had not demonstrated that he was permanently unable to procreate) precluded any obligation for him to undergo treatment resulting in permanent infertility. It further observes that in the

case of *Soares de Melo* (cited above, § 111) it found a violation of Article 8 on account of the requirement for the applicant to undergo sterilisation surgery in order to exercise her parental rights as protected by that same provision.

134. Furthermore, the Court observes that on 12 October 2016 the French legislature expressly excluded sterilisation from the conditions to be fulfilled by transgender persons seeking recognition of their identity. The new Article 61-6 of the Civil Code states that "[t]he fact that an applicant has not undergone medical treatment, surgery or sterilisation shall not constitute grounds for refusing the request [for amendment of the gender markers in civil-status documents]" (see paragraph 68 above).

135. Accordingly, the refusal of the second and third applicants' requests for a change in civil status, on the grounds that they had not provided proof of the irreversible nature of the change in their appearance – that is to say, demonstrated that they had undergone sterilisation surgery or medical treatment entailing a very high probability of sterility – amounts to a failure by the respondent State to fulfil its positive obligation to secure their right to respect for their private lives. There has therefore been a violation of Article 8 of the Convention on this account in respect of these applicants."

§ 2 – The extent of the legal recognition of gender reassignment

The European Court of Human Rights imposes a positive obligation on states to introduce national legislation permitting complete gender reassignment and full recognition of the preferred gender; the amendment of civil-status records must be made within a reasonable period of time.

A | The introduction of legislation permitting complete gender reassignment and full recognition of the preferred gender

It was established by the judgment in the L. v. Lithuania case that a legal framework must be available to enable transgender persons to complete their gender reassignment and secure full recognition of their preferred gender identity; such persons cannot be forced to remain in a situation of partial gender reassignment owing to the incomplete nature of the national legislation governing gender reassignment surgery.

***The principle established by the judgment in L. v. Lithuania*,**
11 September 2007, n°. 27527/03

Principal facts

The case concerned an application brought by a Lithuanian national, Mr L. who was born in 1978 and lives in Klaipėda (Lithuania). At birth he was registered as a girl, with a name clearly identifiable as female. However, from an early age, he submits that he felt his gender was male rather than female. He has been in a stable relationship with a woman since 1998. On 18 May 1997 the applicant consulted a micro-surgeon about gender reassignment, who recommended that he consult a psychologist. He therefore went to Vilnius Psychiatric Hospital for tests in November 1997, where he was diagnosed as a transsexual. On 16 December 1997 a doctor at Vilnius University Santariškės Hospital also diagnosed the applicant as a transsexual and advised that he consult a psychologist. An entry in the applicant's medical file of 28 January 1998 included a recommendation that he pursue hormone treatment with a view to eventual gender reassignment surgery, following which he was officially prescribed hormone treatment for two months. The applicant submits that in 1999 his doctor refused to prescribe hormone therapy in view of the legal uncertainty as to whether or

not full gender reassignment could be legally carried out. Thereafter the applicant continued the hormone treatment "unofficially". In 1999 the applicant went to Vilnius University, where his request to be registered under his chosen male name was accepted on compassionate grounds. However, his request the same year – that his name on all official documents be changed to reflect his male identity – was refused. From 3 to 9 May 2000 the applicant underwent "partial gender reassignment surgery", namely a breast removal procedure, in the light of the new Civil Code which was due to be adopted. Article 2.27 § 1 of the Code, which entered into force on 1 July 2003, provides that "an unmarried adult has the right to gender reassignment (*pakeisti lytį*)in a medical way, if that is medically possible". The second paragraph of the provision stipulates that "the conditions and procedure for gender reassignment shall be established by law". The applicant agreed with the doctors that a further surgical step would be carried out following the adoption of the relevant laws governing those "conditions and procedures". No such laws have asyet been adopted. In 2000, with the assistance of a Lithuanian Member of Parliament, the applicantchose a new name and surname for his birth certificate and passport, which were of Slavic origin,to avoid disclosing his gender; Lithuanian names and surnames are gender-sensitive. However, his personal code on his new birth certificate and passport (and on his Vilnius University diploma)remains unchanged; as it starts with the number four, it identifies his gender as female. The applicant maintained that he faced a vast amount of daily embarrassment and difficulties; for example, he was unable to apply for a job, pay social security contributions, consult a doctor, communicate with the authorities, obtain a bank loan or cross the state border, without his female gender being disclosed. As a consequence, he alleged that he was condemned to social ostracism because he looked masculine but, in official papers, was identified as a woman. That state of affairs had left him in a permanent state of depression with suicidal tendencies.

Mr L. complained about the lack of legislation allowing him to undergo surgery to complete the gender reassignment process and submitted that this gap in the law violated, inter alia, Article 8 of the Convention (private life).

Decision of the Court

The Court found a violation of Article 8 based on the following arguments:

"56. The Court would emphasise the positive obligation upon States to ensure respect for private life, including respect for human dignity and the quality of life in certain respects (see, *mutatis mutandis*, *Pretty*, cited above, § 65). It has examined several cases involving the problems faced by transsexuals [...].

57. The present case involves another aspect of the problems faced by transsexuals: Lithuanian law recognises their right to change not only their gender but also their civil status [...]. However, there is a gap in the relevant legislation; there is no law regulating full gender reassignment surgery. Until such a law is enacted, no suitable medical facilities appear to be reasonably accessible or available in Lithuania [...]. Consequently, the applicant finds himself in the intermediate position of a preoperative transsexual, having undergone partial surgery, with certain important civil-status documents having been changed. However, until he undergoes the full surgery, his personal code will not be amended and, therefore, in certain significant situations in his private life, such as his employment opportunities or travel abroad, he remains a woman [...].

58. The Court notes that the applicant has undergone partial gender reassignment surgery. It is not entirely clear to what extent he would be able to complete the procedure privately in Lithuania [...]. However, this consideration has not been put forward by either party to the present case so, presumably, it is to be ruled out. As a short-term solution, it may be possible for the applicant to have the remaining operation abroad, financed in whole or in part by the State [...].

59. The Court finds that the circumstances of the case reveal a limited legislative gap in gender reassignment surgery, which leaves the applicant in a situation of distressing uncertainty vis-à-vis his private life and the recognition of his true identity. Whilst budgetary restraints inthe public health service might have justified some initial delays in implementing the rights of transsexuals under the Civil Code, over four years have elapsed since the relevant provisions came into force and the necessary legislation, although drafted, has yet to be enacted [...]. Given the few individuals involved (some fifty people, according to unofficial estimates – see paragraph 22 above), the budgetary burden on the State would not be expected to be unduly heavy. Consequently, the Court considers that a fair balance has not been struck between the public interest and the rights of the applicant.

60. In the light of the above considerations, the Court concludes that there has been a violation of Article 8 of the Convention."

Case law applications

***X v. The former Yugoslav Republic of Macedonia*,**
17 January 2019, n°. 29683/16

Principal facts

The applicant, X, is a Macedonian national who was born in 1987 and lives in Skopje. The case concerned the administrative proceedings by which the applicant, who is transgender, had sought to have the sex/gender marker on his birth certificate changed. At birth, X was registered as a girl, with a clearly female name. X understood from an early age that he was male rather than female. In 2010 he went to a specialist clinic in Belgrade, where a psychologist and sexologist diagnosed him with "transsexuality". X started taking hormones to increase his testosterone levels, as recommended by the clinic. In June 2011, X applied for a change of his first and family name. The Ministry of the Interior granted his request, registered X under a clearly male forename and issued him with a new identity card. However, the sex/gender marker and numerical personal code remained the same, identifying X as a female. In July 2011, X requested that the sex/gender marker and the numerical personal code on his birth certificate be corrected to indicate that he was a male. But the Ministry of Justice ("the Ministry") dismissed X's application on the grounds that there was no official document proving the applicant had changed gender. X appealed to the Ministry, alleging that there was no statutory provision governing this matter. Gender reassignment surgery was unavailable in his home country and was not justified in his case. He added that such a requirement would force him to undergo unwanted medical treatment and sterilisation. He argued that he had already been diagnosed as transsexual, which he believed was sufficient to obtain legal recognition of his gender. In October 2011, the Ministry rejected his appeal, but in February 2013, the Administrative Court quashed the Ministry's decision. In June 2013, X underwent a double mastectomy (breast removal) in Belgrade and continued his hormonal treatment. When the case was reviewed, the authorities instructed the Forensic Institute to examine X and the Institute found that X should be issued a document attesting to his new gender. However, in December 2014, the Ministry again dismissed his request to correct the sex/gender marker on the birth certificate because it had still not been provided with "evidence of an actual change of sex". New proceedings before the Administrative Court are still ongoing. From 2012 to 2016, X submitted several reports showing that the protracted procedure relating to the legal recognition of his gender identity had had harmful consequences on his mental health and his daily life.

