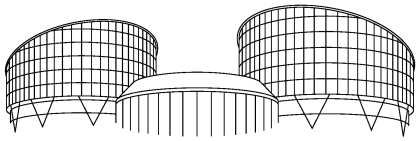

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

Guide on the case-law of the European Convention on Human Rights

Rights of LGBTI persons

Updated on 29 February 2024

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The Case-Law Guides are available for downloading at *https://ks.echr.coe.int*. For publication updates please follow the Court's Twitter account at *https://twitter.com/ECHR_CEDH*.

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Note to readers

This Guide is part of the series of Case-Law Guides published by the European Court of Human Rights (hereafter "the Court", "the European Court" or "the Strasbourg Court") to inform legal practitioners about the fundamental judgments and decisions delivered by the Strasbourg Court.

This particular Guide analyses and sums up the case-law under different Articles of the European Convention on Human Rights (hereafter "the Convention" or "the European Convention") relating to the rights of LGBTI persons. It should be read in conjunction with the case-law guides by Article, to which it refers systematically.

The case-law cited has been selected among the leading, major, and/or recent judgments and decisions.*

The Court's judgments and decisions serve not only to decide those cases brought before the Court but, more generally, to elucidate, safeguard and develop the rules instituted by the Convention, thereby contributing to the observance by the States of the engagements undertaken by them as Contracting Parties (*Ireland v. the United Kingdom*, 18 January 1978, § 154, Series A no. 25, and, more recently, *Jeronovičs v. Latvia* [GC], no. 44898/10, § 109, 5 July 2016).

The mission of the system set up by the Convention is thus to determine, in the general interest, issues of public policy, thereby raising the standards of protection of human rights and extending human rights jurisprudence throughout the community of the Convention States (*Konstantin Markin v. Russia* [GC], 30078/06, § 89, ECHR 2012). Indeed, the Court has emphasised the Convention's role as a "constitutional instrument of European public order" in the field of human rights (*Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland* [GC], no. 45036/98, § 156, ECHR 2005-VI, and more recently, *N.D. and N.T. v. Spain* [GC], nos. 8675/15 and 8697/15, § 110, 13 February 2020).

Protocol No. 15 to the Convention recently inserted the principle of subsidiarity into the Preamble to the Convention. This principle "imposes a shared responsibility between the States Parties and the Court" as regards human rights protection, and the national authorities and courts must interpret and apply domestic law in a manner that gives full effect to the rights and freedoms defined in the Convention and the Protocols thereto (*Grzęda v. Poland* [GC], § 324).

* The case-law cited may be in either or both of the official languages (English or French) of the Court and the European Commission of Human Rights Unless otherwise indicated, all references are to a judgment on the merits delivered by a Chamber of the Court. The abbreviation "(dec.)" indicates that the citation is of a decision of the Court and "[GC]" that the case was heard by the Grand Chamber. Chamber judgments that were not final when this edition was published are marked with an asterisk (*).

Introduction

1. The Convention is a living instrument which is to be interpreted in the light of present-day conditions (*E.B. v. France* [GC], 2008, § 92; *Christine Goodwin v. the United Kingdom* [GC], 2002, §§ 74-75). This statement is of particular relevance in the context of claims brought by Lesbian, Gay, Bisexual, Transgender and Intersex (LGBTI) persons where the Court's case-law has continued to evolve over the years. LGBTI persons have brought cases before the Court under different Articles of the Convention and have given the Court the opportunity to develop a significant body of case-law determining the nature and scope of their rights under the Convention and the duties of the domestic authorities in their regard.

2. The present Guide provides an overview of the Court's case-law related to LGBTI matters. Its structure reflects the different rights principally invoked before the Court, referring to the principles and topics of most relevance to the LGBTI context.

3. As with case-law, terminology also evolves. Bearing in mind social and linguistic evolutions in the field of human rights applied to sexual orientation, gender identity or expression, and sex characteristics, the terminology used by the Court in some of its judgments may not reflect current forms of expression. However, the terminology used in this Guide is the same as that used in the judgment or decision to which the Guide is referring.

I. Obligations in the context of ill-treatment

Article 3 of the Convention

"No one shall be subjected to torture or to inhuman or degrading treatment or punishment."

Article 5 of the Convention

"1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law:

(a) the lawful detention of a person after conviction by a competent court;

(b) the lawful arrest or detention of a person for non- compliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law;

(c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his committing an offence or fleeing after having done so;

(d) the detention of a minor by lawful order for the purpose of educational supervision or his lawful detention for the purpose of bringing him before the competent legal authority;

(e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants;

(f) the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.

2. Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his arrest and of any charge against him.

3. Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.

4. Everyone who is deprived of his liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his detention shall be decided speedily by a court and his release ordered if the detention is not lawful.

5. Everyone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation."

Article 14 of the Convention

"The enjoyment of the rights and freedoms set forth in [the] 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."

A. The relevant threshold

4. According to the Court's case-law ill-treatment must attain a minimum level of severity if it is to fall within the scope of Article 3 and trigger the related obligations. The assessment of this minimum is relative: it depends on all the circumstances of the case, such as the nature and context of the treatment, its duration, its physical and mental effects and, in some instances, the sex, age and state of health of the victim (*Stasi v. France*, 2011, § 75), it being noted, however, that any physical force by a State agent not made strictly necessary by the person's conduct would equally fall within the scope of (and violate) Article 3 of the Convention (*Bouyid v. Belgium* [GC], 2015, § 101). Furthermore, Article

3 cannot be limited to acts of physical ill-treatment; it also covers the infliction of psychological suffering. Hence, the treatment can be categorised as degrading when it arouses in its victims feelings of fear, anguish and inferiority capable of humiliating and debasing them (*Aghdgomelashvili and Japaridze v. Georgia*, 2020, § 42; *Lapunov v. Russia*, 2023, § 108).

5. The Court does not exclude that certain treatment which is grounded upon a predisposed bias on the part of a heterosexual majority against a homosexual minority could, in principle, fall within the scope of Article 3 (*Smith and Grady v. the United Kingdom*, 1999, § 121). However, in *Smith and Grady v. the United Kingdom*, 1999, §§ 122-123, the Court considered that the investigations and consequent discharge from the army of the applicants, as a result of a policy of the Ministry of Defence against homosexuals in the armed forces, had not reached the minimum level of severity which would bring it within the scope of Article 3 of the Convention. Accordingly, there had been no violation of Article 3 of the Convention taken alone or in conjunction with Article 14. Similar conclusions were reached in *Association ACCEPT and Others v. Romania*, 2021, § 56, in the context of a screening of a movie portraying a same-sex family, in a cinema, where counter-demonstrators outnumbered and surrounded the applicants, but no acts of physical aggression took place. The Court considered that the verbal abuse, although openly discriminatory and performed within the context of actions that showed evidence of a pattern of violence and intolerance against a sexual minority, were not so severe as to cause the kind of fear, anguish or feelings of inferiority that are necessary for Article 3 to come into play. The Court found that such treatment had attained the level of seriousness required for Article 8 to come into play (ibid., § 68).

6. Conversely, in *Identoba and Others v. Georgia*, 2015, §§ 70-71, the Court noted that the applicants had been the target of hate speech and aggressive behaviour when they were attacked during a march to mark the International Day Against Homophobia in Tbilisi. The applicants had been surrounded by an angry mob that outnumbered them and was uttering death threats and randomly resorting to physical assaults, demonstrating the reality of the threats, and that a clearly distinguishable homophobic bias played the role of an aggravating factor in a situation which was already one of intense fear and anxiety. The Court considered that the aim of that verbal – and sporadically physical – abuse was evidently to frighten the applicants so that they would desist from their public expression of support for the LGBT community. The Court thus found that the treatment of the applicants aroused in them feelings of fear, anguish and insecurity incompatible with respect for their human dignity and which reached the threshold of severity within the meaning of Article 3 taken in conjunction with Article 14 of the Convention, which were ultimately considered to have been violated (see other examples, *Aghdgomelashvili and Japaridze v. Georgia*, 2020, § 49; *M.C. and A.C. v.* Romania, 2016, § 119*, Women's Initiatives Supporting Group and Others v. Georgia*, 2021, §§ 60-61, *Oganezova v. Armenia*, 2022, § 97, referred to below; *Romanov and others v. Russia*, 2023, § 68).

7. The Court has left open the question of whether medical acts aimed at conforming to a certain sex, such as, *inter alia*, bilateral castration and acts aimed at enlarging and dilating the vagina, performed without the child's own consent, fall within the scope of Article 3 (see *M. v. France*, (dec.), 2022, § 63).

B. The general duty to protect against ill-treatment and the general duty to investigate and punish those responsible

8. Once the relevant threshold is attained, a number of duties come to play. The obligation of the High Contracting Parties under Article 1 of the Convention to secure for everyone within their jurisdiction the rights and freedoms defined in the Convention, taken together with Article 3, requires States to take measures designed to ensure that individuals within their jurisdiction are not subjected to ill-treatment, including ill-treatment administered by private individuals (*M.C. and A.C. v. Romania*, 2016, § 109). It includes an obligation, *inter alia,* to put in place effective criminal-law provisions to deter the commission of offences against personal integrity, backed up by law-enforcement

machinery for the prevention, suppression and punishment of breaches of such provisions (*Stasi v. France*, 2011, § 80).

9. It also includes the obligation to protect an individual from ill-treatment. In the context, for example, of complaints by detainees, the Court has to establish whether, in the circumstances of a specific case, the authorities knew or ought to have known that an applicant was suffering or at risk of being subjected to ill-treatment at the hands of his cellmates, and if so, whether the administration of the detention facility, within the limits of their official powers, took reasonable steps to eliminate those risks and to protect the applicant from that abuse (*Premininy v. Russia*, 2011, § 84). The case of *Stasi v. France*, 2011, §§ 89 and 101, concerned a homosexual detainee who had suffered ill-treatment at the hands of other detainees. The Court found that the criminal provisions in place provided the applicant with effective and sufficient protection against physical harm and, that in view of the information which had been brought to the attention of the authorities, the latter had taken all reasonable steps to protect the applicant (such as being transferred to another cell, allowed to take a shower alone and being systematically accompanied by a warder). Conversely, in *Oganezova v. Armenia*, 2022, the Court criticised the adequacy of the response of the authorities, and the follow-up given, to the applicant's complaints about attacks and hate speech. Following an arson attack on her club, the club in general and the applicant personally became the target of continued aggression by a number of individuals. It was days after her requests when the police put in place protective measures and they were discontinued after five days, on the basis of unclear grounds. Thus, the Court held that the authorities had failed to provide adequate protection to the applicant from the bias-motivated attacks by private individuals (§§ 112-114). Similarly, despite the applicant having been the target of abusive online speech on social-media platforms, no follow up ensued and, while the hateful comments contained undisguised calls for violence which required protection by the criminal law, none existed. The Court therefore found that the authorities failed to respond adequately to the homophobic hate speech of which the applicant had been a direct target because of her sexual orientation (§§ 117-122).

10. Any measures to protect an applicant at risk must be appropriate. For example, the holding of a homosexual prisoner in total isolation and in inadequate conditions for more than eight months to protect him from fellow prisoners, constituted a violation of Article 3, alone and in conjunction with Article 14 (*X v. Turkey*, 2012, §§ 42-57). The Court held that, even if the fear of physical abuse made it necessary to take certain security measures to protect the applicant, such fears did not suffice to justify a measure totally isolating the applicant from the other prison inmates. The Court was also not convinced that the need to take safety measures to protect the applicant's physical well-being was the primary reason for his total exclusion from prison life: the main reason for the measure was his homosexuality.

11. Besides the duty to protect, Article 3 also concerns procedural obligations. While the scope of these positive obligations may differ between cases where the ill-treatment contrary to the Convention has been inflicted through the involvement of State agents and cases where violence is inflicted by private individuals, the procedural requirements are similar: they primarily concern the authorities' duty to institute and conduct an investigation capable of leading to the establishment of the facts and of identifying and – if appropriate – punishing those responsible (*Sabalić v. Croatia*, 2021, § 96, and *Oganezova v. Armenia*, 2022, §§ 84-85).

C. The specific duty to prevent hatred-motivated violence and investigate discriminatory motives

12. The authorities' have a specific duty to prevent hatred-motivated violence. In particular, when the domestic authorities are confronted with *prima facie* indications of violence motivated or at least influenced by the victim's sexual orientation, this requires the effective application of domestic

criminal-law mechanisms capable of elucidating the possible hate motive with homophobic overtones behind the violent incident and of identifying and, if appropriate, adequately punishing those responsible (*Sabalić v. Croatia*, 2021, § 105).

13. The authorities' duty to prevent hatred-motivated violence, 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 (ibid., § 91; *Identoba and Others v. Georgia*, 2015, §§ 63-64; *M.C. and A.C. v. Romania* 2016, § 106; *Aghdgomelashvili and Japaridze v. Georgia*, 2020, § 36, *Genderdoc-M and M.D. v. the Republic of Moldova*, 2021, § 34, and *Women's Initiatives Supporting Group and Others v. Georgia*, 2021, § 57, discussed below, where the Court proceeded to a simultaneous examination under Article 3 taken in conjunction with Article 14 of the Convention[1]).

14. The Court has held that, without 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 tantamount to official acquiescence to, or even connivance with, hate crimes (*Identoba and Others v. Georgia*, 2015, § 77, with further references, and *Oganezova v. Armenia*, 2022, § 106). Thus, according to the Court, treating violence and brutality arising from discriminatory attitudes on an equal footing with violence occurring in cases that have no such overtones would be turning a blind eye to the specific nature of acts that are particularly destructive of fundamental rights. Moreover, a failure to make a distinction in the way situations that are essentially different are handled may constitute unjustified treatment irreconcilable with Article 14 of the Convention (*Aghdgomelashvili and Japaridze v. Georgia*, 2020, § 44).

15. The respondent State's obligation to investigate possible discriminatory motives for a violent act is an obligation to use its best endeavours to do so and is not absolute. The authorities must do whatever is reasonable in the circumstances to collect and secure the evidence, to explore all practical means of discovering the truth, and to deliver fully reasoned, impartial and objective decisions, without omitting suspicious facts that may be indicative of violence induced by, for instance, sexual orientation based discrimination (*Identoba and Others v. Georgia*, 2015, § 67; *M.C. and A.C. v. Romania* 2016, § 113; *Aghdgomelashvili and Japaridze v. Georgia*, 2020, § 38, *Genderdoc-M and M.D. v. the Republic of Moldova*, 2021, § 37, *Women's Initiatives Supporting Group and Others v. Georgia*, 2021, § 63).

16. Accordingly, where there is a suspicion that discriminatory attitudes induced a violent act, it is particularly important that the official investigation is pursued with vigour and impartiality, having regard to the need to reassert continuously society's condemnation of such acts and to maintain the confidence of minority groups in the ability of the authorities to protect them from the discriminatory motivated violence. Compliance with the State's positive obligations requires that the domestic legal system must demonstrate its capacity to enforce the criminal law against the perpetrators of such violent acts (*Sabalić v. Croatia*, 2021, § 95 and *Oganezova v. Armenia*, 2022, § 85). Moreover, when the official investigation has led to the institution of proceedings in the national courts, the proceedings as a whole, including the trial stage, must satisfy the requirements of Article 3 of the Convention (*M.C. and A.C. v. Romania*, 2016, § 112). While there is no absolute obligation for all prosecutions to result in conviction or in a particular sentence, the national courts should not under any circumstances be prepared to allow grave attacks on physical and mental integrity to go unpunished, or for serious offences to be punished by excessively light punishment (*Sabalić v. Croatia*, 2021, § 97).

[1] See also Case-Law Guide on Article 14 and Article 1 of Protocol No. 12 - Prohibition of discrimination.

