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State obligation to recognise and protect same-sex relationships

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In *Przybyzewska v Poland* (nos 11,454/17 and 9 others, 12 December 2023) the European Court of Human Rights (ECtHR) considered whether the absence of legal recognition and protection for same-sex couples in Poland amounted to a breach of Article 8 (right to respect for private and family life) of the European Convention on Human Rights (ECHR).

The applicability of Article 8 of the Convention to the lack of legal recognition and protection for same-sex couples, under both its ‘private life’ and ‘family life’ has, on numerous occasions, been confirmed by the ECtHR (see *Oliari v Italy*, nos 18,766/11 and 360,330/11, 21 July, 2015, *Pajić v. Croatia*, no. 68453/13, 23 February, , 2016, *Chapin and Charpentier v. France*, no. 40183/07, 9 June, , 2016, *Taddeucci and McCall v. Italy*, no. 51362/09, 30 June, , 2016, *Fedotova v Russia*, nos 40,792/10, 30538/14, and 43,439/14, 17 January, , 2023).

In *Przybyzewska*, an application from five same-sex couples, who were denied formal recognition of their relationships by Polish authorities, contended that the lack of legal recognition placed them at a significant disadvantage vis a vis taxation, social rights, and family law. Each couple had made the legally required declaration to their local Civil Status Offices (*kierownik urzędu stanu cywilnego*) that there were no impediments preventing them from marrying, a condition for getting married in Poland, as required by Article 1 of the Family and Custody Code. These declarations were refused on the grounds that that marriage ‘as a union between a man and a woman’ is constitutionally enshrined in Polish Law (Article 18), thus preventing same-sex couples from formalising their relationship. (No other method of legal recognition of relationships (e.g. civil partnership, registered partnership) is possible in Poland.)

The Polish Government argued that, as the lack of legal recognition and protection derived from the Constitution (para 74), it was not possible to legally acknowledge same-sex relationships (para 7). It asserted that the cultural and prevailing social attitudes justified the lack of provision (para 121). While the Court accepted that protection of the ‘traditional’ family may, at least in principle, justify a difference in treatment with regards to sexual orientation, there was no justification for the argument that same-sex unions ‘harm families constituted in the traditional way’ (para 120). Indeed, Article 14 of the Convention states that the culture, traditions, and stereotypes of a particular country cannot, by itself, provide sufficient justification for difference in treatment based on sexual orientation. Reiterating comments made in *Fedotova*, the Court held that the alleged hostility and negativity on the part of the heterosexual

majority could not be set against the applicants' interests in having their relationships recognised and protected by law (para 118); 'securing rights to same-sex couples does not in itself entail weakening the rights secured to other people or other couples' (para 120). The Polish Government's position that the 'traditional' conception of marriage as a union between a man and a woman constituted Poland's social and legal heritage was further rejected on the basis that the present case did not concern same-sex marriage; it concerned the lack of legal recognition and protection for same-sex relationships.

The Polish Government objected to the application on two grounds. The first was that the applicants had not exhausted domestic legal remedies: eight out of the ten applicants had constitutional complaints still pending. The ECtHR dismissed this objection, citing the ongoing challenges to judicial independence in Poland (para 52).

The Government's second argument was that that whilst marriage does confer 'special protection' in, *inter alia*, property and inheritance rights (para 23), domestic Polish law provides 'sufficient' legal measures for couples in *de facto* relationships, regardless of sexual orientation (e.g. tenancy agreements (Article 691 of the Civil Code), criminal law (Article 115 of the Criminal Code, Article 182 of the Criminal Procedure), next-of-kin recognition (Article 3(1)(2) Patients' Rights and the Commissioner for Patients' Rights) housing benefits (para 22), and financial disputes at relationship breakdown (para 27 and 28). Further, the Government asserted that those rights that could not be enjoyed by virtue of recognition of their *de facto* relationship, could 'effectively be exercised through private contractual arrangements' (para 113), reiterating the view expressed in *Buhuceanu v Romania (nos 20,081/19 and 20 others, 23 May, 2023)*. The Court, however, rejected this assertion, declaring (para 113) that:

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.