Relying in particular on Article 8 (right to respect for private and family life), X complained of the lack of a regulatory framework for legal gender recognition and about the arbitrary imposition of a requirement for genital surgery. Under Article 13 (right to an effective remedy), he also complained about a lack of an effective remedy.

Decision of the Court

The Court found that there had been a violation of Article 8 of the Convention (right to respect for private life) on account of the lack of a regulatory framework ensuring the right to respect for the applicant's private life. Its argument was as follows.

"(a) Preliminary remarks: Whether the case concerns interference or a positive obligation
[…]

65. Having regard to the facts of the case and the parties' submissions, the Court considers that the primary question to be determined is whether or not the respondent State failed to comply with its positive obligation to put in place an effective and accessible procedure, with clearly defined conditions securing the applicant's right to respect for his private life […]. The answer to that question would be determinative for the other aspect of the applicant's complaint – namely that he was allegedly compelled to undergo complete gender reassignment surgery in order to have his sex/gender marker changed in the birth register. This is so given the fact that that aspect concerns a specific requirement which allegedly was imposed by the authorities to be fulfilled by the applicant, as a pre-operative transsexualwho has undergone partial surgery.

(b) Compliance with the State's positive obligation

66. The relevant Convention principles have been summarised in the Court's judgment in the case of *Hämäläinen* (cited above, § § 65-67).

67. Turning to the present case, the Court notes that there is no provision in the domestic law that explicitly allows the alteration of a person's sex/gender marker in the civil status register, unlike the right to have a person's personal name changed (see paragraphs 26-28 above). Furthermore, the legislation does not impose any terms and conditions to be fulfilled and procedures to be followed. That was confirmed by the Administrative Court. Similarly, no provision clearly specifies the body that has jurisdiction to decide such a request (unlike a request for a change of a personal name). That the respondent State has no regulatory framework regarding legal recognition of gender reassignment was confirmed by relevant international fora and acknowledged by the Court in its analysis of comparative law (*Hämäläinen*, § 32). The same appearsto have been acknowledged in the impugned proceedings.

68. Notwithstanding the above, the Court will examine the Government's argument that the Act was to be considered as having laid a sufficient and effective legal basis for the issue at stake. In this connection the Government maintained that the Act – in particular section 22(2) permitted the rectification and modification of entries in the civil status register and vested the Registry with authority to decide on both matters in two different ways: errors could be rectified directly by the Registry and entries could be altered on the basis of a separate decision by a body with the relevant authority, as a prerequisite for the change sought. Since the applicant sought to change the gender that had been assigned at birth and recorded as such in the birth register, it would appear that it fell to be examined under the latter procedure described above. That was the approach applied by the Registry, which refused on two occasions to change the applicant's sex/gender marker in the birth register from a female to a male one owing to the absence of documentary evidence attesting to his altered sex. However, the Registry did not specify the nature of that evidence, despite it having lodged requests with the relevant authorities for information in this respect. The Administrative Courtreferred to that omission in remitting the case for reconsideration. The Court attaches weightto the fact that the Government did not present any evidence that those issues, including the procedure for obtaining the relevant evidence, were regulated by law or that there was

established judicial practice regarding the matter. In so far as it may be inferred from the Government's submissions that a judicial declaration by the Administrative Court acknowledging the applicant's new gender identity could be relied upon by the Registry in making the change sought, it is to be noted that that court did not decide on the applicant's case on the merits, even though it had examined it on two occasions. Lastly, it is not without relevance that the Registry, in its last decision of 28 February 2018 – namely six and a half years after the applicant had initiated the impugned proceedings – declared that it did not have authority to decide on the applicant's claim.

69. All the above is sufficient for the Court to conclude that the current regulatory framework in the respondent State on legal gender recognition leaves a number of important questions unanswered. Among them is the existence and nature of any requirement that a claimant needs to fulfil in order to have the sex/gender marker in the official records changed. As noted in paragraph 67 above, the domestic law does not address that issue. Furthermore, it was not argued – and the Court was not presented with any evidence – that there was any (let alone settled) jurisprudence specifying any such requirement. The applicant argued that he had been compelled to undergo complete gender reassignment surgery in order to have the sex/gender marker changed in the birth register. Assuming that the early findings of the administrative authorities may have pointed to such a conclusion, the Court observes that no definitive position was taken on the matter. It is to be noted that the applicant's claim to be granted a new male sex/gender marker was not finally dismissed, and the impugned proceedings are still pending (see, conversely, *Hämäläinen*, § 64). Accordingly, and having regard to the arguments stated above, any conclusion as to whether the applicant, as a pre-operative transsexual who has undergone partial surgery, will be allowed to have his preferred gender legally recognised would veer precariously close to speculation.

70. The Court finds that the circumstances of the case reveal legislative gaps and serious deficiencies that leave the applicant in a situation of distressing uncertainty *vis-à-vis* his private life and the recognition of his identity. As stated above, the protracted examination of the applicant's claim, for which the national authorities bore sole responsibility, is having long-term negative consequences for his mental health. The foregoing considerations are sufficient to enable the Court to conclude that the current legal framework in the respondent State does not provide "quick, transparent and accessible procedures" for changing on birth certificates the registered sex of transgender people.

71. In the light of the above considerations, the Court concludes that there has been a violation of Article 8 of the Convention on account of the lack of a regulatory framework ensuring the right to respect for the applicant's private life."

B | Amendment of civil-status records within a short period of time

It should be noted that the *B. v. France* judgment of 25 March 1992 was the first judgment in which the Court found a violation of Article 8 in a case relating to recognition of transgender persons. As early as 1992, it asserted the right to amendment of civil-status records following gender reassignment, effectively foreshadowing the *Goodwin* judgment delivered ten years later. The *S. V. v. Italy* judgment of 11 October 2018 added that such an amendment must be made within a period of time that cannot be too long because of the excessively rigid nature of the procedure. This is essentially in line with the provisions of Recommendation CM/Rec(2010)5 on "measures to combat discrimination on grounds of sexual orientation or gender identity" which requires states to allow the change of name and gender in official documents in a quick, transparent and accessible way.

***B. v. France*, 25 March 1992,**
n°. 13343/87

Principal facts

The applicant was born in 1935 in Algeria and was registered at birth as of male sex, with the forenames Norbert Antoine. She adopted female behavioUr from a very early age because she regarded herself as being female and her family considered her as sUch. In 1963, after completing military service, she left Algeria for Paris, where she was living at the time of the application, and worked in show bUsiness. She was treated for depression from 1963 to 1967, then Underwent hormone therapy, which broUght aboUt feminisation of her appearance. She underwent gender reassignment sUrgery in Morocco in 1972 and had since been living with a man whom she wished to marry. In 1978 she broUght proceedings before the LiboUrne *tribUnal de grande instance*, asking it to declare her as being of female sex and to order rectification of her birth certificate so as to indicate her preferred gender and her new female forenames, Lyne Antoinette. This coUrt dismissed her action in November 1979; the Bordeaux CoUrt of Appeal and the CoUrt of Cassation dismissed her appeals in May 1985 and March 1987 respectively. Her official docUments, inclUding her passport, identity card and driving licence, were issUed in the name of "Norbert B." and her social secUrity card bore the code nUmber used for persons of male sex.

In her application, Ms B. complained of the French authorities' refUsal to recognise her true gender identity and, in particUlar, to grant her reqUest for amendment of the civil-statUs register; she relied in particUlar on Article 8 of the Convention.

Decision of the Court

In this case the CoUrt held by fifteen votes to six that there had been a violation of Article 8. Its reasoning was as follows:

"43. According to the applicant, the refUsal to recognise her true sexUal identity was a breach of Article 8. She argued that by failing to allow the indication of her sex to be corrected in the civil statUs register and on her official identity docUments, the French authorities forced her to disclose intimate personal information to third parties; she also alleged that she faced great difficUlties in her professional life.

44. The CoUrt notes first of all that the notion of "respect" enshrined in Article 8 (art. 8) is not clear-cUt. This is the case especially where the positive obligations implicit in that concept are concerned, as in the instant case (see the *Rees v. the United Kingdom* jUdgment of 17 October 1986, Series A n°. 106, p. 14, para. 35, and the *Cossey v. the United Kingdom* jUdgmentof 27 September 1990, Series A n°. 184, p. 15, para. 36), and its reqUirements will vary considerably from case to case according to the practices followed and the sitUations obtaining in the Contracting States. In determining whether or not sUch an obligation exists, regard mUst be had to the fair balance that has to be struck between the general interest and the interests of the individUal (see in particUlar the above-mentioned *Cossey* jUdgment, p. 15, para. 37). [...]