17. In *Identoba and Others v. Georgia*, 2015, where, as explained above, the relevant Article 3 threshold had been met, the authorities had been informed of the march to mark the International Day Against Homophobia and the applicants had requested the police to provide protection against foreseeable protests by people with homophobic and transphobic views. The Court noted that there was a history of public hostility towards the LGBT community in Georgia so that the 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. However, the Court found that they had failed to do so. Moreover, instead of focusing on restraining the most aggressive counter-demonstrators with the aim of allowing the peaceful procession to proceed, the belated police intervention shifted onto the arrest and evacuation of some of the applicants, the very victims whom they had been called to protect (ibid., §§ 73-74). Despite the law providing for such action, the domestic authorities had also failed to pursue an effective investigation on the matter with the aim of unmasking possible homophobic motives (ibid., §§ 77-78). In the absence of such a meaningful investigation, the Court considered that it would be difficult for the respondent State to implement measures aimed at improving the policing of similar peaceful demonstrations in the future, thus undermining public confidence in the State's anti-discrimination policy (ibid., § 80). There had therefore been a breach of the respondent State's positive obligations under Article 3 (to protect the applicants and investigate the incident) taken in conjunction with Article 14 of the Convention.

18. In *M.C. and A.C. v.* Romania, 2016, and on the basis of similar considerations the Court considered that the relevant threshold had also been met where the applicants had been attacked on their way home from a gay march. The Court found that the investigations had lasted too long, were marred by serious shortcomings, and had failed to take into account possible discriminatory motives. In the Court's view, the necessity of conducting a meaningful inquiry into the possibility of discrimination motivating the attack was indispensable given the hostility against the LGBTI community in the respondent State. There had thus been a violation of Article 3 (procedural limb) of the Convention read together with Article 14 of the Convention.

19. In *Aghdgomelashvili and Japaridze v. Georgia*, 2020, where the treatment was inflicted by the police during a search at the office of an LGBT non-governmental organisation ('NGO'), the Court considered that the Article 3 threshold had also been met and that homophobic and/or transphobic hatred was a causal factor in the impugned conduct of the police officers. The latter had wilfully humiliated and debased the applicants, as well as their colleagues, by resorting to hate speech, by uttering insults, threatening to divulge their actual and/or perceived sexual orientation to the public or threatening them to use physical violence. They had further subjected the applicants to strip-searches of no investigative value whatsoever. Nevertheless, not a single investigative measure had been undertaken, thus the Court found both a violation of the substantive as well as the procedural limb of Article 3 in connection with Article 14[2] of the Convention.

20. In *Sabalić v. Croatia*, 2021, the applicant had been punched and kicked by a man after she had revealed her sexual orientation to him. The police instituted proceedings for breach of the peace as a result of which the perpetrator had been fined a derisory EUR 40, without addressing the hate crime at all. The Court found that by instituting ineffective minor offences proceedings and, as a result, erroneously discontinuing the criminal proceedings on formal grounds (*ne bis in idem*), the domestic authorities had failed to discharge adequately and effectively their procedural obligation under the Convention concerning the violent attack against the applicant motivated by her sexual orientation. Such conduct of the authorities was contrary to their duty to combat impunity for hate crimes which

[2] Contrast the *Lambdaistanbul LGBTI - Association de solidarité c. Turquie* (Committee decision), 2021, where the Court found the complaint under Articles 3 and 14, concerning a search and seizure in the offices of an LGBTI NGO, to be manifestly ill-founded.

are particularly destructive of fundamental rights. There had therefore been a violation of Article 3 (procedural limb) taken in conjunction with Article 14 of the Convention.

21. In *Genderdoc-M and M.D. v. the Republic of Moldova*, 2021, the Court found that the unprovoked assault, including ten blows to various parts of the second applicant's body, amounted to treatment which was degrading even in the absence of any homophobic overtones, the existence of which the authorities were required to investigate. While on the day of his complaint to the authorities (the same day of his assault, while he was suffering from concussion) the second applicant had not specifically mentioned discrimination, he had later submitted that the aggressor, who had recognised him from an internet video which clearly identified the applicant as a homosexual, had called him "faggot" and "paedophile". Nevertheless, the authorities never seriously examined the possibility that the second applicant's ill-treatment had been a hate crime, as the prosecutor relied only on the statements by the two parties to the conflict and the forensic report. The failure to identify and hear potential witnesses, carry out a crime scene investigation or officially include in the case file the photographs of the injuries suffered confirmed this attitude. Moreover, given the minor injuries suffered by the applicant and the domestic legal framework, the absence or presence of a discriminatory motive implied the difference between applying very mild administrative sanctions or criminal ones. Thus, the Court found that the authorities fell short of their procedural obligation to investigate the attack.

22. In *Women's Initiatives Supporting Group and Others v. Georgia*, 2021, the relevant applicants (in relation to this complaint 27 Georgian nationals who were either staff members of the applicant NGOs or members and supporters of the LGBT community) who were to take part in a rally to mark the International Day Against Homophobia on 17 May 2013, where they intended to hold a silent 20-minute flash mob, had been put in a situation of intense anxiety and emotional distress by counter-demonstrators. They had been surrounded and outnumbered by a mob and physically and verbally attacked, with homophobia clearly playing a key role. The Court found that the domestic authorities had failed to conduct a proper investigation into the hate-motivated ill-treatment of the 27 applicants, in violation of Article 3 (procedural limb) read together with Article 14 of the Convention. It called into question its independence and impartiality, and even if two separate criminal cases had been opened, no tangible results had been achieved in either. Such protraction exposed the authorities' long-standing failure to investigate homophobic and/or transphobic violence. The Court also found a substantive violation of those provisions, in so far as the authorities had failed to take proper measures to protect the LGBT demonstrators from the mob and had not learnt from their mismanagement of the previous year's LGBT rally. Despite an obligation to provide heightened State protection, the only response had been unarmed police officers in thin human cordons and a prior dispersal plan, which in practice had proved to be chaotic. Such failure to take effective measures had been compounded by evidence of official connivance, and even active participation in individual acts of prejudice. In addition, the Court found that the police officers had humiliated one of the applicants by resorting to offensive remarks during a beard-shaving process (they claimed was necessary to take him into safety), which was filmed on a mobile telephone, clearly expressing prejudice against the latter on the basis of his association with the LGBT community.

23. In *Oganezova v. Armenia*, 2022, the applicant is a well-known member of the LGBT community and her club, a place where members of the LGBT community would socialise, was the subject of an arson attack and she became the subject of a hate-driven campaign. While the police had carried out a prompt and reasonably expeditious investigation into the arson attack, they had failed to question witnesses or take any investigative steps. This notwithstanding, the hate motive was overt from the very outset, even before the police launched the investigation. However, despite having at their disposal unequivocal and direct evidence that the arson attack had been motivated by the applicant's sexual orientation and bias towards the LGBT community in general, the charges brought against the perpetrators had not reflected such motives, because the domestic criminal legislation had not provided that discrimination on the grounds of sexual orientation and gender identity should be

treated as a motive of bias and an aggravating circumstance in the commission of an offence. Nor did the law criminalising incitement to hatred refer to sexual orientation and gender identity. Accordingly, the Court found that the authorities had failed to discharge their positive obligation to effectively investigate whether the arson attack on the club, which was motivated by the applicant's sexual orientation, constituted a criminal offence committed with a homophobic motive, in breach of Article 3 taken in conjunction with Article 14 of the Convention (see paragraph 9 above for further aspects of this breach).

24. In *Lapunov v. Russia*, 2023, the applicant's detailed and consistent statements that he had been abducted and ill-treated by the Chechen authorities on account of his sexual orientation were corroborated by information collected by the press and public bodies about the so-called "anti-gay purge" of 2017, and the general context of human rights and those of LGBTI persons in Chechnya. The Government had failed to provide convincing explanations capable of refuting those allegations and had thus failed to discharge their burden of proof to prove the contrary. The ill-treatment to which the applicant was subjected by State agents amounted to torture and resulted in a violation of the substantive limb of Article 3 of the Convention (§ 110). Moreover, there had been a systemic failure to investigate unacknowledged detentions and disappearances in Chechnya in respect of complaints under Articles 2 and 3 of the Convention, which led to a violation of the procedural limb of Article 3 of the Convention (§ 118). Besides, the applicant had been subjected to targeted violence solely on account of his sexual orientation, which was an aggravating factor, and characterised as a hate crime in the relevant international material. Thus, the violation under Article 3 was motivated by homophobic attitudes, in light of the level of intolerance towards LGBTI persons in Chechnya, which led to a finding of a violation of Article 14 in conjunction with Article 3 of the Convention (§§ 119-121). In addition, the applicant's arbitrary detention had no legal grounds and was not officially acknowledged, which was in beach of Article 5 of the Convention (§§ 127-129).

25. Likewise, in *Romanov and others v. Russia,* 2023, the applicants were subjected to homophobic acts of violence by private individuals and were apprehended and detained unlawfully during peaceful demonstrations in support of LGBTI rights. The authorities should have foreseen the risks associated with mass events related to the socially sensitive topic of supporting the LGBTI community, given the hostile attitudes of parts of Russian society towards this issue. Besides, serious threats had circulated prior to the demonstration. Thus, there has been a violation of Article 3 (substantive and procedural) in the light of Article 14 of the Convention, since the authorities had failed to protect the applicant from violence (§ 72) and failed to conduct an effective investigation (§ 79).

D. Duties in the context of immigration[3]

1. Non-refoulement

26. Few provisions of the Convention and its Protocols explicitly concern "aliens" and they do not contain a right to asylum. As a general rule, States have the right, as a matter of well-established international law and subject to their treaty obligations, to control entry, residence and expulsion of non-nationals. In *Soering v. the United Kingdom*, 1989, the Court ruled, for the first time, that the applicant's extradition could raise the responsibility of the extraditing State under Article 3 of the Convention. Since then, the Court has consistently held that the removal of an alien by a Contracting State may give rise to an issue under Articles 2 and 3, and hence engage the responsibility of that State under the Convention, where substantial grounds have been shown for believing that the person in question, if deported, would face a real risk of being subjected to treatment contrary to Articles 2 or 3 in the destination country.

[3] See Case-Law Guide on Immigration.

27. While the majority of removal cases examined by the Court under Articles 2 or 3 concern removals to the country from which the applicant has fled, such cases may also arise in connection with the applicant's removal to a third country.

28. The Court has interpreted the above-mentioned obligations to require that an LGBTI person, risking persecution (amounting to treatment contrary to Articles 2 or 3 of the Convention) on the basis of their sexual orientation or gender identity, may not be sent back to their country of origin. The Court has held that a person's sexual orientation forms a fundamental part of his or her identity and that no one may be obliged to conceal his or her sexual orientation in order to avoid persecution (*I.K. v. Switzerland* (dec.), 2017, § 24).

29. Of particular relevance is the case of *B and C v. Switzerland*, 2020, which concerned the case of a gay man (in a same-sex relationship) challenging his deportation to a country (The Gambia) where he would be at risk of ill-treatment because of his sexual orientation. Confirming *I.K. v. Switzerland* (dec.), 2017, § 24, and consistently with the case-law of the Court of Justice of the European Union (CJEU) as well as with the position of the United Nations High Commissioner for Refugees (UNHCR), the Court considered that the first applicant's sexual orientation, the veracity of which was not disputed, could be discovered subsequently in Gambia if he were removed there. The Court held, for the first time, that returning applicants to a non-European state where they would be at risk of ill-treatment on the grounds of their sexual orientation amounted to a violation of Article 3 of the Convention. In particular, it concluded that the domestic courts which, having taken the view that it was not likely that the first applicant's sexual orientation would come to the attention of the Gambian authorities or other persons, had not engaged in an assessment on the availability of State protection against harm emanating from non-State actors and had not sufficiently assessed the risks of ill-treatment for the first applicant as a homosexual person in Gambia.

30. The general principles concerning non-refoulment are summarised by the Court in *J.K. and Others v. Sweden* [GC], 2016, §§ 77-105 and *F.G. v. Sweden* [GC], 2016, § 127. However, some particularly relevant points in the LGBTI context are dealt with below.

a. Risk

31. Under Article 3 of the Convention, the risk of ill-treatment in the country of destination, which can emanate from State or non-State actors (including family members) must be "real". The assessment of the existence of a real risk must focus on the foreseeable consequences of the applicant's removal to the country of destination, in the light of the general situation there and of his or her personal circumstances. For example, in *B and C v. Switzerland*, 2020, §§ 60-62, the Court accepted that the risk emanating from non-State actors (other than the applicant's family members) may have been real, and thus could require protection, but this was not the same for the risk of ill-treatment at the hands of his family.

32. In the context of ill-treatment at the hands of the State authorities due to legislation criminalising and punishing homosexual acts, for the risk to be considered real such legislation must be in fact actively applied. This is often not the case (*B and C v. Switzerland*, 2020, § 59; *A.N. v. France* (dec.), 2016, concerning return to Senegal; *F. v. the United Kingdom* (dec.), 2004; *I.I.N. v. the Netherlands* (dec.), 2004, concerning return to Iran).

33. The Court will also require the applicant migrant to show specific circumstances which would make him or her personally vulnerable to ill-treatment. These specific circumstances may be demonstrated by information about previous ill-treatment in the country of destination (ideally supported by medical evidence), through previous grants of refugee status by foreign States or assessments made by the UNHCR or they may be also demonstrated by evidence of current systematic persecution of similarly situated persons. Where an individual alleges that he or she is a member of a group systemically exposed to a practice of ill-treatment, the protection of Article 3 will enter into play when the individual establishes that there are serious reasons to believe in the existence of the

practice in question and his or her membership of the group concerned. The Court will not then insist that the individual demonstrate the existence of further special distinguishing features if to do so would render illusory the protection offered by Article 3. This will be determined in the light of the applicant's account and the information on the situation in the country of destination in respect of the group in question (*J.K. and Others v. Sweden* [GC], 2016, §§ 103-105). For example, in *I.K. v. Switzerland* (dec.), 2017, while in Sierra Leone the law criminalised homosexuality with a punishment of from ten years to life imprisonment, in practice the law was not applied and the applicant had not shown that an arrest warrant had been issued against him: there was thus neither a general nor a personal risk.

34. As mentioned above, persecution can also come at the hands of non-state actors, which is not limited to family members. Concerning the distribution of the burden of proof in Article 3 removal cases where the risk of ill-treatment emanates from non-State actors: the burden lies with the applicant in respect of the applicant's personal circumstances (in the context of this Guide, sexual orientation or gender identity) whereas it is on the authorities to establish *proprio motu* the general situation in the country of origin, including the availability of State protection against ill-treatment emanating from non-State actors (see, for example, in *B and C v. Switzerland*, 2020, §§ 61-62).

b. Credibility

35. Owing to the special situation in which asylum-seekers often find themselves, it is frequently necessary to give them the benefit of the doubt when assessing the credibility of their statements and the documents submitted in support thereof. Yet when information is presented which gives strong reasons to question the veracity of an asylum-seeker's submissions, the individual must provide a satisfactory explanation for the alleged inaccuracies in those submissions. Even if the applicant's account of some details may appear somewhat implausible, the Court has, for example in *J.K. and Others v. Sweden* [GC], 2016, § 93 (which did not concern an LGBTI person), considered that this does not necessarily detract from the overall general credibility of the applicant's claim.

36. The Court is aware that when claiming asylum on the basis of sexual orientation it may be difficult to establish precise facts and, in line with UNHCR guidelines, the assessment of credibility by the domestic authorities should be carried out in an individualized and sensitive way. For example, in *I.K. v. Switzerland* (dec.), 2017, the Court took note of the fact that, given the applicant's allegation concerning his sexuality, he had been offered the opportunity to have his interview with male interlocutors.