Whilst the Court did recognise the positive developments in Polish case law which extended (certain) rights to same-sex couples, it concluded that 'same-sex partners are unable to regulate fundamental aspects of their life, such as those concerning property, maintenance, taxation, and inheritance, as an officially recognised couple' (para 114).

As seen in *Fedotova, Buhuceanu, Vallianatos v Greece (nos 29,381/09 and 32,684/09, 7 November, 2023)* and *Maymulakhin and Markiv v Ukraine (nos 75,135/14, 1 September, 2023)*, the Court reiterated the need for official recognition of same-sex couples, declaring that they are 'in a relevantly similar situation to different-sex couples as regards their need for formal acknowledgement and protection of their relationship' (para 110). As stated in *Vallianatos*, and confirmed in the present case, having same-sex

relationships legitimised and protected by law is of ‘intrinsic value’ to the personal and social identity of individuals (para 109).

While the legal recognition and protection of same-sex relationships constitute one of the elements of the right to respect for an individual’s private and family life, States are afforded a ‘margin of appreciation’ in determining the particular provision available to same-sex relationships. Indeed, Articles 8, 12, and 14 of the Convention have not (at least, not yet) been interpreted as imposing a positive obligation to provide same-sex marriage. Article 8 of the Convention, however, does compel States to ensure ‘adequate’ legal recognition and protection of same-sex relationships, i.e. it is not the specific form (e.g. marriage) but the adequacy of the recognition and protection afforded (para 102).

In the present case, the Court held that Poland has ‘overstepped its margin of appreciation and has failed to comply with its positive obligation to ensure that the applicants had a specific legal framework providing for the recognition and protection of same-sex unions’ (para 123). As in *Fedotova*, the Court emphasised that the margin of appreciation cannot be used as a justification rendering Article 8 protections as illusory (para 80). In failing to provide specific legal framework providing for the recognition and protection for same-sex couples, the ECtHR ruled that the Polish State, in contravention of Article 8, violates their right to private and family life and that it is a form of indirect discrimination on the basis of sexual orientation.

This case, as in earlier rulings, has implications for all member States of the Council of Europe in reiterating the positive obligation to ensure legal recognition and protection of same-sex couples and highlighting the importance of the ECtHR in advancing the cause of same-sex rights, particularly in political contexts where the legal recognition of LGBTQ couples is not widely supported by society at large. Whilst the rulings will have little consequence in countries such as the UK or France, where the State provision goes beyond the minimum threshold, the present case adds further to the content of core rights for individuals in same-sex relationships, both material and moral (para 102). The challenge for the Court, however, is the implementation of its judgements in contexts where there is marked social disapproval of same-sex unions which risks alienating particular States by ‘us[ing] judicial compulsion at will to brutally force social changes in the Contracting States’ (para 17, Dissenting Opinion of [the Russian] Judge Lobov in *Fedotova*). As Judge Wojtyczek observed in his dissenting opinion in *Fedotova* (para 4.2), while cases such as these may have limited, if any, immediate practical consequences for the defendant States, and despite Russia’s withdrawal from the Convention (September 2022), they establish a universal legal precedent which profoundly transforms the legal landscape and sets powerful precedents which can be utilised by same-sex couples in more conservative States where they lack legal recognition and protection.

Disclosure statement

No potential conflict of interest was reported by the author(s).

References

1. Buhuceanu V Romania, 2023. nos 20081/19 and 20 others, 23 May
2. Chapin and Charpentier V. France, 2016. no. 40183/07, 9 June
3. Fedotova and Others v Russia, 2023. Application nos 40792/10, 30538/14, and 43439/14, 17 January
4. Maymulakhin and Markiv V Ukraine, 2023. nos 75135/14, 1 September
5. Oliari and Others V Italy, 2015. nos 18766/11 and 360330/11, 21 July
6. Pajić V. Croatia, 2016. no. 68453/13, 23 February
7. Przybyzewska v Poland, 2023. nos 11,454/17 and 9 others, 12 December
8. Taddeucci and McCall v. Italy, 2016. no. 51362/09, 30 June
9. Vallianatos and Others V Greece, 2023. Application nos 29381/09 and 32684/09, 7 November