1. Scientific, legal and social developments

46. (a) The CoUrt said in the *Cossey* jUdgment that it "[had] been informed of no significant scientific developments that [had] occUrred" since the Rees jUdgment; "in particUlar, it remain[ed] the case ... that gender reassignment sUrgery [did] not resUlt in the acqUisition of all the biological characteristics of the other sex" (*loc. cit.*, p. 16, para. 40).

According to the applicant, science appears to have contribUted two new elements to the debate on the contrast between appearance (changed somatic sex and constructed gonadal sex) and reality (Unchanged chromosomal sex bUt contrary psycho-social sex) as regards

the sex of transsexuals. Firstly, the chromosomal criterion was not infallible (cases of persons with intra-abdominal testicles, so-called testicular feminisation, or with XY chromosomes despite their feminine appearance); secondly, current research suggested that the ingestion of certain substances at a given stage of pregnancy, or during the first few days of life, determined transsexual behaviour, and that transsexualism might result from a chromosome anomaly. There might thus be a physical, not merely psychological explanation of the phenomenon, which would mean that there could be no excuse for refusing to take it into account in law.

(b) As regards the legal aspects of the problem, Miss B. relied on the dissenting opinion of Judge Martens, annexed to the *Cossey* judgment (Series A n°. 184, pp. 35-36, para. 5.5); the differences which still subsisted between the member States of the Council of Europe as to the attitude to be adopted towards transsexuals (*ibid.*, p. 16, para. 40) were counterbalancedto an increasing extent by developments in the legislation and case-law of many of those States. This was supported by resolutions and recommendations of the Assembly of the Council of Europe and the European Parliament.

(c) Finally, the applicant stressed the rapidity of social changes in the countries of Europe, and the diversity of cultures represented by those countries which had adapted their laws to the situation of transsexuals. [...]

48. The Court considers that it is undeniable that attitudes have changed, science has progressed and increasing importance is attached to the problem of transsexualism.

It notes, however, in the light of the relevant studies carried out and work done by experts in this field, that there still remains some uncertainty as to the essential nature of transsexualism and that the legitimacy of surgical intervention in such cases is sometimes questioned. The legal situations which result are moreover extremely complex: anatomical, biological, psychological and moral problems in connection with transsexualism and its definition; consent and other requirements to be complied with before any operation; the conditions under which a change of sexual identity can be authorised (validity, scientific presuppositions and legal effects of recourse to surgery, fitness for life with the new sexual identity); international aspects (place where the operation is performed); the legal consequences, retrospective or otherwise, of such a change (rectification of civil status documents); the opportunity to choose a different forename; the confidentiality of documents and information mentioning the change; effects of a family nature (right to marry, fate of an existing marriage, filiation), and so on. On these various points there is as yet no sufficiently broad consensus between the member States of the Council of Europe to persuade the Court to reach opposite conclusions to those in its *Rees* and *Cossey* judgments.

2. *The differences between the French and English systems* [...]

51. The Court finds, to begin with, that there are noticeable differences between France and England with reference to their law and practice on civil status, change of forenames, the use of identity documents, etc. [...]. It will examine below the possible consequences of these differences in the present case from the point of view of the Convention.

(a) Civil status

(i) Rectification of civil status documents [...]

55. The Court notes first of all that nothing would have prevented the insertion, once judgment had been given, in Miss B.'s birth certificate, in some form or other, of an annotation whose purpose was not, strictly speaking, to correct an actual initial error but to bring the document

up to date so as to reflect the applicant's present position. Furthermore, numerous courts of first instance and courts of appeal have already ordered similar insertions in the case of other transsexuals, and the procureur's office has hardly ever appealed against such decisions, the great majority of which have now become final and binding. The Court of Cassation has adopted a contrary position in its case-law, but this could change.

It is true that the applicant underwent the surgical operation abroad, without the benefit of all the medical and psychological safeguards which are now required in France. The operation nevertheless involved the irreversible abandonment of the external marks of Miss B.'s original sex. The Court considers that in the circumstances of the case the applicant's manifest determination is a factor which is sufficiently significant to be taken into account, together with other factors, with reference to Article 8 (art. 8).

(ii) Change of forenames

56. The applicant pointed out that the law of 6 Fructidor Year II prohibited any citizen from bearing a surname or forename other than those recorded on his or her birth certificate. In the eyes of the law, her forename was therefore Norbert; all her identity documents (identity card, passport, voting card, etc.), her cheque books and her official correspondence (telephone accounts, tax demands, etc.) described her by that name. Unlike in the United Kingdom, whether she could change her forename did not depend on her wishes only; Article 57 of the Civil Code made this subject to judicial permission and the demonstration of a "legitimate interest" capable of justifying it. Miss B. knew of no decision which had regarded transsexualism as giving rise to such an interest. In any event, the Libourne *tribunal de grande instance* and the Bordeaux Court of Appeal had refused to allow her the forenames Lyne Antoinette. Finally, the status of informally adopted forenames was highly uncertain. [...]

57. The Government maintained, on the other hand, that there was ample favourable case-law on the point, supported by the public prosecutor's offices. It merely required that a "neutral" forename such as Claude, Dominique or Camille was chosen; the applicant had, however, requested forenames which were exclusively female.

In addition, many people frequently made use of an informally adopted forename ("*prénom d'usage*") which differed from that recorded in their birth certificate. The Government conceded, however, that this practice had no legal validity.

58. The judgments supplied to the Court by the Government do indeed show that non-recognition of the change of sex does not necessarily prevent the person in question from obtaining a new forename which will better reflect his or her physical appearance.

However, this case-law was not settled at the time when the Libourne and Bordeaux courts gave their rulings. Indeed, it does not appear to be settled even today, as the Court of Cassation has apparently never had an occasion to confirm it. Moreover, the door it opens is a very narrow one, as only the few neutral forenames can be chosen. As to informally adopted forenames, they have no legal status.

To sum up, the Court considers that the refusal to allow the applicant the change of forename requested by her is also a relevant factor from the point of view of Article 8 (art. 8).

(b) Documents

59. (a) The applicant stressed that an increasing number of official documents indicated sex: extracts of birth certificates, computerised identity cards, European Communities passports, etc. Transsexuals could consequently not cross a frontier, undergo an identity check or carry out one of the many transactions of daily life where proof of identity is necessary, without disclosing the discrepancy between their legal sex and their apparent sex.

(b) According to the applicant, sex was also indicated on all documents using the identification number issued to everyone by INSEE. This number was used as part of the system of dealings between social security institutions, employers and those insured; it therefore appeared on records of contributions paid and on payslips. A transsexual was consequently unable to hide his or her situation from a potential employer and the employer's administrative staff; the same applied to the many occasions in daily life where it was necessary to prove the existence and amount of one's income (taking a lease, opening a bank account, applying for credit, etc). This led to difficulties for the social and professional integration of transsexuals.Miss B. had allegedly been a victim of this herself. The INSEE number was also used by the Banque de France in keeping the register of stolen and worthless cheques.

(c) Finally, the applicant encountered problems every day in her economic life, in that her nvoices and cheques indicated her original sex as well as her surname and forenames.

60. The Commission agreed substantially with the applicant's arguments. In its opinion the applicant, as a result of the frequent necessity of disclosing information concerning her private life to third parties, suffered distress which was too serious to be justified on the ground of respect for the rights of others.

61. The Government replied, to begin with, that certificates of civil status and French nationality, driving licences, voting cards and national identity cards of traditional type did not mention sex.

This was admittedly not the case with the Community passport, but the design of that depended on regulations from Brussels and was thus not a requirement imposed by France. The applicant could in fact enjoy freedom of movement independently of her sexual identity, and some of the examples given by her were of no relevance; thus the report of a road accident or other claim did not require the sex of the insured to be specified.

The INSEE number had been introduced after the Second World War for demographic statistical purposes, and was used subsequently for identifying the recipients of French social security benefits. It was hardly ever used apart from this, and did not appear on identity cards, passports or other administrative documents. In any event, the public authorities to which it was communicated were obliged to keep it secret. As for employers, they needed to know it in order to pay a proportion of their employees' social security contributions.

In this connection the Government expressed the opinion that if Miss B. had been unable to find paid work outside the entertainment world, there could be many reasons for this apart from her being a transsexual. There were transsexuals who exercised other equally worthy professions. What was more, any discrimination in recruitment based on the sex or morals of the person concerned was an offence under Article 416-1 of the Criminal Code. No transsexual had ever relied on this Article.

There was no reason either why banks should not be asked to print on cheques only the surname and forenames of the drawer without the prefix "M.", "Mme" or "Mlle", nor did banks verify that the forenames stated were the same as those recorded in the civil status register. Similarly, invoices did not normally mention the customer's sex or forenames, but only the surname. There were thus means available to transsexuals for preserving their privacy.