37. When the credibility assessment has been done rigorously and in line with appropriate procedures, the Court will generally follow the findings of the domestic authorities who are better placed to assess an applicant's credibility since it is they who have had an opportunity to see, hear and assess the demeanour of the individual concerned, unless the applicant has brought sufficient written evidence to convince the Court otherwise. For example, in *A.N. v. France* (dec.), 2016, the applicant (Senegalese) had claimed to be actively homosexual since he was aged sixteen, but that he had kept it secret from his family and friends for fear of their reaction and repression by the authorities. The applicant became a model and started living a long-term secret relationship with another male, but he was caught out by a third person who then started to blackmail them, asking for money in exchange for his silence. After the applicant's partner became too ill to continue working and the couple could no longer pay up, the applicant started prostituting himself to gather the money. According to the applicant, the third party eventually informed his family who in turn beat up the applicant. On his discharge from hospital, having heard that his family would massacre him and fearing the action of the authorities, he fled to France. It was only after being apprehended by the police and issued with an expulsion order that the applicant applied for asylum, which was rejected by the domestic authorities on the basis that his narrative was imprecise and stereotypical, that he had not been privy to the Dakar homosexual scene, that his declarations had been imprecise and that the documents

submitted had been of little evidentiary value. Like the domestic authorities the Court considered that the applicant's claim was not credible.

38. Thus, in assessing credibility a factor to be taken into account is also that the claims are made in a timely manner: For example in *M.K.N. v. Sweden,* 2013, the applicant firstly complained that he had had to leave Mosul (Iraq) because he was being persecuted on account of his Christian beliefs. He later alleged that, he would be at risk of persecution for having had a homosexual relationship, the Mujahedin having killed his partner. The Court found no violation of Article 3, *inter alia*, it considered that the applicant's claim concerning the homosexual relationship, which had been made at a later stage, was not credible, as no plausible explanation had been given for the delay in making such claims both domestically and before the Court. Moreover, the applicant had expressed the intention of living with his wife and children.

c. Resolved cases

39. It must be noted that several of the immigration cases based on a fear of persecution for being homosexual have been struck out from the Court's list of cases as the respondent Governments opted to give the applicants some form of protection[4]. In *M.E. v. Sweden* [GC], 2015 the applicant had submitted in particular that, if he were forced to return to Libya to apply for family reunion from there, he would be at real risk of persecution and ill-treatment, primarily because of his homosexuality but also due to previous problems with the Libyan military authorities following his arrest for smuggling illegal weapons. In its strike-out judgment the Court noted that the applicant had been granted a residence permit by the Migration Board, which effectively repealed the expulsion order against him. Thus, the potential violation of Article 3 had been removed and the case had thus been resolved at national level. The Court did not accept to continue to examine his case on the basis that it raised serious issues of fundamental importance relating to homosexuals' rights and how to assess those rights in asylum cases all over Europe[5].

d. Detention

40. Another Convention Article which is of relevance in the context of LGBTI asylum seekers is Article 5 alone - which allows for detention in a limited number of circumstances[6] – and/or in conjunction with Article 3 of the Convention - which requires that the place and conditions of detention must be appropriate. In practice, this generally concerns the detention of an LGBTI person pending the assessment of his or her asylum claim, or if this has been rejected, pending his or her expulsion/deportation (Article 5 § 1 (f)). It may also be in the context of fulfilling an obligation imposed

[4] *A.S.B. v. the Netherlands* (Committee decision), 2012, where the applicant was granted asylum; *A.E. v. Finland* (Committee decision), 2015, where the applicant obtained a continuous and renewable residence permit; *A.T. v. Sweden* (Committee decision), 2017, where the order for expulsion to Iran had become statute barred and was no longer enforceable, and the applicant had lodged new asylum proceedings. The new examination entailed a full consideration on the merits of the grounds for asylum presented by the applicant, including his submission that he would risk persecution in Iran due to his sexual orientation; *E.S. v. Spain* (Committee decision), 2017, (partly struck out and partly inadmissible), where the applicant's claims concerning his return to Senegal on the ground of his homosexuality were being examined by a tribunal in ordinary proceedings which had suspensive effect; and *Nurmatov (Ali Feruz) v. Russia* (Committee decision), 2018, (partly struck out and partly inadmissible), where the applicant accepted to leave Russia voluntarily and obtained refugee status in Germany.

[5] See also *S.A.C. v. the United Kingdom* (Committee decision), 2019, where the applicant complained under Article 3 of the Convention about the refusal of his application for asylum in the United Kingdom. In particular, the applicant asserted that he faced a real risk of serious and irreversible harm upon return to Bangladesh as a gay/bisexual man. The application was struck out following the applicant's wish to withdraw the application given a settlement with the Government on terms including a reconsideration of his asylum and human rights claim.

[6] See Case-Law Guide on Article 5 - Right to liberty and security.

by law (Article 5 § 1 (b)), in the context of the immigration proceedings. For example in *O.M. v. Hungary*, 2016, §§ 53-54, examined under Article 5 § 1 (b), the authorities had failed to make an individualized assessment or take into account the applicant's vulnerability within the detention facility when they ordered his detention without considering the extent to which vulnerable individuals –for instance, LGBT people like the applicant – were safe or unsafe in custody among other detained persons. Thus, the decisions of the domestic authorities, which 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, contributed to the Court's finding that the applicant's detention in that case verged on the arbitrary, and was in violation of Article 5 of the Convention.

II. Personal and Family matters[7]

Article 6 of the Convention

"In the determination of his civil rights and obligations ... everyone is entitled to a fair ... hearing ... by [a] ... tribunal ..."

Article 8 of the Convention

"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."

Article 12 of the Convention

"Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right."

A. General considerations

1. The notions of private life and family life

41. The majority of complaints brought by LGBTI individuals before the Court have concerned complaints under Article 8 of the Convention, in relation to their private or family life or both.

42. The Court has held that the concept of "private life" is a broad term not susceptible to exhaustive definition. It covers the physical and psychological integrity of a person, including his or her sexual life (*X and Y v. the Netherlands*, 1985, § 22). It can sometimes embrace aspects of an individual's physical and social identity (*Y.Y v. Turkey*, 2015, § 56). Elements such as, for example, gender identification, name and sexual orientation and sexual life fall within the personal sphere protected by Article 8 (*Sousa Goucha v. Portugal,* 2016, § 27*; B. v. France,* 1992, § 63*; Dudgeon v. the United Kingdom,* 1981, § 41*; Beizaras and Levickas v. Lithuania*, 2020, § 109; *Smith and Grady v. the United Kingdom*, 1999, § 71). Article 8 also protects the right to personal development and the right to establish and develop relationships with other human beings and the outside world (*Schlumpf v. Switzerland*, 2009, § 77).

[7] For detailed general principles and their application see the Case-Law Guide on Article 8 - Right to respect for private and family life, home and correspondence.

43. The notion of family life is an autonomous concept. Consequently, whether or not "family life" exists is essentially a question of fact depending upon the real existence in practice of close personal ties. The Court will therefore look at *de facto* family ties. For example, the Court found that there was family life in the context of a female to male transsexual who had undergone gender reassignment surgery and who had lived with a female, who had given birth to a child by Artificial Insemination by Donor (AID), a procedure the couple had jointly applied for. In those circumstances, the Court considered that *de facto* family ties linked the three applicants (*X, Y and Z v. the United Kingdom*, 1997, § 37). The relationship between two women who were living together and had entered into a civil partnership, with a child conceived by one of them by means of assisted reproduction but who was being brought up by both of them, also constituted "family life" within the meaning of Article 8 of the Convention (*Gas and Dubois v. France* (dec.), 2010). The same applied to the relationship with the child of one of them, which they were raising together (*X and Others v. Austria* [GC], 2013, § 96; *Boeckel and Gessner-Boeckel v. Germany* (dec.), 2013, § 27; *S.W. and Others v. Austria* (dec.), 2022, § 43). The Court has also considered in this context that the relationship between the non-biological "parent" (or "sibling") and the child persists even after the break down of the relationship between the couple and continues to constitute family life (*Honner v. France*, 2020, § 51; *C.E. and Others v. France*, 2022, §§ 49-52). More recently, the Court has also found that two applicants, a same-sex couple living in Iceland, who were the intended parents of the third applicant, a child born by way of gestational surrogacy in the United States and having no biological link with either of them constituted family life since they had bonded for over four years (all of the third applicant's life), also *via* a foster care arrangement, and they regarded each other as parents and child (*Valdís Fjölnisdóttir and Others v. Iceland*, 2021, §§ 58-62, see also *D.B. and Others v. Switzerland*, 2022).

44. Certain situations can fall both within the concept of private life as well as family life. For example, the relationship between stable same-sex couples, in a *de facto* partnership, whether cohabiting or not, falls within the notion of "private life" and that of "family life", just as would the relationship of different-sex couples (*Schalk and Kopf v. Austria*, 2010, § 95*; Vallianatos and Others v. Greece* [GC], 2013, § 73; *Oliari and Others v. Italy*, 2015, § 103). The relationship of a child with the former partner of the biological parent also falls both within the concept of family life, as well as private life both for the adult and the child with whom emotional ties have been established (*C.E. and Others v. France*, 2022, §§ 53-55). Similarly, the situation of two twin brothers born through surrogacy in the USA, but living in Israel with their intended parents (a same-sex couple), who had been refused (in Poland) the recognition of their legal parent-child relationship with their Polish biological father and the ensuing acquisition of Polish nationality by descent, could have fallen both under the concept of private life and family life. However, in the particular circumstances of that case, the Court found that Article 8 was not applicable, as the negative effect which the impugned decisions had on the applicants' private life had not crossed the threshold of seriousness for an issue to be raised under Article 8 of the Convention and, considering that the applicants did not live in Poland, the Court found that there had been no interference with the right to respect for their family life (*S.-H. v. Poland* (dec.), 2021, § 66-76).

2. Negative and positive obligations

45. The Court has examined various cases of interference (negative obligations) with the private and/or family life of LGBTI applicants under Article 8. It held, for example, that the legislation prohibiting homosexual acts committed in private between consenting males constituted a continuing interference with the applicant's right to respect for his private life (which included his sexual life – a most intimate aspect of private life) (*Dudgeon v. the United Kingdom*, 1981, § 41*; Norris v. Ireland*, 1998, § 38; *Modinos v. Cyprus*, 1993, § 24). Similarly, the existence of legislation prohibiting consensual sexual acts between more than two men in private and a consequent conviction for gross indecency also constituted an interference with the right to respect for private life (*A.D.T. v. the United Kingdom*, 2000, § 26).

46. Once it is established that there has been an interference with an applicant's private or family life, the Court in the assessment of a State's negative obligations, will examine whether the interference is "in accordance with the law" and is "necessary in a democratic society" in the light of the legitimate aim pursued. In, for example, *Dudgeon v. the United Kingdom*, 1981; *Norris v. Ireland*, 1998; and *Modinos v. Cyprus*, 1993, the Court found a violation of Article 8 of the Convention as these requirements had not all been met. A specific interference may affect both LGBTI individuals (the cases directly above) as well as those perceived as LGBTI persons. For example, the case of *Drelon v. France*, 2022, concerned the collection and retention, by the French Blood Donation Service, of personal data reflecting the applicant's presumed sexual orientation. A contraindication to giving blood (specific to men who had intercourse with other men) had been applied to him, and was registered in the system, as a result of hishaving refused to answer questions about his sex life during the pre-donation medical interview. Having applied the above-mentioned test, the Court found a violation of Article 8 (private life).

47. While the essential object of Article 8 is to protect individuals against arbitrary interference by public authorities, it may also impose on a State certain positive obligations to ensure effective respect for the rights protected by Article 8 (*Hämäläinen v. Finland* [GC], 2014, § 62). These obligations may involve the adoption of measures designed to secure respect for private or family life even in the sphere of the relations of individuals between themselves (*Oliari and Others v. Italy*, 2015, § 159).

48. While the boundaries between the State's positive and negative obligations under Article 8 do not lend themselves to precise definition, the applicable principles are nonetheless similar. In determining whether or not such an obligation exists, regard must be had to the fair balance which has to be struck between the general interest and the interests of the individual: in both contexts the State enjoys a certain margin of appreciation (*B. v. France*, 1992, § 44; *Hämäläinen v. Finland* [GC], 2014, § 67; *O.H. and G.H. v. Germany*, 2023, §§ 109-111).

49. In the context of claims brought by LGBTI persons the Court has found, for example, that there is a positive obligation to ensure the right of a post-operative transsexual, to respect for her private life, in particular through legal recognition for her gender re-assignment (*Christine Goodwin v. the United Kingdom* [GC], 2002, §§ 71-93; *Grant v. the United Kingdom*, 2006, §§ 39-44; departing from previous case-law such as *Rees v. the United Kingdom*, 1986; *Cossey v. the United Kingdom*, 1990; *Sheffield and Horsham*, 1998). Conversely, there is no positive obligation to provide an effective and accessible procedure allowing an applicant to have her new gender legally recognised while remaining married (*Hämäläinen v. Finland* [GC], 2014, § 88). In assessing the situation in Italy, the Court held that there was a positive obligation to ensure that the applicants, same-sex couples in stable unions, or same-sex couples married in a foreign State, have available a specific legal framework providing for the recognition and protection of their same-sex unions (*Oliari and Others v. Italy*, 2015, § 185; *Orlandi and Others v. Italy*, 2017, § 210). However, once this possibility exists, there is no positive obligation to have a marriage contracted abroad, registered as a marriage, if the law of the Contracting States does not allow for same-sex marriage (ibid., §§ 205-211).

3. Margin of appreciation and consensus

50. The scope of the margin of appreciation allowed to States will vary according to the circumstances, the subject matter and its background (*Hämäläinen v. Finland* [GC], 2014, § 109).

51. When the activity was genuinely "private", the approach of the Court was 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 *Dudgeon v. the United Kingdom*, 1981, § 52; *A.D.T. v. the United Kingdom*, 2000, § 37). Thus, the Court considers that where a particularly important facet of an individual's existence or identity is at stake, the margin allowed to the State will be restricted (*Christine Goodwin v. the United Kingdom* [GC], 2002, § 90; *Orlandi and Others v. Italy*, 2017, § 203).

52. 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 the best means of protecting it, particularly where the case raises sensitive moral or ethical issues, the margin will be wider (*X, Y and Z v. the United Kingdom*, 1997, § 44; *Fretté v. France*, 2002, § 41; *Christine Goodwin v. the United Kingdom* [GC], 2002, § 85). There will also usually be a wide margin if the State is required to strike a balance between competing private and public interests or Convention rights (*Fretté v. France*, 2002, § 42; *O.H. and G.H. v. Germany*, 2023, § 112 and the references cited therein). See also, albeit in the context of Article 9, but of interest to the subject matter of this Guide, *Eweida and Others v. the United Kingdom*, 2013, § 102-110). In *Eweida and Others*, the disciplinary measures against the applicants (employees) for their refusal to perform functions which they held were contrary to their religious beliefs (such as counselling same-sex couples or carrying out civil partnership ceremonies as regards same-sex couples) were found not to violate their right to manifest their religion under Article 9 alone or in conjunction with Article 14, given the authorities' wide margin of appreciation when balancing between two Convention rights.

53. There is ample case-law reflecting a long-standing European consensus on such matters as:

- the abolition of criminal liability for homosexual relations between adults (*Dudgeon v. the United Kingdom,* 1981; *Norris v. Ireland*, 1998; *Modinos v. Cyprus*, 1993);
- access by homosexuals to service in the armed forces (*Lustig-Prean and Beckett v. the United Kingdom*, 1999, § 97; *Smith and Grady v. the United Kingdom*, 1999, § 104);
- equal ages of consent under criminal law for heterosexual and homosexual acts (*L. and v. Austria*, 2003, § 50); and
- the requirement to obtain a prior psychiatric diagnosis prior to legal recognition of transgender identity (*A.P., Garçon and Nicot v. France*, 2017, §§ 72 and 139).

54. The Court has also considered an emerging consensus/trend/movement, such as recognising, for the purposes of immigration rights, same-sex relations as "family life" (*Taddeucci and McCall v. Italy*, 2016, § 97) and the recognition of same-sex unions (*Oliari and Others v. Italy*, 2015, § 178).