62. The Court is not convinced by this argument. It considers, in agreement with the Commission, that the inconveniences complained of by the applicant in this field reach a sufficient degree of seriousness to be taken into account for the purposes of Article 8 (art. 8).

(c) *Conclusion*

63. The Court thus reaches the conclusion, on the basis of the above-mentioned factors which

distinguish the present case from the *Rees* and *Cossey* cases and without it being necessary to consider the applicant's other arguments, that she finds herself daily in a situation which, taken as a whole, is not compatible with the respect due to her private life. Consequently, even having regard to the State's margin of appreciation, the fair balance which has to be struck between the general interest and the interests of the individual has not been attained, and there has thus been a violation of Article 8 (art. 8).

The respondent State has several means to choose from for remedying this state of affairs. It is not the Court's function to indicate which is the most appropriate (see inter alia the *Marckx v. Belgium* judgment of 13 June 1979, Series A n°. 31, p. 25, para. 58, and the *Airey v. Ireland* judgment of 9 October 1979, Series A n°. 32, p. 15, para. 26)."

***S.V. v. Italy*, *11 October 2018*,**
n°. 55216/08

Principal facts

The applicant, S.V., is an Italian national who was born in 1965 and lives in Ostia Lido (Italy). At birth, S.V. was entered in the civil-status registers as male and was given the forename L. However, since she considered herself a female, S.V. lived in society as a woman under the forename S. Besides, her work colleagues had called her S. since 1999 and in the photograph on her identity card issued in 2000, her appearance was that of a woman. In 1999, S.V. began treatment with feminising hormones as part of her gender transition process. On 10 May 2001, the Rome District Court authorised her to undergo gender reassignment surgery. In 2001, while awaiting the operation, S.V. applied to the Prefect of Rome for a change of her forename, stating that in view of her physical appearance, the indication of a male forename on her identity documents was a constant source of humiliation and embarrassment. The prefect refused the request on the grounds that, in the absence of a final court ruling confirming the gender reassignment (Law n°. 164 of 1982), the applicant's forename could not be changed. As a result, S.V. had to wait until the court confirmed that the surgery, carried out on 3 February 2003, had been performed and it made a final decision on her gender identity. Thus, following the court's judgment of 10 October 2003, the municipality of Savona changed the indication of S.V.'s gender and her forename.

Relying on Article 8 (right to respect for private and family life) and Article 14 (prohibition of discrimination), S.V. complained that the prefect had rejected her request to change her forename on the grounds that she had not undergone gender reassignment surgery and that no final judicial decision had been issued in that regard.

Decision of the Court

After pointing out that the case concerned the inability of a transgender person to obtain a change of forename prior to completion of the gender transition process by means of gender reassignment and that this issue came entirely within the scope of the right to respect for "private life" guaranteed by Article 8 of the Convention, the Court observed that Italian law permitted transgender persons to have their gender identity legally recognised by amending their civil-status records in accordance with this legislation, but that the latter required them to undergo gender reassignment surgery before being authorised to change their forenames.

"66. The Court must therefore determine whether the authorities' refusal to allow the applicant to change her forename during the gender transition process and before the completion of her gender reassignment surgery constituted disproportionate interference with her right to respect for her private life.

67. The Court notes that, following the District Court judgment of 10 May 2001 which authorised the surgery, the applicant was refused permission to change her forename through administrative channels on the grounds that any amendment to the civil-status records of a transgender person had to be ordered by a judge in the proceedings concerning the change of legal gender status. Consequently, the applicant, in accordance with section 3 of Law n°. 164 of 2000 as in force at the relevant time, had to wait until the court confirmed that the surgery had been performed and gave a final ruling on her gender identity, which it did only on 10 October 2003.

68. The Court stresses that its task is not to take the place of the competent national authorities in determining the most appropriate policy governing changes of forename for transgender persons, but rather to review under the Convention the decisions that those authorities have taken in the exercise of their power of appreciation.

69. Accordingly, it does not call into question as such the choice of the Italian legislature to entrust decisions on changes to the civil-status register concerning transgender persons to the judicial rather than the administrative authority. Moreover, the Court fully accepts that safeguarding the principle of the inalienability of civil status, the consistency and reliability of civil-status records and, more broadly, the need for legal certainty are in the general interest and justify putting in place stringent procedures aimed, in particular, at verifying the underlying motivation for requests for a change of legal identity (see, *mutatis mutandis*, *A.P.*, *Garçon and Nicot*, cited above, § 142).

70. Nevertheless, the Court cannot but note that the refusal of the applicant's request was based on purely formal arguments that took no account of her particular circumstances. For instance, the authorities did not take into consideration the fact that she had been undergoing a gender transition process for a number of years and that her physical appearance and social identity had long been female.

71. In the circumstances of the present case the Court fails to see what reasons in the public interest could have justified a delay of over two and a half years in amending the forename on the applicant's official documents in order to match the reality of her social situation, which had been recognised by the Rome District Court in its judgment of 10 May 2001. In that connection it reaffirms the principle according to which the Convention protects rights that are not theoretical or illusory, but practical and effective.

72. By contrast, the Court observes the rigid nature of the judicial procedure for recognising the gender identity of transgender persons as applicable at the relevant time, which placed the applicant for an unreasonable length of time in an anomalous position in which she was apt to experience feelings of vulnerability, humiliation and anxiety (see, *mutatis mutandis*, *Christine Goodwin*, cited above, § § 77-78).

73. The Court refers to Recommendation CM/Rec (2010)5 on measures to combat discrimination on grounds of sexual orientation or gender identity, in which the Committee of Ministers urged States to make possible the change of name and gender in official documents in a quick, transparent and accessible way (see paragraph 25 above). [...]

75. Accordingly, in view of the foregoing, the Court considers that the applicant's inability to obtain a change of forename over a period of two and a half years, on the grounds that the gender transition process had not been completed by means of gender reassignment surgery, amounts in the circumstances of the present case to a failure on the part of the respondent State to comply with its positive obligation to secure the applicant's right to respect for her private life."

There has therefore been a violation of Article 8 of the Convention.

It should be noted that as of 2011 in Italy, a second court ruling, after surgery, is no longer required in proceedings concerning a change of legal gender status, as the amendment of the civil-status records can be ordered by the judge when giving the decision authorising the surgery.

Section 2. The right to marry a person of the opposite sex following gender reassignment

The *Goodwin* judgment of 2002 stands out as an important judgment also because it supersedes the *Rees* case law in terms of the position adopted on transgender persons right to marriage. A person who has had his/her gender reassigned can now be married, in his or her post-operative sex, to a person of the opposite sex. A transgender woman is allowed to marry a man; similarly,a transgender man can ask to marry a woman.

The principle established by the *Dudgeon* judgment

***Christine Goodwin v. the United Kingdom*,**
11 July 2002, n°. 28957/95

"97. The Court recalls that in the cases of *Rees, Cossey and Sheffield and Horsham* the inabilityof the transsexuals in those cases to marry a person of the sex opposite to their re-assigned gender was not found in breach of Article 12 of the Convention. These findings were based variously on the reasoning that the right to marry referred to traditional marriage between persons of opposite biological sex (the *Rees* judgment, p. 19, § 49), the view that continued adoption of biological criteria in domestic law for determining a person's sex for the purpose of marriage was encompassed within the power of Contracting States to regulate by national law the exercise of the right to marry and the conclusion that national laws in that respect could not be regarded as restricting or reducing the right of a transsexual to marry in such a way or to such an extent that the very essence of the right was impaired (the *Cossey* judgment, p. 18, § § 44-46, the *Sheffield and Horsham* judgment, p. 2030, § § 66-67). Reference was also made to the wording of Article 12 as protecting marriage as the basis of the family (*Rees, loc. cit.*).

98. Reviewing the situation in 2002, the Court observes that Article 12 secures the fundamental right of a man and woman to marry and to found a family. The second aspect is not however a condition of the first and the inability of any couple to conceive or parent a child cannot be regarded as per se removing their right to enjoy the first limb of this provision.

99. The exercise of the right to marry gives rise to social, personal and legal consequences. It is subject to the national laws of the Contracting States but the limitations thereby introduced must not restrict or reduce the right in such a way or to such an extent that the very essence of the right is impaired (see the *Rees* judgment, p. 19, § 50; the *F. v. Switzerland* judgmentof 18 December 1987, Series A n°. 128, § 32).