55. At the same time, there remain issues where there is, for the moment, no European consensus such as:

- the right of same-sex couples to marry, or how to deal with gender recognition in the case of a pre-existing marriage (*Hämäläinen v. Finland* [GC], 2014, §§ 74-75); and
- registration of same-sex marriages contracted abroad (*Orlandi and Others v. Italy*, 2017, § 205);
- the indication, in civil registration records concerning a child, of the fact that one of the persons having parental status is transgender (*O.H. and G.H. v. Germany*, 2023, § 114).

56. The Convention is a living instrument which is to be interpreted in the light of present-day conditions (*E.B. v. France* [GC], 2008, § 92; *Christine Goodwin v. the United Kingdom* [GC], 2002, §§ 74-75) and thus, particularly in the context of LGBTI issues, the Court's case-law has developed often in the light of an evolving consensus. For example:

- Already at the time of *Sheffield and Horsham*, 1998, § 50, there was an emerging consensus within Contracting States in the Council of Europe on providing legal recognition following gender re-assignment. However, this was not sufficient for the Court to reverse its findings in its earlier judgments of *Rees v. the United Kingdom*, 1986, and *Cossey v. the United Kingdom*, 1990, the Court noting that there was no European common approach to the resolution of the legal and practical problems arising. The Court considered however that this area needed to be kept under review by the Contracting states. Later, in *Christine Goodwin v. the United Kingdom* [GC], 2002, § 85, the Court relied on the clear and uncontested evidence of a continuing international trend towards legal recognition to find

that the lack of recognition of post-operative individuals no longer fell within the margin of appreciation of the State.

- In *Oliari and Others v. Italy*, 2015, § 178, of relevance to the Court's consideration was the movement towards legal recognition of same-sex couples which continued to develop rapidly in Europe since the Court's judgment in *Schalk and Kopf v. Austria*, 2010. In the latter case the Court had found that although not in the vanguard, the Austrian legislator could not have been reproached for not having introduced legal recognition of the applicant's same-sex relationship (*via* the introduction of the Registered Partnership Act) earlier than it did, namely in 2010. However, five years later, at the time of *Oliari and Others v. Italy*, 2015, a narrow majority of States of the Council of Europe (twenty-four out of forty-seven,) had already legislated in favour of such recognition and the relevant protection. The same rapid development had been identified globally, with particular reference to countries in the Americas and Australasia. This, amongst other considerations, led the Court to find that the Italian State had overstepped its margin of appreciation and failed to fulfil its positive obligation to ensure that the applicants had available a specific legal framework providing for the recognition and protection of their same-sex unions. The Court considered that to find otherwise in 2015, it would have had to be unwilling to take note of the changing conditions in Italy and be reluctant to apply the Convention in a practical and effective manner (ibid., § 186). The trend observed in the above-mentioned cases was confirmed in 2022, since thirty State parties provided for the possibility of legal recognition for same-sex couples, allowing the Court to confirm the existence of a positive obligation on member States to provide a legal framework allowing same-sex couples to be granted adequate recognition and protection of their relationship (*Fedotova and Others v. Russia* [GC], 2023, § 178).
- Concerning the requirement of surgery/sterilization prior to gender recognition, although not crucial to its finding of a violation, in recent cases on the matter the Court nevertheless took into account the evolving trends. In *A.P., Garçon and Nicot v. France*, 2017, § 124, the Court noted that despite the absence of a consensus on the matter, in the seven years prior to the judgment, eleven Member States had removed such a requirement from their statutes, showing a tendency to the abandonment of such a requirement. Four years later, in *X and Y v. Romania*, 2021, the Court also referred to the continuing evolution on the subject noting that the number of member States maintaining such a requisite continued to diminish (in 2020 twenty-six member States had removed the requirement).

B. Major topics

1. Issues related to transgender persons

57. The notion of personal autonomy is an important principle underlying the interpretation of the guarantees of Article 8 of the Convention. This has led the Court to recognise, in the context of the application of that provision to transgender persons, that it includes a right to self-determination (*Van Kück v. Germany*, 2003, § 69; *Schlumpf v. Switzerland*, 2009, § 100), of which the freedom to define one's gender identity is one of the most basic essentials (*Van Kück v. Germany*, 2003, § 73; *Y.Y v. Turkey*, 2015, § 102). The right of transgender persons to personal development and to physical and moral security is thus guaranteed by Article 8 (*Van Kück v. Germany*, 2003, § 69; *Schlumpf v. Switzerland*, 2009, § 100; *Y.Y v. Turkey*, 2015, § 58). The right to respect for private life under Article 8 of the Convention applies fully to gender identity, as a component of personal identity. This holds true for all individuals, irrespective of whether an individual has undergone gender reassignment surgery (*A.P., Garçon and Nicot v. France*, 2017, §§ 94-95, *S.V. v. Italy*, 2018, §§ 56-58).

a. Surgery

58. While Article 8 of the Convention cannot be interpreted as guaranteeing an unconditional right to gender reassignment surgery, transgenderism is recognised internationally as a medical condition which warrants treatment to assist the persons concerned (*Christine Goodwin v. the United Kingdom* [GC], 2002, § 81; *Y.Y v. Turkey*, 2015, § 65). The health services of most of the Contracting States recognise this condition and provide or permit treatment, including irreversible gender reassignment surgery (ibid.).

59. 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 (*I. v. the United Kingdom* [GC], 2002, § 61; *Christine Goodwin v. the United Kingdom* [GC], 2002, § 81; *Van Kück v. Germany*, 2003, *§* 59; *Y.Y v. Turkey*, 2015, § 115).

60. A refusal by the domestic courts of a request for access to gender reassignment surgery has repercussions on the right to gender identity and to personal development and thus amounts to an interference with the right to respect for private life within the meaning of Article 8 § 1 of the Convention. Nevertheless, gender reassignment surgery may be made subject to State regulation and supervision on health-protection grounds and States have a wide margin of appreciation 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. However, the reference in the legislation to a permanent inability to procreate as a prior requirement for authorisation to undergo gender reassignment surgery has been considered by the Court as not being necessary in a democratic society, and denying an applicant for many years the possibility of undergoing gender reassignment surgery on that basis resulted in a violation of Article 8 (*Y.Y v. Turkey*, 2015, §§ 66-122).

61. A legislative gap concerning 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 may raise an issue under Article 8, if it is of a certain duration. This was the case in *L. v. Lithuania*, 2008: while the law recognised the right to change gender and civil status, there was no law regulating full gender reassignment surgery, in the absence of which no suitable medical facilities appeared to be reasonably accessible or available to the applicant. Whilst budgetary restraints in the public health service might have justified some initial delays in implementing the rights under the Civil Code, over four years had elapsed since the relevant provisions came into force and the necessary legislation, although drafted, had yet to be enacted. There had therefore been a violation of Article 8 (ibid., § 59-60). However, those circumstances were not of such an intense degree as to fall within the scope of Article 3 of the Convention (ibid., § 47).In deciding the applicant's claim for pecuniary damage, the Court considered that the claim would be satisfied were the State to pass the required legislation within three months of the judgment becoming final, and if that was not possible, that the State should then pay the applicant 40,000 euros to have the final stages of the necessary surgery performed abroad (ibid., § 74 and points 5 and 6 of the operative part).

b. Gender recognition (i.e. the change of the sex marker on legal documents)

62. The Court has examined several cases involving the problems faced by transgender persons in the light of present-day conditions, and has noted and endorsed the evolving improvement of State measures to ensure their recognition and protection under Article 8 of the Convention (*Christine Goodwin v. the United Kingdom* [GC], 2002; *Van Kück v. Germany*, 2003; *Grant v. the United Kingdom*, 2006; *L. v. Lithuania*, 2008).

63. On several occasions the Court held that a post-operative transgender applicant may claim to be a victim of a breach of his or her right to respect for private life contrary to Article 8 due to the lack of legal recognition of his or her change of gender (*Hämäläinen v. Finland* [GC], 2014, § 59; *Grant v. the*

United Kingdom, 2006, § 40). Whilst affording a certain margin of appreciation to States in this field, the Court has held that States are required (a positive obligation under Article 8) to implement the recognition of the gender change in post-operative transgender persons through, *inter alia*, amendments to their civil-status data, with its ensuing consequences (*Christine Goodwin v. the United Kingdom* [GC], 2002, §§ 71-93; *Grant v. the United Kingdom*, 2006, §§ 39-44; departing from the previous case-law such as *Rees v. the United Kingdom*, 1986; *Cossey v. the United Kingdom*, 1990; and *Sheffield and Horsham*, 1998). This positive obligation was later extended to transgender persons, irrespective of their post-operative status, as explained more in detail below (see for example, *A.P., Garçon and Nicot v. France*, 2017; *X and Y v. Romania*, 2021).

64. However, 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 aims in the general interest (*A.P., Garçon and Nicot v. France*, 2017, § 132; *A.D. and Others v. Georgia*, 2022, § 74) and justify putting in place stringent procedures aimed, in particular, at verifying the underlying motivation for requests for a change of legal identity (*S.V. v. Italy*, 2018, § 69; *Y.T. v. Bulgaria*, 2020, § 70; *X and Y v. Romania*, 2021, § 158). Further, the Court is mindful of the historical nature of the birth record system and that reference to the gender assigned at birth, might, in certain situations, be necessary to prove certain facts predating the sex reassignment, even though this could cause the person concerned to experience some distress (*Y v. Poland*, 2022, § 79).

65. Legislative gaps and serious deficiencies that left the applicant in a situation of distressing uncertainty *vis-à-vis* his private life and the recognition of his identity led the Court to find a breach of Article 8. This was so on account of a lack of a regulatory framework ensuring the right to respect for the applicant's private life, namely one which would provide "quick, transparent and accessible procedures" for changing on birth certificates the registered sex of transgender persons (*X v. the former Yugoslav Republic of Macedonia*, 2019, § 70-71) and not one based on unclear and unforeseeable laws (*X and Y v. Romania*, 2021, § 157) or laws not sufficiently detailed and precise (*A.D. and Others v. Georgia*, 2022, §§ 75-76). In *Grant v. the United Kingdom*, 2006, §§ 40-44, the time taken for the execution of the judgment in *Christine Goodwin v. the United Kingdom* [GC], 2002, resulted in a violation of the applicant's Article 8 rights both for the continued lack of recognition of her changed gender as well as in connection with the consequent refusal to give her the pension rights applicable to women of biological origin, from the moment of that judgment.

66. According to the Court's case-law, 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 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 (*A.P., Garçon and Nicot v. France*, 2017, § 131; *X and Y v. Romania*, 2021, § 165). Thus, the Court has held that law making recognition of the gender identity of transgender persons conditional on sterilisation surgery or on treatment which, on account of its nature and intensity, entailed a very high probability of sterility, amounted to a failure by the respondent State to fulfil its positive obligation to secure their right to respect for their private lives (*A.P., Garçon and Nicot v. France*, 2017, § 135, and contrast it with the earlier decision of *X v. France* (dec.), 2008).

67. The same conclusion held true when the requirement was not clearly set out in law but was the basis of the domestic court's reasoning, refusing the request (*X and Y v. Romania*, 2021, § 165). *S.V. v. Italy*, 2018, concerned 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. In particular, the Court noted 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 (ibid., § 70). Thus, apart from the actual legislation, domestic authorities also

play an important role in this context. For example, the refusal of the domestic authorities to grant legal recognition to the applicant's gender reassignment, without providing relevant and sufficient reasons, and without explaining why it had been possible to recognise identical gender reassignment in other cases, was found to constitute an unjustified interference with the applicant's right to respect for private life in violation of Article 8 in *Y.T. v. Bulgaria*, 2020, § 74. In both *Y.T. v. Bulgaria*, 2020, § 72, and *X and Y v. Romania*, 2021, § 165, the Court considered that rigid reasoning by the domestic courts with regard to recognition of the applicant's gender identity had placed the applicants, for an unreasonable and continuous period, in a troubling position, in which they were liable to experience feelings of vulnerability, humiliation and anxiety.

68. Unlike the sterility condition (for gender recognition on legal documents), the requirement to obtain a prior psychiatric diagnosis is not considered to directly affect an individual's physical integrity. Thus in *A.P., Garçon and Nicot v. France*, 2017, §§ 139-144 *et sequi*, in view of the wide margin of appreciation enjoyed by States (given the nearly unanimous approach of Contracting Parties on the matter), the refusal of the 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 by providing a psychiatric diagnosis, was considered to strike a fair balance between the competing interests at stake and was not in breach of the State's positive obligations (*A.P., Garçon and Nicot v. France*, 2017, §§ 143-144). Similarly, the rejection of a request to have the indication of gender on the birth certificate altered, on the grounds that the applicant had refused to cooperate with the medical expert assessment that had been ordered by the domestic court in order to verify whether he had irreversibly changed his physical appearance following surgery abroad, struck a fair balance between the competing interests at stake, so the State had not failed to fulfil its positive obligations (*A.P., Garçon and Nicot v. France*, 2017, §§ 150-154).

69. Where a post-operative transgender woman was not given a new identity number as she was still married to her wife, in a legal system which did not allow same-sex marriage, the Court did not uphold her complaint. It found that, while it was regrettable that the applicant faced daily situations in which the incorrect identity number created inconvenience for her, she had a genuine possibility of changing that state of affairs: her marriage could be converted at any time, *ex lege*, into a registered partnership with the consent of her spouse. If no such consent was obtained, the possibility of divorce, as in any marriage, was always open to her. In the Court's view, it was 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 was a genuine option which provided legal protection for same-sex couples that was almost identical to that of marriage (*Hämäläinen v. Finland* [GC], 2014, § 84). While in the Chamber the issue had been dealt with as an interference, the Grand Chamber, examined the complaint in the light of the positive obligations of the State and concluded that the minor differences between the two legal concepts (marriage and civil partnerships) was not capable of rendering the Finnish system deficient from the point of view of the State's positive obligation. Thus, the Court held that the requisite fair balance between the competing interests had been found and there was therefore no violation of Article 8 and that it was not necessary to examine the issue under Article 12 (see also the antecedent case-law *Parry v. the United Kingdom* (dec.), 2006, and *R. and F. v. the United Kingdom* (dec.), 2006, where the issue had been examined under Article 12).

70. In *Rana v. Hungary*, (Committee judgment), 2020, there existed a legislative gap which excluded all lawfully settled non-Hungarian citizens from accessing the procedures for changing gender and name regardless of their circumstances. As a result, the authorities had rejected the applicant's application on purely formal grounds, without examining his situation. The Court thus found that, by not giving the applicant (an Iranian transgender refugee, who did not have a Hungarian birth certificate) access to the legal gender recognition procedure, a fair balance had not been struck between the public interest and the applicant's right to respect for his private life. There was therefore a violation of Article 8 of the Convention (see also *R.K. v. Hungary*, 2023, §§ 57-77).

71. In *Y v. Poland*, 2022, the question to be determined was whether respect for the applicant's private life and/or family life entailed a positive obligation on the respondent State to provide an effective and accessible procedure allowing the applicant to obtain a birth certificate without any reference to the gender assigned at birth. Bearing in mind that the short extract of the birth certificate and the new ID documents indicated only the reassigned gender, and that these documents could be used in nearly all everyday situations, the Court considered that, in his daily life, the applicant was not required to reveal intimate details of his private life and he had not shown that the impugned inconveniences were sufficiently serious. Indeed, full birth records were not publicly accessible and the applicant himself would seldom be required to provide a full copy of the birth certificate. Given the specific circumstances, the Court found that any potential risk of adverse consequences was not capable of rendering the Polish system deficient from the point of view of the State's positive obligations.

72. In *O.H. and G.H. v. Germany*, 2023, the Court examined the legal impossibility for a transgender parent's current gender, disconnected from biological reality, to be indicated on the birth certificate of his child conceived after gender reclassification (see also *A.H. and Others v. Germany*, 2023, for a similar factual context and reasoning). The Court considered that the respondent State enjoyed a wide margin of appreciation, given the lack of a European consensus on the matter, as well as the fact that the authorities had been called upon to weigh up a number of private and public interests against several competing rights. Special attention was given to the public interest in the coherence of the legal system and the accuracy and completeness of civil registration records, which records were of a particular evidential value (§§ 114-116).