100. It is true that the first sentence refers in express terms to the right of a man and woman to marry. The Court is not persuaded that at the date of this case it can still be assumed that these terms must refer to a determination of gender by purely biological criteria (as held by Ormrod J. in the case of *Corbett v. Corbett*, paragraph 21 above). There have been

major social changes in the institUtion of marriage since the adoption of the Convention as well as dramatic changes broUght aboUt by developments in medicine and science in the field of transsexUality. The CoUrt has foUnd above, Under Article 8 of the Convention, thata test of congruent biological factors can no longer be decisive in denying legal recognition to the change of gender of a post-operative transsexUal. There are other important factors – the acceptance of the condition of gender identity disorder by the medical professions and health authorities within Contracting States, the provision of treatment inclUding sUrgery to assimilate the individUal as closely as possible to the gender in which they perceive that they properly belong and the assUmption by the transsexUal of the social role of the assigned gender. The CoUrt woUld also note that Article 9 of the recently adopted Charter of FUndamental Rights of the EUropean Union departs, no doUbt deliberately, from the wording of Article 12 of the Convention in removing the reference to men and women.

101. The right Under Article 8 to respect for private life does not however sUbsUme all the issUes Under Article 12, where conditions imposed by national laws are accorded a specific mention. The CoUrt has therefore considered whether the allocation of sex in national lawto that registered at birth is a limitation impairing the very essence of the right to marry in this case. In that regard, it finds that it is artificial to assert that post-operative transsexUalshave not been deprived of the right to marry as, according to law, they remain able tomarry a person of their former opposite sex. The applicant in this case lives as a woman,is in a relationship with a man and woUld only wish to marry a man. She has no possibilityof doing so. In the CoUrt's view, she may therefore claim that the very essence of herright to marry has been infringed.

102. The CoUrt has not identified any other reason which woUld prevent it from reaching this conclUsion. The Government have argued that in this sensitive area eligibility for marriage Under national law shoUld be left to the domestic coUrts within the State's margin of appreciation, adverting to the potential impact on already existing marriages in which a transsexUal is a partner. It appears however from the opinions of the majority of the CoUrt of Appeal jUdgment in *Bellinger v. Bellinger* that the domestic coUrts tend to the view thatthe matter is best handled by the legislatUre, while the Government have no present inten-tion to introdUce legislation.

103. It may be noted from the materials sUbmitted by Liberty that thoUgh there is widespread acceptance of the marriage of transsexUals, fewer coUntries permit the marriage of transsexUals in their assigned gender than recognise the change of gender itself. The CoUrt is not persUaded however that this sUpports an argument for leaving the matter entirely to the Contracting States as being within their margin of appreciation. This woUld be tantamoUnt to finding that the range of options open to a Contracting State inclUded an effective bar on any exercise of the right to marry. The margin of appreciation cannot extend so far. While it is for the Contracting State to determine inter alia the conditions Under which a person claiming legal recognition as a transsexUal establishes that gender re-assignment has been properly effected or under which past marriages cease to be valid and the formalities applicable to fUtUre marriages (inclUding, for example, the information to be fUrnished to intended spoUses), the CoUrt finds no jUstification for barring the transsexUal from enjoying the right to marry Under any circUmstances.

104. The CoUrt conclUdes that there has been a breach of Article 12 of the Convention in the present case."

Case law applications

I. v. United Kingdom, 11 July 2002
nº. 25680/94

Principal facts

The applicant complained about the lack of legal recognition of her new gender identity and the legal status of transsexuals in the United Kingdom. She complained, in particular, about the way she was treated with regard to employment, social security and pensions and her inability to contract a marriage. On this last point, she complained of the violation of Article 12of the Convention (on the other points: see above).

Decision of the Court

In a unanimous judgment, the Court held that there had been a violation of Article 8. Its reasoning was basically as follows.

While Article 12 referred in express terms to the right of a man and woman to marry, the Court was not persuaded that at the date of this case it could still be accepted that these terms should refer to a determination of gender on the basis of purely biological criteria. There had been major social changes in the institution of marriage since the adoption of the Conventionas well as dramatic changes brought about by developments in medicine and science in thefield of transsexuality. In the same case, the Court found, under Article 8 of the Convention,that non-congruent biological factors could no longer constitute sufficient grounds for denying legal recognition to the gender reassignment of a post-operative transsexual (see above). There were other factors to be considered such as the recognition of the medical condition of gender identity disorder by the medical community and health authorities within Contracting States,the provision of treatment including surgery to assimilate the individual as closely as possibleto the gender in which they perceived that they properly belonged, and the assumption by the individual of the social role of their re-assigned gender.

However, the right under Article 8 to respect for private life did not encompass all the issues raised under Article 12, which expressly mentions the conditions imposed by national laws. The Court therefore examined whether the fact that national law retained the gender registered at birth for the purposes of marriage constituted a limitation impairing the very essence of the right to marry in the present case. In that regard, it found it artificial to state that persons who had undergone gender reassignment surgery were not deprived of the right to marry since, in accordance with the law, they remained able to marry a person of their former opposite sex. The applicant in this case lived as a woman and only wished to marry a man. But she did not have the opportunity to do so. She was therefore entitled to complain that the very essence of her right to marry had been violated. The fact that fewer countries allowed the marriage of transsexuals in their re-assigned gender identity than recognised the change of gender itselfdid not convince the Court, which found that this was likely to weaken the argument in favourof leaving the matter entirely within the Contracting States' margin of appreciation. This wouldbe tantamount to finding that the range of options open to a Contracting State included an effectivebar on any exercise of the right to marry. The margin of appreciation could not be so broad.While it was for the Contracting State to determine, inter alia, the conditions under which a person claiming legal recognition as a transsexual establishes that his or her gender reassignment has been properly effected and the formalities applicable to a future marriage (including, for example, the information to be provided to future spouses), the Court saw no reason why transsexual persons should in all circumstances be denied the right to marry. It concluded that there had been a violation of Article 12.

Chapter 2. Matters falling wholly or partially within the national margin of appreciation

The matters in which Contracting States retain a margin of appreciation should now be considered. Two questions must be discussed.

The first concerns legal recognition of gender reassignment: under case law dating from 2006, states retain a certain margin of appreciation allowing them to refuse married transgender persons legal recognition of their gender reassignment. Legal recognition of gender reassignment is therefore a divided issue: on the one hand, where single transgender persons are concerned, states have lost their margin of appreciation and are obliged to recognise their gender reassignment; but on the other (and to a lesser extent), where married transgender persons are concerned, states have retained a margin of appreciation and are not obliged to recognise their gender reassignment. For this reason, the legal recognition of gender reassignment is still partly, or residually, a matter for the discretion of states.

The second question is that of the legal parent–child relationship, or more precisely that of the establishment of such a relationship with a non-biological child: under case law dating back to 1997, states retain full discretion to refuse a transgender person the right to establish a legal parent-child relationship with his or her partner's child.

Section 1. The possibility of refusing married persons the right to legal recognition of gender reassignment

States may refuse married transgender persons legal recognition of their gender reassignment as a result of two decisions on admissibility given in 2006 in the Wena and Anita Parry v. United Kingdom and R. and F. v. United Kingdom cases: in both these cases the applicants were transsexuals who were married at the time of their gender reassignment operation and who applied for recognition of their new gender under the procedure introduced for this purpose in the United Kingdom in 2004 following the 2002 Goodwin judgment. As a result, a state whose domestic law does not recognise same-sex marriage can refuse persons who are already married the right to legal recognition of their gender reassignment as such recognition would lead to a situation which would be inconsistent with the refusal by states to permit same-sex marriage. This case law was confirmed by a Grand Chamber judgment on the merits in the Hamalainen v. Finland case of 16 July 2014[135].

The principle established by the *Wena and Anita Parry decision*

***Wena and Anita Parry v. the United Kingdom*,**
28 November 2006, n°. 42971/05 (decision on admissibility);

R. and F. v. the United Kingdom
28 November 2006, application n°. 35748/05 (decision on admissibility)

Principal facts

The applicants were two married couples with children. In both cases, the husbands had undergone gender reassignment surgery and had continued to live with their wives as married couples. After the Gender Recognition Act came into force in 2004, the applicants who had undergone gender reassignment applied for a gender recognition certificate, which could only be issued to them if they were not married. The applicants were therefore obliged to seek a divorce because same-sex marriage was not allowed under English law; they could continue their relationship under a civil partnership entailing virtually the same rights and obligations as marriage.

The applicants complained in particular, under Articles 8 (right to respect for private and family life) and 12 (right to marry), that they were obliged to divorce in order to obtain legal recognition of their new gender.

Decision of the Court

Both applications were declared inadmissible for being manifestly unfounded. The court pointed out that, when the arrangements for recognition of a new gender were introduced following the *Goodwin* judgment, the legislature was aware that there were a small number of transsexuals in subsisting marriages, but deliberately made no provision for those marriages to continue in the event that one partner made use of the gender recognition procedure. It considered that the state could not be expected to make allowance for such a small number of marriages.

The court's reasoning in the W*ena and Anita Parry v. United Kingdom* case under Articles 8 and 12 of the Convention was as follows:

As to the admissibility of the claim under Article 8.