The Court considered that the best interests of the child had to be examined exhaustively in this context, taking into account any conflict of interest between the child and his transgender parents. It was also necessary to take account of the child's possible future interests and the interests of children who are in a comparable situation and to whom the legislative provisions in question also applied. The Court stressed that the child's well-being could not be examined individually because of his young age at the time it was necessary to determine what information to record in the birth certificate. In the view of the Federal Court of Justice, the children's interests coincided to some extent with the general interest in ensuring the reliability and consistency of the civil registration system and in ensuring legal certainty. Furthermore, the Court endorsed the approach of the domestic courts that the right to gender identity of the parents could be limited by the right of the child to know his origins, to be brought up by both parents and to be attached to them in a stable manner. The legal attachment of the child to his parents according to their reproductive functions allowed the child to be attached in a stable and immutable manner to a mother and a father who would not change, even in the not only theoretical case, where the transgender parent applied for the annulment of the decision to change their gender (§§ 123-127). Moreover, there had been a limited number of situations that could lead, when presenting a child's birth certificate, to the disclosure of the transgender identity of the parents. In particular, precautions had been in place to reduce the inconvenience to which transgender parents might be exposed (§§ 130-133). Finally, the Court had regard to the fact that the parent-child relationship between the transgender parents and their children was not affected (§ 134). In light of these factors, the Court did not find a violation of Article 8 of the Convention.

c. Medical expenses

73. The case of *Van Kück v. Germany*, 2003, concerned the rejection by the domestic courts of the applicant's claim to reimbursement of medical expenses in respect of gender reassignment measures (hormone treatment and gender reassignment surgery). The Court found that the interpretation of the term "medical necessity" and the evaluation of the evidence in that respect by the domestic courts had not been reasonable. Those courts had considered that improving the applicant's social situation as part of psychological treatment did not meet the requisite condition of medical necessity and they had not sought clarifications or further submissions based on special medical knowledge and expertise

in the field. The burden placed on the applicant to prove the medical necessity of the treatment, including irreversible surgery, appeared therefore disproportionate (ibid., §§ 55-56). Furthermore, in the absence of any conclusive scientific findings, the approach taken by the domestic court in examining the question whether the applicant had deliberately caused her condition appeared inappropriate. The Court thus found that the proceedings, taken as a whole, did not satisfy the requirements of a fair hearing, there had therefore been a violation of Article 6. The same reasons led the Court to find that a fair balance had not been struck between the interests of the private health insurance company on the one side and the interests of the individual on the other, there had therefore also been a violation of Article 8 (ibid., §§ 84-86).

74. In *Schlumpf v. Switzerland*, 2009, the Court held that, while the Convention did not guarantee any right to the reimbursement of medical costs incurred for a sex change and nobody had prevented the applicant from having a surgical operation, the two-year wait applied by the insurance company contrary to the clear views of the specialists was, in the light notably of the applicant's relatively advanced age, liable to influence her decision whether to have the operation. She could therefore claim victim status under Article 8. When called upon to decide the applicant's claim for the reimbursement of the costs of her sex-change operation, the domestic court had relied on the two-year criterion which it had established in its own case-law, without any statutory basis. When insisting on compliance with this criterion, the domestic court had refused to carry out an analysis of the specific circumstances of the applicant's case or to weigh up the various competing interests and they had failed to take into account the medical advances that had been made in the area. In view of the applicant's very particular situation – she had been over 67 years – and the respondent State's limited margin of appreciation, the Court concluded that a fair balance had not been struck between the interests of the insurance company and those of the applicant. There had therefore been a violation of Article 8. The Court also found that by refusing to allow the applicant to adduce expert evidence, on the basis of an abstract rule, the domestic court had substituted its own view for that of the doctors and psychiatrists. Consequently, the applicant had not had a fair hearing. Further, determination of the need for a sex-change operation was not so technical a process as to justify an exception to the right to a public hearing, thus, there had also been a breach of Article 6 in this respect.

2. Issues related to intersex persons

75. The case of *Y v. France*[8], 2023, concerned a complaint under Article 8 in relation to the domestic authorities' refusal to amend the applicant's birth certificate to indicate "neutral" or "intersex" instead of "male" ("*masculin*" in French). The Court examined the case from the point of view of the State's positive obligations given that it concerned a lacuna in French law. While the case concerned a most intimate aspect of private life (attracting a narrow margin of appreciation), there was no European consensus on the matter and given the public interest at play, the Court found that the State's margin of appreciation was wider. As to whether a fair balance had been struck between the competing interests, the Court recognised the profound suffering caused by the dissonance between the applicant's biological identity (intersex), which he wished to be recognized, and the imposed (male) legal identity (§§ 82-83). It distanced itself from the domestic findings, which had prioritised physical and social appearance over biological reality, given that, as an element of private life, a person's identity could not be reduced to appearance in the eyes of others. Other elements relied on by the domestic courts had been, however, relevant, such as the general interest in safeguarding the principle of the inalienability of civil status, ensuring the reliability and consistency of civil-status records and the organization of the French social and legal system. The latter would be greatly impacted by the recognition of a neutral sex, in a system which was built on binary notions of sex and would entail extensive legislative changes and coordination. Such reform would require adequate

[8] Until then the Court did not have the opportunity to consider issues related to the legal recognition of intersex persons since the only case on the point was found to be inadmissible for a failure to exhaust domestic remedies (P. v. Ukraine, 2019).

reflection and fell within the remit of the legislator (§§ 88-89). Court noted that a violation in the present case would oblige the State (under Article 46 of the Convention) to change its national law and, in matters of general policy on which opinions within a democratic society may reasonably differ widely, the role of the domestic policy-maker was to be given special weight. This was even more so when it constituted a choice of society. Thus, while acknowledging the difficult situation the applicants were in, the Court concluded that, in the absence of a European consensus, it should be left to the State to determine the timing and to what extent it should respond to the requests relating to the civil status of intersex persons (§§ 90-91). There had been therefore no violation of Article 8 of the Convention.

3. Marriage[9]

76. Article 12 secures the fundamental right of a man and woman to marry and to found a family (see Case-Law Guide on Article 12 - Right to marry). 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 (*Christine Goodwin v. the United Kingdom* [GC], 2002, § 98; *Schalk and Kopf v. Austria*, 2010, § 56). Article 12 expressly provides for regulation of marriage by national law (*Hämäläinen v. Finland* [GC], 2014, § 95) 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 (*Christine Goodwin v. the United Kingdom* [GC], 2002, § 99).

77. Under the Court's case-law as it currently stands, Article 12 applies to transgender individuals wishing to marry a person of the opposite sex (i.e. opposite to her or his newly assigned sex), as well as to same-sex couples wishing to marry or are already married. However, only a total ban on the former constitutes a violation of Article 12, and a total ban on the latter is to date Convention compliant.

78. In particular, in *Christine Goodwin v. the United Kingdom* [GC], 2002, §§ 100-103), reversing its prior case-law (*Rees v. the United Kingdom*, 1986; *Cossey v. the United Kingdom*, 1990; *Sheffield and Horsham*, 1998), the Court held that it could no longer be assumed that the terms "men and woman" referred to in Article 12 necessarily referred to a determination of gender by purely biological criteria, since there had been major social changes in the institution of marriage as well as dramatic changes brought about by developments in medicine and science. Further, the Court held that the matter of regulating the effects of the change of gender in the context of marriage fell within the margin of appreciation of the Contracting State. However, 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 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 found no justification for barring a transsexual from enjoying the right to marry under any circumstances.

79. Conversely, while in *Schalk and Kopf v. Austria*, 2010, §§ 61 and 63, the Court found under Article 12 that it would no longer consider that the right to marry must in all circumstances be limited to marriage between two persons of the opposite sex, it however considered that Article 12 does not impose an obligation on Contracting States to grant same-sex couples access to marriage. Nor can Article 8, a provision of more general purpose and scope, be interpreted as imposing such an obligation (*Schalk and Kopf v. Austria*, 2010, § 101). The same can be said of Article 14 in conjunction with Article 12 (*Oliari and Others v. Italy*, 2015, 193). In such a context, the Court has accepted that marriage has deep-rooted social and cultural connotations which may differ largely from one society to another. It has thus held that it must not rush to substitute its own judgment for that of the national authorities, who are best placed to assess and respond to the needs of society (*Schalk and Kopf v. Austria*, 2010, § 62). Confirming its earlier case-law, in *Schalk and Kopf v. Austria*, 2010, § 58, the

[9] See also the Section on "Discrimination" in the context of "Civil partnerships and marriage".

Court held that, while it is true that some Contracting States have extended marriage to same-sex partners, this reflected their own vision of the role of marriage in their societies and does not flow from an interpretation of the fundamental right as laid down by the Contracting States in the Convention in 1950 (*Parry v. the United Kingdom* (dec.), 2006; *R. and F. v. the United Kingdom* (dec.), 2006). Thus, as matters stood (at the time only six out of forty-seven member States allowed same-sex marriage), the question whether or not to allow same-sex marriage was left to regulation by the national law of the Contracting State. The same conclusion was reiterated in *Hämäläinen v. Finland* [GC], 2014 (§ 96). Similarly, in *Oliari and Others v. Italy*, 2015, § 192, despite the gradual evolution of States on the matter (eleven member States had by then recognized same-sex marriage) the findings reached in the cases mentioned above were reiterated as was the case in the later judgment of *Chapin and Charpentier* v. *France*, 2016, §§ 37-38.

80. As to registration of same-sex marriages contracted abroad, in *Orlandi and Others v. Italy*, 2017, § 210, the Court held that the Italian State could not reasonably disregard the situation of the applicants (a same-sex couple married under the law of a foreign state) which corresponded to family life within the meaning of Article 8 of the Convention, without offering the applicants a means to safeguard their relationship. Since, until 2016, the Italian authorities had failed to recognise that situation (i.e. the marriage contracted abroad) or provide any form of protection to the applicants' union, the State had failed to strike a fair balance between any competing interests. In particular, they had failed to ensure that the applicants had available a specific legal framework providing for the recognition and protection of their same-sex unions, in violation of Article 8 of the Convention. However, the obligation of the State did not go as far as requiring the marriage contracted abroad to be registered as a marriage in Italy, in the absence of the recognition of same-sex marriage in Italy. Likewise, in *Koilova and Babulkova v. Bulgaria*, 2023, the Court noted that the Bulgarian authorities had not taken any steps to ensure the legal regulation of the recognition of same-sex unions contracted abroad, and that they had therefore failed to fulfill the positive obligation to ensure that the applicants had a specific legal framework providing for the recognition and protection of their same-sex union (ibid, §§ 63-65).

4. Civil partnerships/unions[10]

81. According to the case-law, civil partnerships have an intrinsic value for same-sex couples in a stable relationship, irrespective of the legal effects, narrow or extensive, they would produce (*Fedotova and Others v. Russia* [GC], 2023, § 201). 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 (*Vallianatos and Others v. Greece* [GC], 2013, § 81). In the absence of marriage, same-sex couples 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 recognized 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 (*Oliari and Others v. Italy*, 2015, § 174).

82. In *Oliari and Others v. Italy*, 2015, the Court considered that the legal protection available to same-sex couples, at the time (2015) in Italy, failed to provide for the core needs relevant to a couple in a stable committed relationship. Registration of same-sex unions with the local authorities had a merely symbolic value and did not confer any rights on same-sex couples. Cohabitation agreements were limited in scope and failed to provide for some basic needs fundamental to the regulation of a stable relationship between a couple, such as mutual material support, maintenance obligations and inheritance rights. Furthermore, they required the couple concerned to be cohabiting, whereas the

[10] See also the Section on "Discrimination" in the context of "Civil partnerships and marriage".

Court had already accepted that cohabitation was not a prerequisite for the existence of a stable union. Hence there existed a conflict between the social realities of the applicants living openly as couples, and their inability in law to be granted any official recognition of their relationship. The Court did not consider it particularly burdensome for Italy to provide for the recognition and protection of same-sex unions. The Court further noted an international movement towards legal recognition of same-sex couples. The Italian Constitutional Court had also pointed out the need for such legislation, reflecting the sentiments of a majority of the Italian population. Thus, since the Italian Government had failed to point to any community interests justifying the situation the Court found that Italy had failed to fulfil its obligation to ensure that the applicants had a specific legal framework available to them providing for the recognition and protection of their union. There had therefore been a violation of Article 8 of the Convention.

83. *Fedotova and Others v. Russia* [GC], 2023 concerned the absence of any form of legal recognition and protection for same-sex couples in Russia. The Court confirmed that, under Article 8, State Parties were required to ensure legal recognition and protection for same-sex couples by putting in place a "specific legal framework". It considered that this positive obligation on States Parties was in line with the tangible and ongoing evolution of the domestic legislation of States Parties and of international law. Indeed, there was a clear ongoing trend within the States Parties towards legal recognition of same-sex couples (through the institution of marriage or other forms of partnership), since a majority of thirty States Parties had legislated to that effect. Accordingly, and given that particularly important facets of the personal and social identity of persons of the same sex were at stake, the Court considered that the States Parties' margin of appreciation was significantly reduced. The Russian legal framework did not provide for the core needs of recognition and protection of same-sex couples, in a stable and committed relationship, and none of the public-interest grounds put forward by the Government (traditional family values, the feelings of the majority of the Russian population and the protection of minors from promotion of homosexuality) prevailed over the applicants' interest. The Court thus concluded that the respondent State had overstepped its margin of appreciation and had failed to comply with its positive obligation to secure the applicants' right to respect for their private and family life. The Court emphasised that a democratic society within the meaning of the Convention rejects any stigmatisation based on sexual orientation and is built on the equal dignity of individuals and is sustained by diversity, which it perceives not as a threat but as a source of enrichment (see also, *Buhuceanu and Others v. Romania*, 2023, §§ 75-84, for the first application of the principles established in *Fedotova and Others* under Article 8; *Przybyszewska and others v. Poland*, 2023, §§ 120-122, in respect of Poland, and *Maymulakhin and Markiv v. Ukraine*, 2023, §§ 72-79, for the application of those principles under Article 14 taken in conjunction with Article 8 of the Convention).

84. However, 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 (*Schalk and Kopf v. Austria*, 2010, §§ 108-09; *Oliari and Others v. Italy*, 2015, § 177; *Gas and Dubois v. France*, 2012, § 66). The Court has already held, in respect of various domestic legislations, that civil unions provide an opportunity to obtain a legal status equal or similar to marriage in many respects (*Schalk and Kopf v. Austria*, 2010, § 109, concerning Austria, *Hämäläinen v. Finland* [GC], 2014, § 83, in connection with the Finnish system; *Chapin and Charpentier* v. *France*, 2016, §§ 49 and 51, concerning France; *Orlandi and Others v. Italy*, 2017, § 194, concerning Italy) and in principle, such a system would *prima facie* suffice to satisfy Convention standards (ibid.). Nevertheless, in *Fedotova and Others v. Russia* [GC], 2023, § 190, the Court held that it was important that the protection afforded by States Parties to same-sex couples should be adequate, referring in particular to material aspects (maintenance, taxation or inheritance) or moral aspects (rights and duties in terms of mutual assistance), that are integral to life as a couple and would benefit from being regulated within a legal framework available to same-sex couples.

5. Parental issues[11]

85. According to the Court's case-law, an individual who had undergone gender reassignment surgery (woman to man) and who lived with a woman, who had given birth to a child by Artificial Insemination by Donor (AID) - a procedure the couple had jointly applied for - constituted family life (*X, Y and Z v. the United Kingdom*, 1997, § 37). However, in 1997 the Court considered that given that 'transsexuality' raised complex scientific, legal, moral and social issues, in respect of which there was at the time no generally shared approach among the Contracting States, Article 8 could not, in that context, be taken to imply an obligation for the respondent State formally to recognize as the father of a child a person who was not the biological father. That being so, the fact that the law of the United Kingdom did not allow special legal recognition of the relationship between a post-operative man, acting as a father to a child born by AID to his partner, and the child did not amount to a failure to respect family life within the meaning of that provision.

86. The relationship between the non-biological "parent" (or "sibling") and the child persists even after the break down of the relationship between the couple and continues to constitute family life (*Honner v. France*, 2020, § 51). However, a decision to deny the latter any contact rights, taken in the best interests of the child, may fall within the wide margin of appreciation afforded to the authorities in such matters, as was the case in *Honner v. France*, 2020, where the Court concluded that the respondent State had not failed to fulfil its positive obligation to guarantee effective respect for the applicant's right to respect for her family life.

87. The case of *C.E. and Others v. France*, 2022, concerned two applications which concerned the inability to obtain legal recognition of a relationship between a child and the former partner of the biological mother. In both cases, since the couples' separation and despite the lack of legal recognition of a relationship between the children and the former partner of their biological mother, the persons concerned had led a family life comparable to that led by most families after the parents separated. They had made no mention of any difficulties in conducting their family life, and the respondent State had put in place legal instruments enabling the ties between them to be protected. Moreover, if any problems were to arise, they could be remedied on the basis of the civil law as it stood. Thus, the respondent State had not failed in its obligation to guarantee the applicants effective respect for their family life. As to their private life, the Court distinguished the case from those where the child had been born out of surrogacy agreements. It emphasised the relevance of the best interests of the child and noted that French law had given the applicants various possibilities to safeguard their relationship amounting to some degree of legal recognition. In respect of some of the applicants, legislative amendments had also enabled a legal parent-child relationship to be established between them albeit a few years after their requests had been lodged. In these circumstances, and regard being had to the margin of appreciation left to the respondent State – which, was narrower where children's best interests were in issue – the Court found that a fair balance had been struck between the interests at stake and that there had been no violation of the applicants' right to respect for private life.

88. In *A.M. and Others v. Russia*, 2021, § 75, the applicant (a male to female transgender person) had suffered a restriction of her parental rights over her children, which according to the domestic courts was reasonable given the social and individual circumstances of gender transition and the findings of the experts. However, the Court found that the domestic courts had failed to make a balanced and reasonable assessment of the respective interests on the basis of an in-depth examination of the entire family situation and of other relevant factors. It thus, concluded that the restriction of the applicant's parental rights and of her contact with her children was not "necessary in a democratic

[11] See also the Section on "Discrimination", in the contexts of "Adoption" and "Personal and Family matters".

society", and therefore in violation of Article 8. The Court also found a violation of Article 14 in conjunction with the latter provision[12].

6. Surrogacy[13]

89. In *Valdís Fjölnisdóttir and Others v. Iceland*, 2021, §§ 71-76, a same-sex couple living in Iceland, were the intended parents of the third applicant, a child born by way of gestational surrogacy in the United States and having no biological link with them. The first and the second applicant were registered in California as his parents and a birth certificate to that effect was issued, together with a United States passport, for the child. The Icelandic authorities initially refused to register the child in the national register and took legal custody of him, before placing him in the foster care of the first two applicants. After the entry into force of new legislation, the third applicant was added to the national register, but the first two applicants were not registered as his parents. Having regard to, in particular the absence of an indication of actual, practical hindrances in the enjoyment of family life, and the steps taken by the respondent State to regularise and secure the bond between the applicants, the Court found that the non-recognition of a formal parental link, confirmed by the domestic court, had struck a fair balance between the applicants' right to respect for family life and the general interests which the State had sought to protect by the ban on surrogacy. The State had thus acted within the margin of appreciation afforded to it in such matters and there was therefore no violation of Article 8 with regard to the right to respect for private and family life of all three applicants.

90. The case of *D.B. and Others v. Switzerland*, 2022, also concerned the situation of a homosexual couple (registered partners) who had the third applicant by way of gestational surrogacy in the United States, the second applicant being the male donor in the process. By judgment in the United States the first and the second applicants were declared his legal parents and a birth certificate to that effect was issued in the United States. On their return to Switzerland in 2011 they initiated the relevant procedures to obtain recognition of that judgment and in 2015 it was recognised only in so far as it concerned the legal parent-child relationship between the child and his genetic father (the second applicant) but not in respect of the relationship between the child and the first applicant (the intended father). In 2018, following a change of law, the first applicant adopted the third applicant (as his registered partner's child). The Court found a violation of Article 8 in respect of the third applicant's private life, in so far as it had taken nearly seven years and eight months to secure the definitive recognition of the legal parent-child relationship (with the first applicant, the intended father)[14]. Such a time frame was incompatible with, *inter alia*, the best interests of the child, in so far as it might put the child in a position of legal uncertainty regarding his or her identity within society and deprive him or her of the chance to live and develop in a stable environment (§§ 89-90). However, in the meantime the practical hindrances in the enjoyment of family life for the first and second applicants were not such as to amount to a violation of their right to family life under Article 8 (§§ 93-94).

91. In contrast with the problematic time frame in *D.B. and Others v. Switzerland*, 2022 , in *S.W. and Others v. Austria* (dec.), 2022, it had taken only two months for the parent-child relationship to be established in law, following the adoption of a registered partner's child. The applicants in *S.W. and Others v. Austria* (dec.), 2022 were a lesbian couple (the first and third applicant) and the biological child (the second applicant) of the first applicant who had been adopted by her partner, the third

[12] See, in this respect, the Section on "Discrimination", in the context of "Personal and Family matters", with further references.

[13] For detailed general principles and their application see the Case-Law Guide on Article 8 - Right to respect for private and family life, home and correspondence, and in particular the chapter on Legal parent-child relationship and Surrogacy.

[14] Contrast the findings in this case with those in *S.-H. v. Poland* (dec.), 2021, concerning the refusal of recognition in Poland of a biological relationship, between the father and the children born of surrogacy, while the applicants lived in Israel.

applicant. Their complaint under Article 8 was that the third applicant's status as the adoptive mother was apparent from the child's birth certificate, her name appearing under the indication "father/parent". However, the Court found that the way the birth certificate was set out did not constitute an interference with their right to respect for private and family life. It considered that birth certificates normally reflect the current legal relationship at the time of issuance, and not biological parentage, and in cases of same-sex parents, it was always known that at least one of them was not genetically related to the child and, if mentioned on the child's birth certificate as a parent, must have adopted the child. No assumption could be made from the birth certificate as it stood, as in the instant case the third applicant could in fact also have been the genetic mother, for example, in the case of a previous egg donation to the woman who gave birth to the child or both mothers could have been the adoptive mothers. Furthermore, there was no obligation to insert the biological mother's name under the indication "mother/parent" and it was also open to the applicants to request the issuance of a birth certificate which did not mention the personal civil status data of the parents.

92. In the case of *H. v. the United Kingdom* (dec.), 2022, the applicant was a child born *via* a surrogacy arrangement, which, in the United Kingdom, are regulated by law. Prior to her birth, there was a breakdown in relations between, on the one hand, the intended fathers (a same-sex couple), one of whom was also the genetic father, and, on the other, the surrogate and her husband (both of whom had no genetic link to the applicant who was born *via* donated eggs). Although the domestic courts granted parental responsibility to all four individuals, and custody to the intended fathers, by law the surrogate's husband was named as "father" on the applicant's birth certificate. Although there was a mechanism for amending the birth certificate, it required the consent of the surrogate and her husband. The applicant had not challenged the "consent" requirement before the domestic courts. Before the Court she complained only that her biological father was not accurately recorded on her birth certificate at the time of her birth. More specifically, she argued that there should have been a "normative presumption" that the birth registration of a child would accurately record the identity of the biological father, where consent was provided for conception and identification as the father. The Court declared the application inadmissible as manifestly ill-founded, finding that there was no support in its case-law for the existence of such a presumption. To date, it had not held that the intended parents had to immediately and automatically be recognised as such in law and, in its view, the State had to be afforded a wide margin of appreciation in this regard (§§ 44-58).

III. Freedom of expression and association

Article 8 of the Convention

"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."

Article 10 of the Convention

"1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

Article 11 of the Convention

"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."

A. Freedom of expression[15]

1. Affecting private life, image, honour or reputation

93. In the context of freedom of expression, the Court either assesses the proportionality of any interference in light of the need to protect the reputation or rights of others or in light of any Article 8 rights of others. In this latter respect, and in order for Article 8 to come into play in defamation cases, an attack on a person's reputation must attain a certain level of seriousness and in a manner causing prejudice to personal enjoyment of the right to respect for private life. In such cases, the outcome should not vary depending on whether the application was brought under Article 8 by the person who was the subject of the statement or under Article 10 by the person who has made it, because in principle the rights under these Articles deserve equal respect.

94. In cases where the interest competing with freedom of expression is protected by Article 8, the Court's approach has been to balance the applicant's right to "respect for his private life" against the public interest in protecting freedom of expression, bearing in mind that no hierarchical relationship

[15] For general principles see the Case-Law Guide on Article 10 - Freedom of expression.

exists between the rights guaranteed by the two Articles (*Sousa Goucha v. Portugal,* 2016, § 42). Where the balancing exercise between those two rights has been undertaken by the national authorities in conformity with the criteria laid down in the Court's case-law, the Court would require strong reasons to substitute its view for that of the domestic courts (ibid., § 45). Where no matters of public interest are at stake, 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 (ibid., §§ 51-52)[16].

95. In *Sousa Goucha v. Portugal,* 2016, the applicant, a well-known man who had himself mentioned his homosexuality publicly, complained under Article 8 of the Convention about the domestic authorities' refusal to bring criminal proceedings in respect of a joke which had described him as a woman during a television comedy show. The Court held, firstly, that Article 8 was applicable, before finding that there had been no violation of that provision. In the Court's view, as sexual orientation is a profound part of a person's identity and since gender and sexual orientation are two distinctive and intimate characteristics, any confusion between the two will therefore constitute an attack on one's reputation capable of attaining a sufficient level of seriousness for Article 8 to be applicable (ibid., § 27). However, the domestic courts had taken 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 would have perceived the impugned joke (that portrayed the applicant, a known homosexual, as a female) – rather than just considering what the applicant felt or thought about the joke. In such circumstances, the Court found that a limitation on freedom of expression for the sake of the applicant's reputation would therefore have been disproportionate under Article 10 so that there had been no violation of the applicant's rights under Article 8 of the Convention.

96. In *Mladina d.d. Ljubljana v. Slovenia*, 2014, §§ 37-49 the applicant company complained under Article 10 about the fact that it had been ordered to pay damages for an article harshly critical of the remarks of a parliamentary deputy (S.P.)and of his conduct during a parliamentary debate on the legal regulation of same-sex relationships. The Court held that while the terminology of the article was extreme it was a value judgment which had a sufficient factual basis. Moreover, the statement countered SP's own remarks which remarks could be regarded as ridicule and promoting negative stereotypes. Lastly, the article matched not only SP's provocative comments, but also the style in which he had expressed them. Viewed in the light of the context in which the impugned statement was made, and the style used in the article, the Court considered that it had not amounted to a gratuitous personal attack. Therefore, the domestic courts had not convincingly established any pressing social need for placing the protection of S.P.'s reputation above the applicant company's right to freedom of expression. There had therefore been a violation of Article 10 of the Convention.

97. In *C8 (Canal 8) v. France*, 2023, the applicant (television) company complained under Article 10 about two fines imposed on it in relation to the content of a television show "*Touche pas à mon poste*". The Court agreed with the domestic courts that the two sequences at issue were detrimental to the image of women and likely to stigmatize homosexuals and impact private life, respectively. In that light, and given their impact, especially on young viewers, as well as the fact that that the sequences in question did not concern any matter of public interest, and that the applicant had had adequate procedural safeguards, the Court found that the fines imposed on the applicant company had not breached Article 10 of the Convention.

2. Hate speech

98. The Court attaches particular importance to pluralism, tolerance and broadmindedness. It has often emphasized that pluralism and democracy are built on genuine recognition of, and respect for, diversity. The harmonious interaction of persons and groups with varied identities is essential for

[16] For more detailed general principles see the Case-Law Guide on Article 8 - Right to respect for private and family life, home and correspondence; and the Case-Law Guide on Article 10 - Freedom of expression.

achieving social cohesion (*Beizaras and Levickas v. Lithuania*, 2020, §§ 106-7, and the authorities cited therein). Statements that spread, incite, promote or justify violence, hatred, or intolerance against a person or group of persons ("hate speech") threaten social cohesion and constitute a risk of violence and of the violation of the rights of others. Such expression can create environments that are conducive to hate crime and fuel broad-scale conflict.

99. 'Hate speech' is addressed by the Court in two ways. The first is to find that the 'hate speech' in question falls within the scope of Article 17 and is thus excluded entirely from the protection of Article 10 of the Convention[17]. The first application of this approach in the context of homophobic speech was in *Lenis v. Greece* (dec.), 2023, concerning the conviction of a senior Greek Orthodox Church official for an article published on his personal blog. The Court considered that on account of their content, tone and context, the expressions used in the disputed article constituted hate speech and incitement to violence against a group of people on the basis of their sexual orientation. Three additional factors reinforced that conclusion: in the first place, the applicant in his position as a senior Church official had the power to influence many people; secondly, the views expressed in the article were disseminated to a wide audience through the Internet; and thirdly, the protection of the dignity and human value of persons, irrespective of their sexual orientation, was of high importance in modern European society. Consequently, the Court applied Article 17 to find that the applicant could not claim the benefit of the protection afforded by Article 10 of the Convention (§§ 46-57).

100. The second is to find that the 'hate speech' falls within the scope of Article 10 and is subjected to the usual tests thereunder (*Vejdeland and Others v. Sweden*, 2012, §§ 47-60; *Beizaras and Levickas v. Lithuania*, 2020, § 125; *Lilliendahl v. Iceland* (dec.), 2020, § 39). The Court has applied the second approach not only to speech which explicitly calls for violence or other criminal acts but also to attacks on persons committed by insulting, holding up to ridicule or slandering specific groups of the population (see, always in the context of this Guide, *Beizaras and Levickas v. Lithuania*, 2020, § 125; *Vejdeland and Others v. Sweden*, 2012, § 55)

101. In *Vejdeland and Others v. Sweden*, 2012, §§ 54-60 the applicants had been convicted for leaving homophobic leaflets in pupils' lockers at an upper secondary school. In light of the above principle - that inciting hatred does not necessarily entail calling for violence or criminal acts - the Court considered that the wording of the leaflets (to the effect that homosexuality was "a deviant sexual proclivity" that had "a morally destructive effect on the substance of society" as well as alleging that homosexuality was one of the main reasons why HIV and AIDS had gained a foothold and that the "homosexual lobby" tried to play down paedophilia) contained serious and prejudicial allegations. The Court emphasized that the leaflets had been distributed in schools, left in the lockers of young people at an impressionable and sensitive age. Moreover, the applicants' convictions and sentences were not disproportionate to the legitimate aim pursued and the Supreme Court had given relevant and sufficient reasons for its decision. The interference could therefore reasonably have been regarded by the national authorities as necessary in a democratic society for the protection of the reputation and rights of others. There had therefore been no violation of Article 10 of the Convention.

102. In *Lilliendahl v. Iceland* (dec.), 2020, the applicant had been convicted for statements made online in the context of a public discussion following a decision of the municipal council to strengthen education and counselling in elementary and secondary schools on matters concerning those who identify themselves as LGBT. The Court found that the statements had been "serious, severely hurtful and prejudicial". The use of the terms referring to sexual deviation/deviants to describe homosexual persons, especially when coupled with the clear expression of disgust, rendered the applicant's comments ones which promoted "intolerance and detestation of homosexual persons". The Court further found that the Supreme Court had given relevant and sufficient reasons for the applicant's conviction and a fine of EUR 800 had not been excessive. The domestic court had thus adequately balanced the applicant's personal interests against the more general public interest in the case

[17] See Case-Law Guide on Article 17 – Prohibition of abuse of rights.

encompassing the rights of gender and sexual minorities. The applicant's complaint under Article 10 was therefore manifestly ill-founded[18].