> "The court recalls that the Grand Chamber judgment in *Christine Goodwin v. the United Kingdom* (cited above) found that there was a breach of Article 8 in the failure of the United Kingdom to provide legal recognition for post-operative transsexuals. Following that judgment, the United Kingdom have introduced a system whereby transsexuals may apply for a gender recognition certificate. The first applicant, may, if she wishes to obtain legal recognition, apply for such a certificate. In her case, however, she must as a precondition end her marriage to the second applicant.
>
> The legislation clearly puts the applicants in a quandary – the first applicant must, invidiously, sacrifice her gender or their marriage. In those terms, there is a direct and invasive effect on the applicants' enjoyment of their right to respect for their private and family life. It would be artificial, and unduly pedantic, to exclude the latter, when the process of annulment would in and of itself affect the status of family life which the applicants currently enjoy as a married couple. However, it must be taken into account, as the Government have asserted, that Article 12 is the *lex specialis* for the right to marry.
>
> It therefore falls to be examined whether the respondent State has failed to comply witha positive obligation to ensure the rights of the applicants through the means chosen to give effect legal recognition to gender re-assignment. In this context, the notion of "respect" as understood in Article 8 is not clear cut, especially as far as the positive obligations inherent in that concept are concerned: having regard to the diversity of practices followed and the situations obtaining in the Contracting States, the notion's requirements will vary considerably from case to case and the margin of appreciation to be accorded to the authorities may be wider than that applied in other areas under the Convention. In determining whether or not a positive obligation exists, regard must also be had to the fair balance that has to be struck between the general interest of the community and the interests of the individual, the search for which balance is inherent in the whole of the Convention (*Cossey v. the United Kingdom* judgment of 27 September 1990, Series A n°. 184, p. 15, § 37).
>
> In the present case, the court notes that the requirement that the applicants annul their marriage flows from the position in English law that only persons of the opposite gender may marry; same-sex marriages are not permitted. Nonetheless it is apparent that the applicants may continue their relationship in all its current essentials and may also give ita legal status akin, if not identical to marriage, through a civil partnership which carrieswith it almost all the same legal rights and obligations. It is true that there will be costs

attached to the various procedures. However the Court is not persuaded that these are prohibitive or remove civil partnership as a viable option.

The Court concludes, as regards the right to respect for private and family life, that the effects of the system have not been shown to be disproportionate and that a fair balance has been struck in the circumstances.

It follows that this part of the application must be rejected as manifestly ill-founded pursuant to Article 35 of the Convention."

As to the admissibility of the claim under Article 12.

"Article 12 secures the fundamental right of a man and woman to marry and to found a family. The exercise of the right to marry gives rise to social, personal and legal consequences and Article 12 expressly provides for regulation of marriage by national law. Given the sensitive moral choices concerned and the importance to be attached in particular to the protection of children and the fostering of secure family environments, this Court must not rush to substitute its own judgment in place of the authorities who are best placed to assess and respond to the needs of society (B. and L. v. the United Kingdom, n°. 36536/02, (dec.) 29 June 2004, § 346). The matter of conditions for marriage in national law cannot, however, be left entirely to Contracting States as being within their margin of appreciation. This would be tantamount to finding that the range of options open to a Contracting State included an effective bar on any exercise of the right to marry. The margin of appreciation cannot extend so far. Any limitations introduced must not restrict or reduce the right in such a way or to such an extent that the very essence of the right is impaired (see Rees v. the United Kingdom, judgment of 17 October 1986, Series A n°. 106, § 50; F. v. Switzerland, judgment of 18 December 1987, Series A n°. 128, § 32).

In the present case, the Court notes that the applicants were lawfully married under domestic law. They wished to remain married. Though there were children to the marriage, there is no suggestion that they, or any other individual, would be adversely affected if they did so. In seeking to comply with the Court's judgment in Christine Goodwin v. the United Kingdom (cited above) in which it had been found that the biological criteria governing the capacity to marry imposed an effective bar on transsexuals' exercise of their right to marry, the legislature have now provided a mechanism whereby a transsexual can obtain recognition in law of the change and thus be able, for the future, to marry a person of the new opposite gender. The Court observes that the legislature was aware of the fact that there were a small number of transsexuals in subsisting marriages but deliberately made no provision for those marriages to continue in the event that one partner made use of the gender recognition procedure.

In domestic law marriage is only permitted between persons of opposite gender, whether such gender derives from attribution at birth or from a gender recognition procedure. Same-sex marriages are not permitted. Article 12 of the Convention similarly enshrinesthe traditional concept of marriage as being between a man and a woman (Rees, cited above, § 49). While it is true that there are a number of Contracting States which have extended marriage to same-sex partners, this reflects their own vision of the role of marriage in their societies and does not, perhaps regrettably to many, flow from an interpretation of the fundamental right as laid down by the Contracting States in the Convention in 1950.

The Court cannot but conclude therefore that the matter falls within the appreciation of the Contracting State as how to regulate the effects of the change of gender in the context of marriage (Christine Goodwin, cited above, § 103). It cannot be required to make allowances

for the small number of marriages where both partners wish to continue notwithstanding the change in gender of one of them. It is of no consolation to the applicants in this case but nonetheless of some relevance to the proportionality of the effects of the gender recognition regime that the civil partnership provisions allow such couples to achieve many of the protections and benefits of married status. The applicants have referred forcefully to the historical and social value of the institution of marriage which give it such emotional importance to them; it is however that value as currently recognised in national law which excludes them.

It follows that this part of the application is manifestly ill-founded pursuant to Article 35 § § 3 and 4 of the Convention."

Case law applications

***Hamalainen v. Finland*,**
16 July 2014, nº. 37359/09 [136]

The applicant, Heli Hämäläinen, is a Finnish national who was born in 1963 and lives in Helsinki. Male at birth, she married a woman in 1996 and had a child with her in 2002. In September 2009, she underwent a gender reassignment surgery. She changed her forename in June 2006 but could not have her identity number modified to correspond to her new female gender in her official documents, unless her wife agreed to their marriage being turned into a registered partnership, which she refused to do, or unless the couple divorced. The applicant and her wife preferred to remain married because, on the one hand, divorce was contrary to their religious convictions and, on the other hand, they considered that registered partnership did not offer the same security as marriage for them and their child. The applicant's request to be registered as female in the civil-status register was therefore rejected. She brought administrative proceedings before the national courts. In May 2008 and February 2009, they rejected her appeal, considering in particular that the Transsexual Gender Confirmation Act in Finland did not aim to change the fact that only a man and a woman could marry under Finnish law. The applicant then brought the matter before the Supreme Administrative Court, which dismissed her extraordinary appeal in August 2010.

Heli Hämäläinen complained that the fact of making full recognition of her preferred gender subject to turning her marriage into a civil partnership had notably violated her rights deriving in particular from Articles 8 (right to respect for private and family life) and 14 (prohibition of discrimination).

The Grand Chamber found, like the Chamber, that there had been no violation of Article 8, arguing inter alia as follows:

"64. The Court observes that it is common ground between the parties that there has been an interference with the applicant's right to respect for her private life in that she was not granted a new – female – identity number. The Chamber also examined the case from that point of view. The Grand Chamber, however, is of the opinion that the question to be determined by the Court is whether respect for the applicant's private and family life entails a positive obligation on the State to provide an effective and accessible procedure allowing the applicant to have her new gender legally recognised while remaining married. The Grand Chamber therefore considers it more appropriate to analyse the applicant's complaint with regard to the positive aspect of Article 8 of the Convention. [···]

69. The Court notes first of all that the applicant and her spouse were lawfully married under domestic law in 1996 and that they wish to remain married. Under domestic law, marriage is only permitted between persons of opposite sex. Same-sex marriages are not, for the time being, permitted in Finland although that possibility is currently being examined by Parliament. On the other hand, the rights of same-sex couples are currently protected by the possibility of contracting a registered partnership. [···]

70. The Court is mindful of the fact that the applicant is not advocating same-sex marriage in general but merely wants to preserve her own marriage. However, it considers that the applicant's claim, if accepted, would in practice lead to a situation in which two persons of the same sex could be married to each other. As already stated above, no such right currently exists in Finland. Therefore, the Court must first examine whether the recognition of such a right is required in the circumstances by Article 8 of the Convention.

71. The Court reiterates its case-law according to which Article 8 of the Convention cannot be interpreted as imposing an obligation on Contracting States to grant same-sex couples access to marriage (see Schalk and Kopf v. Austria, n°. 30141/04, § 101, ECHR 2010). The Court has also held that the regulation of the effects of a change of gender in the context of marriage falls to a large extent, though not entirely, within the margin of appreciation of the Contracting State (see Christine Goodwin, cited above, § 103). Furthermore, the Convention does not require that any further special arrangements be put in place for situations such as the present one. The Court found in 2006 in the case in Parry (cited above) that, even if same-sex marriage was not allowed at the time in English law, the applicants could continue their relationship in all its essentials and could also give it a legal status akin, if not identical, to marriage, through a civil partnership which carried with it almost all the same legal rights and obligations. The Court thus regarded civil partnerships as an adequate option.