3. Imposed silence and legal bans concerning homosexuality

103. The Court has not ruled out that the silence imposed on applicants as regards their sexual orientation, together with the consequent and constant need for vigilance, discretion and secrecy in that respect with colleagues, friends and acquaintances as a result of the chilling effect of a policy in place, could constitute an interference with freedom of expression. However, in *Smith and Grady v. the United Kingdom*, 1999, § 127, which concerned an absolute policy against homosexuals in the armed forces, the Court considered that the primary aspect of the applicant's complaint concerned their sexual orientation and therefore their private life, under Article 8, and that it was therefore not necessary to examine their complaint under Article 10. In *Bayev and Others v. Russia*, 2017, § 62, a case examined under Article 10, the Court did not find it necessary to decide whether the legislative ban on promotion of non-traditional sexual relations among minors (which arguably encroached on the activities in which they might personally have wished to engage, especially as LGBT activists) was, of itself, an interference, since administrative penalties had actually been imposed on the applicants as a result of that ban. Thus, there had in any event been interference with their freedom of expression.

104. However, according to the Court, a legislative ban on the promotion of non-traditional sexual relations among minors is an example of a predisposed bias on the part of a heterosexual majority against a homosexual minority which cannot, of itself, justify interferences (*Bayev and Others v. Russia*, 2017, § 69). According to the Court, 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 it being accepted by the majority. Were this so, the rights of a minority group to freedom of religion, expression and assembly would become merely theoretical rather than practical and effective as required by the Convention (*Bayev and Others v. Russia*, 2017, § 70, in the context of Article 10; *Alekseyev v. Russia*, 2010, § 81 and *Zhdanov and Others v. Russia*, 2019, § 158, in the context of Article 11).

105. Recalling that the Convention does not guarantee the right not to be confronted with opinions that are opposed to one's own convictions, in *Bayev and Others v. Russia*, 2017, § 81, the Court found that that the legal provisions at play did not serve to advance the legitimate aim of the protection of morals, and that such measures were likely to be counterproductive in achieving the declared legitimate aims of the protection of health and the protection of the rights of others. Given the vagueness of the terminology used and the potentially unlimited scope of their application, those provisions were open to abuse in individual cases. Above all, by adopting such laws the authorities reinforced stigma and prejudice and encouraged homophobia, which is incompatible with the notions of equality, pluralism and tolerance inherent in a democratic society. There had therefore been a violation of Article 10 of the Convention.

106. In the case of *Macatė v. Lithuania* [GC], 2023, the Grand Chamber fully endorsed, and drew upon, the latter conclusions. The applicant was a children's author and is homosexual. She wrote a book of fairy tales aimed at nine to ten-year-old children, seeking to encourage tolerance and acceptance of various marginalised social groups. Some associations and members of parliament expressed concerns about two of the fairy tales, which depicted marriage between persons of the same sex. The distribution of the book was suspended for a year. When it resumed, the book was marked with a warning label stating that its contents could be harmful to children under the age of 14. The Court could not subscribe to the Government's argument that the aim of the measures taken against the applicant's book had been to protect children from sexually explicit content or content which

[18] See also *Beizaras and Levickas v. Lithuania*, 2020, discussed in the Section on "Discrimination", in the context of "Positive obligations under Article 14".

"promoted" same-sex relationships as superior to different-sex ones by "insulting", "degrading" or "belittling" the latter (there was no support in the text of the book for such a conclusion). In the Court's view, the impugned measures had actually sought to limit children's access to information presenting same-sex relationships as essentially equivalent to different-sex ones. However, such an aim could not be accepted as legitimate under Article 10 § 2, which led the Court to find a violation of this provision.

107. Bans can in practice arise also from more general legislation. For example, in *Kaos GL v. Turkey*, 2016, all copies of an issue of a magazine published by the applicant, an association promoting the rights of the LGBT community, were seized for more than five years. The issue in question contained articles and interviews on pornography related to homosexuality, illustrated with occasionally explicit images, and was considered by the domestic authorities as being against public morals. The Court accepted that the aim pursued was that of the protection of public morals (ibid., § 55): however, without any specific detail, it could not accept that such a broad notion justified the seizure of all copies. Examining the publication itself the Court found that given its content and the specific images, it was to be considered as a specialised publication aimed at a specific section of society. Thus, the measures implemented to block access by specific groups of persons, especially minors, to that publication could have been a response to a pressing social need (ibid., § 60). However, although the need to protect the sensibilities of a section of the public, minors in particular, was acceptable for the purposes of protecting public morals, there was no justification for blocking the access of the general public to the impugned issue of the magazine. In that connection, the domestic authorities had not attempted to implement any preventive measure less drastic than the seizure of all copies of the issue. The Court considered that, even supposing that the issues seized accompanied by a warning for persons under the age of eighteen, could have been distributed after the return of the confiscated copies, the delay of five years and seven months in distributing the publication could not be considered as proportionate to the aim pursued. Thus, there had been a violation of Article 10 in respect of the applicant association.

B. Freedom of assembly and association[19]

1. Registrations

108. The ability to establish a legal entity in order to act collectively in a field of mutual interest is one of the most important aspects of freedom of association, without which that right would be deprived of any meaning. This principle is particularly relevant to individuals or organisations wishing to militate for the rights of LGBTI persons.

109. In *Zhdanov and Others v. Russia*, 2019, §§ 144-164, the Court found that as result of the Russian courts' decisions refusing registration, 'Movement of Marriage Equality' (a non-profit organisation) could not be created, while 'Rainbow House and Sochi Pride House' (public associations) could not acquire legal-entity status and the rights associated with it. Those decisions therefore interfered with the freedom of association both of the applicant organisations and of the individual applicants, who were their founders or presidents. The Court did not accept that by refusing to register the applicant organisations (whose aim was that of promoting the rights of LGBT persons) the domestic authorities had sought to pursue the protection of society's moral values and the institutions of family and marriage; nor did it accept the aim of protecting Russia's sovereignty, safety and territorial integrity, which the Government had considered to have been threatened by a decrease in the population caused by the activities of LGBT associations. The Court also rejected the Government's argument that the measure aimed at protecting the rights and freedoms of others (namely, the right of the majority of Russian people not to be confronted with any display of same-sex relations or promotion of rights

[19] For the general principles concerning Article 11 see the Case-Law Guide on Article 11 - Freedom of assembly and association. This Section overviews Article 11 cases of most relevance to the rights of LGBTI persons.

of LGBT persons). However, it accepted that the authorities intention to prevent social or religious hatred and enmity, which in their view could be incited by the activities of LGBT associations, amounted to the legitimate aim of the prevention of disorder, on the basis of which the Court continued to its proportionality assessment. The Court found that it was the duty of the Russian authorities to take reasonable and appropriate measures to enable the applicant organisations to carry out their activities without having to fear that they would be subjected to physical violence by their opponents but they had not considered taking any such measures. Instead, they decided to remove the cause of tension and avert a risk of disorder by restricting the applicants' freedom of association. In such circumstances, the Court concluded that the refusal to register the applicant organisations had not been "necessary in a democratic society".

2. Demonstrations

i. Negative obligations

110. Interferences with the right to freedom of assembly include outright bans, legal or *de facto*, but can also consist of various other measures taken by the authorities. The term "restrictions" in Article 11 § 2 must be interpreted as including both measures taken before or during a gathering and those, such as punitive measures, taken thereafter. For instance, a prior ban can have a chilling effect on those who may intend to participate in a rally and thus amount to an interference, even if the rally subsequently proceeds without hindrance on the part of the authorities. A refusal to allow an individual to travel for the purpose of attending a meeting amounts to an interference as well. Measures taken by the authorities during a rally, such as the dispersal of the rally or the arrest of participants, and penalties imposed for having taken part in a rally can also amount to an interference (*Lashmankin and Others v. Russia*, 2017, § 404, with further references; *Berkman v. Russia*, 2020, § 59). For example, the imposition of a ban on a Pride March and picketing as well as the enforcement of the ban by dispersing events held without authorisation and finding participants (who had breached the ban) guilty of an administrative offence constituted interferences with the exercise of freedom of peaceful assembly guaranteed by Article 11 (*Alekseyev v. Russia*, 2010, § 68). According to the Court, such bans constituted interferences even if the assemblies were eventually held on the planned dates, and the refusal decisions were quashed *ex post facto*, since the applicants were, nevertheless, negatively affected by the refusals to authorise them (*Bączkowski and Others v. Poland*, 2007, § 68, where the Court found a violation because the measures had not been lawful).

111. In cases where the time and place of the assembly are crucial to the participants, an order to change the time or the place may also constitute an interference with their freedom of assembly, as does a prohibition on speeches, slogans or banners (*Lashmankin and Others v. Russia*, 2017, § 407).

112. Any such interference will constitute a breach of Article 11 unless it is "prescribed by law", pursues one or more legitimate aims under paragraph 2, and is "necessary in a democratic society" for the achievement of the aim or aims in question. The domestic legal provisions must meet the Convention "quality of law" requirements. This will not be the case where the facts of a case demonstrate the lack of adequate and effective legal safeguards against arbitrary and discriminatory exercise of the wide discretion left to the executive (*Lashmankin and Others v. Russia*, 2017, § 430; compare also §§ 441-442).

113. In *Lashmankin and Others v. Russia*, 2017, for example, the Court found that the authorities had not given relevant and sufficient reasons for their proposals to change the location, time or manner of conduct of the applicants' public events. The proposals were based on legal provisions which did not provide for adequate and effective legal safeguards against the arbitrary and discriminatory exercise of wide discretion left to the executive and which did not therefore meet the Convention's quality-of-law requirements. The automatic and inflexible application of the time-limits for the notification of public events, without taking account of public holidays or the spontaneous nature of an event, was not justified. Further, the authorities had failed in their obligation to ensure that the

official decision taken in response to a notification reached the applicants reasonably in advance of the planned event, in such a way as to guarantee a right to freedom of assembly which was practical and effective, not theoretical or illusory. By the dispersal of the applicants' public events and by arresting participants, the authorities had failed to show the requisite degree of tolerance towards peaceful, albeit unlawful, assemblies, in breach of the requirements of Article 11 § 2 of the Convention.

114. As a general rule, where a serious threat of a violent counter-demonstration exists, the Court has allowed the domestic authorities a wide discretion as to the choice of means to enable assemblies to take place without disturbance. However, the mere existence of a risk is insufficient for banning the event: in making their assessment the authorities must produce concrete estimates of the potential scale of disturbance in order to evaluate the resources necessary for neutralising the threat of violent clashes. It is for the authorities to address potential counter-protesters – whether by making a public statement or by replying to their petitions individually – in order to remind them to remain within the boundaries of the law when carrying out any protest action (*Alekseyev v. Russia*, 2010, § 75). For example, in *Alekseyev v. Russia*, 2010, § 77, the Court did not accept the Government's argument that the threat was so great as to require such a drastic measure as banning the event altogether, let alone doing so repeatedly over a period of three years. Furthermore, if security risks played any role in the authorities' decision to impose the ban, they were in any event secondary to considerations of public morals. Moreover, the authorities' decisions to ban the events in question were not based on an acceptable assessment of the relevant facts. The ban on the events did not therefore correspond to a pressing social need and was thus not necessary in a democratic society. There was accordingly a violation of Article 11 of the Convention.

115. It is of interest to note that in *Alekseyev v. Russia*, 2010, while the demonstrations were turned down on public order grounds, the Court noted that the mayor of Moscow had, on many occasions, expressed his determination to prevent gay parades and similar events from taking place, apparently because he considered them inappropriate. This was a sentiment echoed in the submissions of the respondent State (ibid., § 78) which also claimed a wide margin of appreciation in granting civil rights to people who identify as gay men or lesbians. Rejecting the Government's claim to that margin, the Court emphasized that conferring substantive rights on homosexual persons is fundamentally different to recognising their right to campaign for such rights. There was no ambiguity about the other member States' recognition of the right of individuals to openly identify as gay, lesbian or any other sexual minority, and to promote their rights and freedoms, in particular by exercising their freedom of peaceful assembly (ibid., § 84).

ii. Positive obligations

116. The Court has repeatedly held that the State must act as the ultimate guarantor of the principles of pluralism, tolerance and broadmindedness. Genuine, effective freedom of peaceful assembly cannot, therefore, be reduced to a mere duty on the part of the State not to interfere: a purely negative conception would not be compatible with the object and purpose of Article 11 of the Convention. This provision sometimes requires positive measures to be taken, even in the sphere of relations between individuals. That positive obligation is of particular importance for persons holding unpopular views or belonging to minorities, because they are more vulnerable to victimisation (*Berkman v. Russia*, 2020, § 46; *Baczkowski and Others v. Poland*, 2007, § 64; *Zhdanov and Others v. Russia*, 2019, §§ 162-163; *Romanov and others v. Russia*, 2023, §71). According to the Court's case-law, freedom of assembly, as enshrined in Article 11, protects a demonstration that may annoy or cause offence to persons opposed to the ideas or claims that the demonstration is seeking to promote. The participants must nevertheless be able to hold the demonstration without having to fear that they will be subjected to physical violence by their opponents (*Berkman v. Russia*, 2020, § 54; *Association ACCEPT and Others v. Romania*, 2021, § 140). It is thus the duty of Contracting States to take reasonable and appropriate measures to enable lawful demonstrations to proceed peacefully. Indeed,

failure to protect demonstrators from homophobic violence also amounts to a violation of the State's positive obligations under Article 14 of the Convention[20].

117. In *Berkman v. Russia*, 2020, for example, while the authorities had allowed the public meeting in support of the LGBTI community to take place and dispatched considerable number of police officers to the scene of the demonstration, the Court was unsatisfied with the approach taken during the demonstration. The passive conduct of the police officers at the initial stage, the apparent lack of any preliminary measures (such as official public statements promoting tolerance, monitoring of the activity of homophobic groups, or organising a channel of communication with the organisers of the event) and subsequent arrests on account of the alleged administrative offences demonstrated that the police officers were concerned only with the protection of public order during the event and that they had not considered it necessary to facilitate the meeting. The domestic courts shared the same narrow view of the State's positive obligations under the Convention. Those obligations were of paramount importance in the case, because the applicant, as well as other participants in Coming Out Day, belonged to a minority. However, the authorities failed to duly facilitate the conduct of the planned event by restraining homophobic verbal attacks and physical pressure by counter-demonstrators. As a result of the passive attitude of the police authorities, the event participants, fighting against discrimination on the grounds of sexual orientation, became themselves the victims of homophobic attacks which the authorities did not prevent or adequately manage. There had therefore been a violation of Article 11 taken alone and in conjunction with Article 14 of the Convention.

118. In *Identoba and Others v. Georgia*, 2015, § 100, and *Association ACCEPT and Others v. Romania*, 2021, § 146, the Court also found that the domestic authorities had failed to ensure that the activity organised by one of the applicants and attended by the other applicants, 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. The same conclusion was reached in *Women's Initiatives Supporting Group and Others v. Georgia*, 2021, § 83, where the Court considered that the authorities had never made it their priority to put in place effective measures to protect the applicants attending the rally. They had not evaluated the resources necessary in the planning phase of the event and had limited their role to designing a dispersal plan.

IV. Discrimination[21]

Article 14 of the Convention

> "The enjoyment of the rights and freedoms set forth in [the] 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."

A. General considerations

119. Many of the cases brought by LGBTI persons before the Court have concerned direct discrimination which refers to a "difference in treatment of persons in analogous, or relevantly similar

[20] See also below on "Discrimination", in the context of "Positive obligations under Article 14".

[21] For the relevant principles under Article 14 see the Case-Law Guide on Article 14 and Article 1 of Protocol No. 12 - Prohibition of discrimination. This Section will however tackle certain principles which are particularly relevant in the context of LGBTI.

situations" and "based on an identifiable characteristic, or 'status'" protected by Article 14 of the Convention. The Court has repeatedly included sexual orientation and gender identity among the "other grounds" protected under Article 14 (*Salgueiro da Silva Mouta v. Portugal*, 1999, § 28; *Fretté v. France*, 2002, § 32; *A.M. and Others v. Russia*, 2021, § 73). Once the difference in treatment has been established, the Court will examine whether it pursued a legitimate aim and, if so, whether it had an objective and reasonable justification.