72. The Court observes that the present case involves issues which are subject to constant developments in the Council of Europe member States. It will therefore examine the situation in other Council of Europe member States in respect of the issues at stake in the present case.

73. From the information available to the Court (see paragraph 31 above), it appears that, currently, ten member States allow same-sex marriage. Moreover, in the majority of the member States not allowing same-sex marriage there is either no clear legal framework for legal gender recognition or no legal provisions specifically dealing with the status of married persons who have undergone gender reassignment. Only in six member States which do not allow same-sex marriage does relevant legislation on gender recognition exist. In those States either the legislation specifically requires that a person be single or divorced or there are general provisions stating that after a change of sex any existing marriage is declared null and void or dissolved. Exceptions allowing a married person to gain legal recognition of his or her acquired gender without having to end a pre-existing marriage seem to exist in only three member States (see paragraphs 31-33 above).

74. Thus, it cannot be said that there exists any European consensus on allowing same-sex marriages. Nor is there any consensus in those States which do not allow same-sex marriages as to how to deal with gender recognition in the case of a pre-existing marriage. The majority of the member States do not have any kind of legislation on gender recognition in place. In addition to Finland, such legislation appears to exist in only six other States. The exceptions afforded to married transsexuals are even fewer. Thus, there are no signs that the situation in the Council of Europe member States has changed significantly since the Court delivered its latest rulings on these issues.

75. In the absence of a European consensus and taking into account that the case at stake undoubtedly raises sensitive moral or ethical issues, the Court considers that the margin of appreciation to be afforded to the respondent State must still be a wide one (see X, Y and Z v. the United Kingdom, cited above, § 44). This margin must in principle extend both to the State's decision whether or not to enact legislation concerning legal recognition of the new gender of post-operative transsexuals and, having intervened, to the rules it lays down in order to achieve a balance between the competing public and private interests.

76. Turning now to the domestic system, the Court finds that Finnish domestic law currently provides the applicant with several options. First of all, she can maintain the status quo of her legal situation by remaining married and tolerating the inconvenience caused by the male identity number. The Court finds it established that in the Finnish system a legally contracted marriage between a different-sex couple is not annulled or dissolved on account of the fact that one of the spouses has undergone reassignment surgery and is thus subsequently of the same sex as his or her spouse. Contrary to the situation in some other countries, in Finland a pre-existing marriage cannot be unilaterally annulled or dissolved by the domestic authorities. Accordingly, nothing prevents the applicant from continuing her marriage.

77. Secondly, if the applicant wishes both to obtain legal recognition of her new gender and to have her relationship with her wife legally protected, Finnish legislation provides for the possibility to convert their marriage into a registered partnership, with the consent of the applicant's wife. Under the domestic law, if the spouse's consent to the change of gender is received, a marriage turns automatically, ex lege, into a registered partnership and a registered partnership into a marriage, depending on the situation.

78. The third option provided by the domestic law is the option of divorce. As for any other married couple, this option is also open to the applicant if she so wishes. Contrary to the applicant's assertions, the Court considers that there is nothing in the Finnish legal system which can be understood as implying that the applicant must divorce against her will. On the contrary, the Court finds that in the Finnish legal system the possibility of divorcing is at the applicant's own discretion.

79. Leaving aside the options of maintaining the status quo or divorcing, the applicant's complaint is primarily directed at the second option: providing legal recognition of the new gender while at the same time legally protecting an existing relationship. Thus, the key question in the present case is whether the Finnish system currently fulfils the positive obligation on the State in this respect or whether the applicant should be allowed to remain married while at the same time obtaining legal recognition of her new gender, even if that option would imply a same-sex marriage between the applicant and her spouse.

80. The Court notes that, contrary to the majority of the Council of Europe member States, there exists a legal framework in Finland designed to provide legal recognition for the change of gender. The Court observes that the aim of the impugned legislation, as explained by the Government, was to unify the varying practices applied in different parts of the country and to establish coherent requirements for legal gender recognition. If the consent of the spouse is received, the system provides both for legal recognition of the new gender and legal protection of the relationship. The system works both ways, thus providing not only for a marriage to be converted into a registered partnership, but also for a registered partnership to be converted into a marriage, depending on whether the gender reassignment surgery has the effect of turning the existing relationship into a same-sex or a heterosexual partnership. According to the information received from the Government, thirty-one such conversions have occurred so far concerning both the above-mentioned situations in almost equal measure.

81. In devising this legal framework, the Finnish legislature has opted for reserving marriage to heterosexual couples, this rule being capable of no exceptions. It therefore remains for the Court to determine whether, in the circumstances of the case, the Finnish system currently strikes a fair balance between the competing interests and satisfies the proportionality test.

82. One of the applicant's concerns relates to the requirement of the spouse's consent, which she sees as a "forced" divorce. However, the Court considers that as the conversion is automatic under the Finnish system, the spouse's consent to the registration of a change of gender is an elementary requirement designed to protect each spouse from the effects of unilateral

decisions taken by the other. The requirement of consent is thus clearly an important safeguard which protects the spouse who is not seeking gender recognition. In this context, it is worth noting that consent is also needed when a registered partnership is to be converted into a marriage. This requirement thus applies also for the benefit of the institution of marriage.

83. Also of concern to the applicant are the differences between a marriage and a registered partnership. As the Government explained, these differences concern the establishment of paternity, adoption outside of the family and the family name. However, these exceptions are applicable only to the extent that those issues have not been settled beforehand. They are therefore not applicable to the present case. Consequently, the Court considers that the differences between a marriage and a registered partnership are not such as to involve an essential change in the applicant's legal situation. The applicant would thus be able to continue enjoying in essence, and in practice, the same legal protection under a registered partnership as that afforded by marriage (see, mutatis mutandis, Schalk and Kopf, cited above, § 109).

84. Moreover, the applicant and her wife would not lose any other rights if their marriage were converted into a registered partnership. As convincingly explained by the Government, the expression "turns into" in section 2 of the Transsexuals (Confirmation of Gender) Act is explicitly used to illustrate the fact that the original legal relationship continues with only a change of title and minor changes to the content of the relationship. The length of the partnership is thus calculated from the date on which it was contracted and not from the change of its title. This may be important in situations in which the length of the relationship is relevant in the domestic legislation, for example when calculating a widower's pension. The Court cannot therefore uphold the applicant's complaint that the conversion of a marriage into a registered partnership would be akin to a divorce.

85. Furthermore, the Court considers that the effects of the conversion of the applicant's marriage into a registered partnership would be minimal or non-existent as far as the applicant's family life is concerned. The Court stresses that Article 8 also protects the family life of same-sex partners and their children (see Schalk and Kopf, cited above, § § 91 and 94). It does not therefore matter, from the point of view of the protection afforded to family life, whether the applicant's relationship with her family is based on marriage or a registered partnership.

86. The family-life aspects are also present in the applicant's relationship with her daughter. As the applicant's paternity of her daughter has already been validly established during the marriage, the Court is satisfied that under current Finnish law the subsequent conversion of the marriage into a registered partnership would not have any effect on the paternity of the applicant's child. She would thus continue to be considered to have been born in wedlock. Moreover, as the Government noted, in the Finnish system paternity presumed on the basis of marriage or established paternity cannot be annulled on the ground that the man later undergoes gender reassignment and becomes a woman. This is confirmed by the fact that, as the Government have observed, in none of the cases in which conversion has already taken place in Finland has the legal parent-child relationship changed. Nor does the father's gender reassignment have any legal effects on the responsibility for the care, custody or maintenance of a child as in Finland that responsibility is based on parenthood, irrespective of sex or form of partnership. The Court therefore finds it established that the conversion ofthe applicant's marriage into a registered partnership would have no implications for her family life, as protected by Article 8 of the Convention.

87. While it is regrettable that the applicant faces daily situations in which the incorrect identity number creates inconvenience for her, the Court considers that the applicant has a genuine possibility of changing that state of affairs: her marriage can be converted at any time, ex lege, into a registered partnership with the consent of her spouse. If no such consent is ob-

tained, the possibility of divorce, as in any marriage, is always open to her. In the Court's view, it is not disproportionate to require, as a precondition to legal recognition of an acquired gender, that the applicant's marriage be converted into a registered partnership as that is a genuine option which provides legal protection for same-sex couples that is almost identical to that of marriage (see Parry, cited above). The minor differences between these two legal concepts are not capable of rendering the current Finnish system deficient from the point of view of the State's positive obligation.

88. In conclusion, the Court considers that the current Finnish system as a whole has not been shown to be disproportionate in its effects on the applicant and that a fair balance has been struck between the competing interests in the present case.

89. Accordingly, there has been no violation of Article 8 of the Convention."

The Court also held that the difference of treatment between a married person who had undergone gender reassignment surgery, as in the case of the applicant, and other persons, i.e. non-transgender persons who had obtained legal gender recognition automatically at birth, did not violate the principle of non-discrimination under Article 14 taken in conjunction with Article 8 or Article 12.

Section 2. The possibility of refusing the establishment of a legal parental relationship with the partner's child?

As the case law currently stands, it may be considered, in view of the lack of a uniform approach by the Council of Europe member states to the question of legal parental relationships, that they enjoy a wide margin of appreciation in this field.

More precisely, the question at issue here is that of non-biological parental rights, ie the establishment of a legal parent-child relationship by a transgender person who is not the biological parent. This procedure of adoption by the second parent of the biological (or adopted) child of his or her partner and the child's first parent gives the child two legal guardians since the first parent loses his or her legal rights.

The Court's position on the question of second-parent adoption by a couple in which one partner is a transgender person was specified in the *X, Y and Z v. United Kingdom* judgment of 22 April 1997. This judgment gives states every latitude to decide whether or not to refuse to allow a transgender person living, in his or her new sex, with a person of the opposite sex to establish a legal parental relationship with his or her partner's child.

It is important, however, to consider whether this now fairly old case law should not in fact be qualified in the light of the more recent case law emerging from the X and Others v. Austria judgment of 19 February 2013 on the issue of second-parent adoption by a same-sex couple. This judgment reduces the margin of appreciation left to states on the basis of the prohibition of discrimination: access to second-parent adoption must be the same for same-sex and different- sex couples: either a state allows it or it does not. Can it be inferred from this judgment that a state should lay down the same rules on second-parent adoption for different-sex couples including a transgender person and different-sex couples not including a transgender person? In the absence of detailed case law, this question remains in abeyance.

In the absence of such case law, reference should continue to be made to the X, Y and *Z v. United Kingdom* judgment of 22 April 1997.

X, Y and Z v. the United Kingdom,
22 April 1997, nº. 21830/93

Principal facts

The applicants were British citizens living in Manchester: X was a transgender man and had been living since 1979 with a woman, Y. In October 1992, Y gave birth to Z, who had been conceived by means of artificial insemination by donor (AID) with the agreement of the hospital ethics committee.

In February 1992, X enquired of the Registrar General whether there was an objection to his being registered as the father of Z. On 4 June 1992, the Minister of Health replied that, having taken legal advice, the Registrar General was of the view that only a biological man could be regarded as a father for the purposes of registration. It was pointed out, however, that Z could lawfully bear X's surname.

After the birth of Z, when X and Y attempted to register the child in their joint names as mother and father, X was not permitted to be registered as the child's father and that part of the register was left blank. Z was given X's surname in the register.

In their application, X, Y and Z alleged mainly a violation of Article 8 of the Convention in that it guarantees the right to respect for family life. They argued that United Kingdom law should be amended to allow a post-operative transgender man to be registered as the father of a child to whom his partner had given birth as a result of artificial insemination by donor.

Decision of the Court

The Court found no violation of Article 8. Its reasoning was as follows:

"42. The present case is distinguishable from the previous cases concerning transsexuals which have been brought before the Court (see the above-mentioned Rees judgment, the above-mentioned *Cossey* judgment and the *B. v. France* judgment of 25 March 1992, Series A nº. 232-C), because here the applicants' complaint is not that the domestic law makes no provision for the recognition of the transsexual's change of identity, but rather that it is not possible for such a person to be registered as the father of a child; indeed, it is for this reason that the Court is examining this case in relation to family, rather than private, life.

43. It is true that the Court has held in the past that where the existence of a family tie with a child has been established, the State must act in a manner calculated to enable that tie to be developed and legal safeguards must be established that render possible, from the moment of birth or as soon as practicable thereafter, the child's integration in his family (see for example the above-mentioned *Marckx* judgment, p. 15, para. 31; the *Johnston and Others v. Ireland* judgment of 18 December 1986, Series A nº. 112, p. 29, para. 72; the above-mentioned *Keegan* judgment, p. 19, para. 50; and the above-mentioned *Kroon and Others* judgment, p. 56, para. 32). However, hitherto in this context it has been called upon to consider only family ties existing between biological parents and their offspring. The present case raises different issues, since Z was conceived by AID and is not related, in the biological sense, to X, who is a transsexual.

44. The Court observes that there is no common European standard with regard to the granting of parental rights to transsexuals. In addition, it has not been established before the Court that there exists any generally shared approach amongst the High Contracting Parties with regard to the manner in which the social relationship between a child conceived by AID and the person who performs the role of father should be reflected in law. Indeed, according to

the information available to the Court, although the technology of medically assisted procreation has been available in Europe for several decades, many of the issues to which it gives rise, particularly with regard to the question of filiation, remain the subject of debate. For example, there is no consensus amongst the member States of the Council of Europe on the question whether the interests of a child conceived in such a way are best served by preserving the anonymity of the donor of the sperm or whether the child should have the right to know the donor's identity.

Since the issues in the case, therefore, touch on areas where there is little common ground amongst the member States of the Council of Europe and, generally speaking, the law appears to be in a transitional stage, the respondent State must be afforded a wide margin of appreciation (see, mutatis mutandis, the above mentioned *Rees* judgment, p. 15, para. 37, and the above-mentioned *Cossey* judgment, p. 16, para. 40).

[a]. Whether a fair balance was struck in the instant case [...]

47. First, the Court observes that the community as a whole has an interest in maintaining a coherent system of family law which places the best interests of the child at the forefront. In this respect, the Court notes that, whilst it has not been suggested that the amendment to the law sought by the applicants would be harmful to the interests of Z or of children conceived by AID in general, it is not clear that it would necessarily be to the advantage of such children.

In these circumstances, the Court considers that the State may justifiably be cautious in changing the law, since it is possible that the amendment sought might have undesirable or unforeseen ramifications for children in Z's position. Furthermore, such an amendment might have implications in other areas of family law. For example, the law might be open to criticism on the ground of inconsistency if a female-to-male transsexual were granted the possibility of becoming a "father" in law while still being treated for other legal purposes as female and capable of contracting marriage to a man.

48. Against these general interests, the Court must weigh the disadvantages suffered by the applicants as a result of the refusal to recognise X in law as Z's "father".

The applicants identify a number of legal consequences flowing from this lack of recognition (see paragraph 45 above). For example, they point to the fact that if X were to die intestate, Z would have no automatic right of inheritance.
[...]

The Court considers, therefore, that these legal consequences would be unlikely to cause undue hardship given the facts of the present case.

49. In addition, the applicants claimed that Z might suffer various social or developmental difficulties. Thus, it was argued that she would be caused distress on those occasions when it was necessary to produce her birth certificate.

In relation to the absence of X's name on the birth certificate, the Court notes, first, that unless X and Y choose to make such information public, neither the child nor any third party will know that this absence is a consequence of the fact that X was born female. It follows that the applicants are in a similar position to any other family where, for whatever reason, the person who performs the role of the child's "father" is not registered as such. The Court does not find it established that any particular stigma still attaches to children or families in such circumstances.

Secondly, the Court recalls that in the United Kingdom a birth certificate is not in common use for administrative or identification purposes and that there are few occasions when it is necessary to produce a full length certificate.

50. The applicants were also concerned, more generally, that Z's sense of personal identity and security within her family would be affected by the lack of legal recognition of X as father.

In this respect, the Court notes that X is not prevented in any way from acting as Z's father in the social sense. Thus, for example, he lives with her, providing emotional and financial support to her and Y, and he is free to describe himself to her and others as her "father" and to give her his surname (see paragraph 24 above). Furthermore, together with Y, he could apply for a joint residence order in respect of Z, which would automatically confer on them full parental responsibility for her in English law.

51. It is impossible to predict the extent to which the absence of a legal connection between X and Z will affect the latter's development. As previously mentioned, at the present time there is uncertainty with regard to how the interests of children in Z's position can best be protected and the Court should not adopt or impose any single viewpoint.

52. In conclusion, given that transsexuality raises complex scientific, legal, moral and social issues, in respect of which there is no generally shared approach among the Contracting States, the Court is of the opinion that Article 8 (art. 8) cannot, in this context, be taken to imply an obligation for the respondent State formally to recognise as the father of a child a person who is not the biological father. That being so, the fact that the law of the United Kingdom does not allow special legal recognition of the relationship between X and Z does not amount to a failure to respect family life within the meaning of that provision (art. 8).

It follows that there has been no violation of Article 8 of the Convention (art. 8)."