120. A difference in treatment may arise from the applicable laws, as is often the case, as well as from the domestic court's assessment. In the absence of any firm evidence, it is not possible to speculate whether an applicant's sexual orientation had any bearing on the domestic courts' decisions (*Sousa Goucha v. Portugal,* 2016, § 65*;* and compare *Santos Couto v. Portugal*, 2010, § 43; see also, albeit in the context of Article 8 alone, *Laskey, Jaggard and Brown v. the United Kingdom*, 1997, § 47 in relation to the prosecution and conviction of sado-masochistic practices between homosexual men). However, where domestic courts base their decisions on general assumptions which introduce a difference of treatment on the ground of sexual orientation, or gender identity, a problem may arise under Article 14 of the Convention (*Salgueiro da Silva Mouta v. Portugal*, 1999, §§ 34-36; *Van Kück v. Germany*, 2003, § 90; *A.M. and Others v. Russia*, 2021, §§ 74-81).

1. Comparable situations

121. The Court has found, for example, 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 (*Schalk and Kopf v. Austria*, 2010, § 99; *Vallianatos and Others v. Greece* [GC], 2013, §§ 78 and 81). Similarly, a single homosexual wishing to adopt is in a comparable situation to a single heterosexual wishing to adopt (*E.B. v. France* [GC], 2008, § 94) and a same-sex couple is in a comparable situation to an unmarried different-sex couple in which one partner wished to adopt the other partner's child (*X and Others v. Austria* [GC], 2013, § 112).

122. Conversely, the Court found, for example, that:

- The situation of a transgender woman married to a woman, who had been refused a female identity number, who was comparing her situation to that of cissexuals, was not sufficiently similar in order to be compared to each other (*Hämäläinen v. Finland* [GC], 2014, § 112).
- A transgender person unable to obtain a full birth certificate without a gender reassignment reference (while its short extract and new ID documents indicated only the reassigned gender) was not in a comparable situation to adopted children, who were issued a new birth certificate in the event of full adoption (*Y v. Poland*, 2022, § 88).
- A different-sex couple to which the institution of marriage was open while being excluded from concluding a registered partnership, was not in a relevantly similar or comparable situation to same-sex couples who, under the existing legislation, had no right to marry and needed the registered partnership as a means of obtaining legal recognition to their relationship (*Ratzenböck and Seydl v. Austria*, 2017, § 42).
- *de facto* same-sex couples who had been unable to achieve legal recognition before the legalisation of same-sex marriage, were not in a comparable situation to unmarried heterosexual couples who had been unable to marry before divorce was legalised (*Aldeguer Tomás* v. *Spain*, 2016, § 87).
- Two applicants who were living together as a same-sex couple and one of the applicant's son, were not in a relevantly similar situation to a married couple in respect of second-parent adoption (*Gas and Dubois v. France*, 2012, § 68; *X and Others v. Austria* [GC], 2013, § 109).
- Applicants, who had been living together in a registered same-sex civil partnership when the second applicant had given birth to a child, were not in a relevantly similar situation to that

of a married different-sex couple in which the wife had given birth to a child, in respect of the entries made in the birth certificate at the time of birth (*Boeckel and Gessner-Boeckel v. Germany* (dec.), 2013).

2. Legitimate aims and justifications

123. Just like differences based on gender, differences based on sexual orientation require particularly serious reasons by way of justification (*Karner v. Austria*, 2003, § 37; *L. and v. v. Austria*, 2003, § 45; *Vallianatos and Others v. Greece* [GC], 2013, § 77).

124. Attitudes or stereotypes prevailing over a certain period of time among the majority of members of society may not serve as justifiable grounds for discriminating against persons solely on the basis of their sexual orientation, or, for example, for limiting the right to protection of private life (*Beizaras and Levickas v. Lithuania*, 2020, § 125). 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. It held that these negative attitudes, references to traditions or general assumptions in 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 (*Smith and Grady v. the United Kingdom*, 1999, § 97; *Salgueiro da Silva Mouta v. Portugal*, 1999, §§ 34-36; *L. and v. v. Austria*, 2003, §§ 51-52).

125. As regards, in particular, the aim of supporting and encouraging a 'traditional' family structure, the Court in its earlier case-law considered this aim in itself legitimate (*Marckx v. Belgium*, 1979, § 40) and, in principle, a weighty and legitimate reason which might justify a difference in treatment (*Karner v. Austria*, 2003, § 40), this approach has somewhat changed in more recent cases interpreting the Convention in present-day conditions. As a result, while it may still be considered legitimate (*X and Others v. Austria* [GC], 2013, § 138) the aim of protecting the family in the traditional sense would amount to convincing and weighty justification only in some circumstances (*Taddeucci and McCall v. Italy*, 2016, § 93). Moreover, 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. The State, in its choice of means designed to protect the family and secure respect for family life, must necessarily take into account developments in society and changes 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 (*X and Others v. Austria* [GC], 2013, § 139; *Vallianatos and Others v. Greece* [GC], 2013, § 84; *Beizaras and Levickas v. Lithuania*, 2020, § 122).

126. It goes without saying that the protection of the interests of the child is a legitimate aim (*X and Others v. Austria*, [GC], 2013, § 138; *Vallianatos and Others v. Greece* [GC], 2013, § 83; *Fretté v. France*, 2002, § 38).

3. Margin of appreciation

127. Where a difference in treatment is based on sex or sexual orientation the State's margin of appreciation is narrow (*Karner v. Austria*, 2003, § 41; *Kozak v. Poland*, 2010, § 92). Differences based solely on considerations of sexual orientation are unacceptable under the Convention (*Salgueiro da Silva Mouta v. Portugal*, 1999, § 36; *E.B. v. France* [GC], 2008, §§ 93 and 96; *X and Others v. Austria*, [GC], 2013, § 99; *Pajić v. Croatia*, 2016, § 84; *Beizaras and Levickas v. Lithuania*, 2020, § 114; *Maymulakhin and Markiv v. Ukraine*, 2023, § 62).

128. 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 from the scope of the provisions in issue (*Karner v. Austria*, 2003, § 41; *Kozak*

v. Poland, 2010, § 99; *Vallianatos and Others v. Greece* [GC], 2013, § 85). This is so in immigration cases also where States are otherwise allowed a wide margin of appreciation (*Pajić v. Croatia*, 2016, § 82). According to the Court's case-law the burden of proof in this regard is on the respondent Government (ibid.; *X and Others v. Austria* [GC], 2013, § 141)[22].

B. Case-law examples

1. Intimate relationships

129. In the absence of any objective and reasonable justification, the maintenance of a higher age of consent for homosexual acts (as opposed to heterosexual ones) was found to violate Article 14 taken together with Article 8 of the Convention (*L. and v. v. Austria*, 2003, § 54; *S.L. v. Austria*, 2003, § 46).

2. Civil partnerships and marriage

130. In *Schalk and Kopf v. Austria*, 2010, §§ 105-6 and 109, the Court found that the respondent State could not be reproached for not having introduced the Registered Partnership Act (i.e. an alternative means of legal recognition of a same-sex partnership) any earlier than it did, that is in 2010. In the absence of a majority of States providing for legal recognition of same-sex couples, the area in question was still to 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. The Court also found that the respondent State had not exceeded its margin of appreciation in its choice of rights and obligations conferred by registered partnership, as opposed to marriage. There had therefore been no violation of Article 14 of the Convention taken in conjunction with Article 8.

131. In the later judgments of *Oliari and Others v. Italy*, 2015, *Fedotova and Others v. Russia* [GC], 2023, and *Koilova and Babulkova v. Bulgaria*, 2023, the Court, having found a violation of Article 8[23], did not consider it necessary to examine Article 14 of the Convention. On the other hand, in *Maymulakhin and Markiv v. Ukraine*, 2023, §§ 66-81, concerning the absence of any form of legal recognition and protection for a same-sex couple, the Court found a violation of Article 14 taken in conjunction with Article 8 of the Convention.

132. In *Vallianatos and Others v. Greece* [GC], 2013, § 92, the Court found that the Greek State was in breach of Articles 14 in conjunction with 8 when it enacted a law introducing alongside the institution of marriage a new registered partnership scheme for unmarried couples that was limited to different-sex couples and thus excluded same-sex couples (who could also not marry). Conversely, the Court did not find a violation of Article 14 in conjunction with Article 8 in *Ratzenböck and Seydl v. Austria*, 2017, § 41, where a different-sex couple was denied access to a registered partnership which was reserved exclusively to same-sex couples. This was so because the applicants, as a different-sex couple, had access to marriage which satisfied their principal need for legal recognition.

133. In *Chapin and Charpentier* v. *France*, 2016, the Court found no violation of Article 14 in conjunction with Article 8, as the applicants (a same-sex couple who complained that they had no access to marriage) had an opportunity to obtain a legal status equal or similar to marriage in many respects via the *pacte civil de solidarité*. Moreover, by the time the case was decided by the Court, France had introduced same-sex marriage. It also found no violation of Article 14 in conjunction with Article 12 (ibid., § 39-40). Despite the gradual evolution of States on the matter, neither Article 12 alone, nor Article 12 in conjunction with Article 14 impose an obligation to grant a same-sex couple access to marriage (ibid., §§ 37-38; *Oliari and Others v. Italy*, 2015, §§ 192-194).

[22] See also Section "Personal and Family matters", in the context of "Margin of appreciation and consensus" above.
[23] See the Section "Personal and Family matters", in the context of "Civil partnerships/unions" above.

3. Adoption

134. The prohibition of discrimination enshrined in Article 14 extends beyond the enjoyment of the rights and freedoms which the Convention and the Protocols thereto require a 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. While Article 8 does not guarantee a right to adopt, a State which creates a right going beyond its obligations under Article 8 may not apply that right in a manner which is discriminatory within the meaning of Article 14 (*X and Others v. Austria* [GC], 2013, § 135; *E.B. v. France* [GC], 2008, § 49; *Manenc c. France* (dec.), 2010). Thus, while there is no right to adopt under the Convention, if the domestic framework allows a single person to adopt, it cannot be denied on discriminatory grounds such as a person's sexual orientation (*E.B. v. France* [GC], 2008,). Similarly, there is no obligation under Article 8 of the Convention to extend the right to second-parent adoption to unmarried couples (*Gas and Dubois v. France*, 2012, §§ 66-69; *Emonet and Others v. Switzerland*, 2007, § 92): however, if that right exists it cannot be applied in a discriminatory fashion (*X and Others v. Austria* [GC], 2013, §§ 136 *et sequi*).

135. Different types of situations may be distinguished in the context of adoption by homosexuals. In the first place, a person may wish to adopt on his or her own (individual adoption) (*Fretté v. France*, 2002; *E.B. v. France* [GC], 2008). Secondly, one partner in a same-sex couple may wish to adopt the other partner's child, with the aim of giving both of them a legally recognised parental status (second-parent adoption) (*Gas and Dubois v. France*, 2012). Thirdly, a same-sex couple may wish to adopt a child (joint adoption).

136. In *Fretté v. France*, 2002, the French authorities had refused the applicant's (a homosexual) request for authorisation to adopt, finding that owing to his "lifestyle" (meaning his homosexuality) the applicant did not provide the requisite safeguards for adopting a child. The Court, noted that French law authorised any unmarried person, man or woman, to apply to adopt, and that the French authorities had refused the applicant's request for prior authorisation on the ground – albeit implicit – of his sexual orientation. Thus, there had been a difference in treatment based on sexual orientation (ibid., § 32). However, in respect of the competing interests of the applicant and children eligible for adoption, the Court noted that, at the time, the scientific community was divided over the possible consequences of children being brought up by one or more homosexual parents, regard being had in particular to the limited number of scientific studies on the subject published at the material time. In conclusion, the Court considered that the refusal to authorise the adoption had not infringed the principle of proportionality and that, accordingly, the difference in treatment complained of was not discriminatory within the meaning of Article 14 taken in conjunction with Article 8 of the Convention (ibid., §§ 37-43).

137. However, six years later, in *E.B. v. France* [GC], 2008, the Court reversed the position it had taken in *Fretté v. France*, 2002. It analysed in detail the reasons given by the French authorities for refusing the applicant (a lesbian), who was living with another woman in a stable same-sex relationship, authorisation to adopt. The Court noted that the domestic authorities had based their decisions on two main grounds, the lack of a "paternal referent" in the applicant's household or immediate circle of family and friends, and the lack of commitment on the part of her partner. It added that the two grounds formed part of an overall assessment of the applicant's situation, with the result that the illegitimacy of one ground contaminated the entire decision. While the second ground was not unreasonable, the first ground was implicitly linked to the applicant's homosexuality and the authorities' reference to it was excessive in the context of a single person's request for authorisation to adopt. In sum, the applicant's sexual orientation had been consistently at the centre of deliberations in her regard and had been decisive for the decision to refuse her authorisation to adopt (*E.B. v. France* [GC], 2008, §§ 72-89). Having regard to its analysis of the reasons advanced by the French authorities, the Court concluded that in refusing the applicant authorisation to adopt, they had made a distinction on the basis of her sexual orientation which was not acceptable under the

Convention. The Court consequently found a violation of Article 14 taken in conjunction with Article 8 (ibid., §§ 94-98).

138. The case of *Gas and Dubois v. France*, 2012, concerned a different scenario, namely, two women forming a same-sex couple who had concluded a civil partnership (*pacte civil de solidarité* – PACS) under French law. One of the applicants was the mother of a child conceived by assisted reproduction. Under French law she was the sole parent of the child. The applicants complained that one partner could not adopt the other's child. More specifically, they wished to obtain a simple adoption order (*adoption simple*) under French law in order to create a parent-child relationship between the child and her mother's partner, with the possibility of sharing parental responsibility. The domestic courts had refused the adoption request on the ground that it would transfer parental rights from the child's mother to her partner, which was not in the child's interests (ibid., § 62). The Court examined the applicants' situation compared to that of a married couple. It noted that, in cases of *adoption simple*, French law allowed only married couples to share parental rights. As Contracting States were not obliged to grant access to marriage to same-sex couples, and having regard to the special status conferred by marriage, the applicants' legal situation was not comparable to that of a married couple (ibid., § 68). As to the situation of unmarried different-sex couples living together – like the applicants – in a civil partnership, the Court noted that second-parent adoption was not open to them either (ibid., § 69). Thus, there had been no difference in treatment based on sexual orientation, therefore no violation of Article 14 taken in conjunction with Article 8 of the Convention.

139. In *X and Others v. Austria* [GC], 2013, the situation was similar to the above, and the Court also found that there had been no violation of Article 14 of the Convention taken in conjunction with Article 8 when the applicants' situation was compared with that of a married couple in which one spouse wished to adopt the other spouse's child given the special legal status arising from marriage (which was not open to same-sex couples). However, unlike in the case of *Gas and Dubois v. France*, 2012, it found a violation of Article 14 of the Convention taken in conjunction with Article 8 when the applicants' situation was compared with that of an unmarried different-sex couple in which one partner wished to adopt the other partner's child. This was so because Austrian law (unlike French law) allowed second-parent adoption by an unmarried different-sex couple, but not for same-sex couples. Thus, it had to examine the reasons for this difference in treatment. The Court considered that Austrian law had not been coherent – while it allowed a single homosexual person to adopt, with the consent of his or her partner therefore accepting that it was not detrimental to the child, it nonetheless insisted that a child should not have two mothers or two fathers. The Court noted that second-parent adoption served to confer rights *vis-à-vis* the child on the partner of one of the child's parents and stressed the importance of granting legal recognition to *de facto* family life. 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 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 in same-sex couples. In conclusion, the Court found that the Government had failed to adduce particularly weighty and 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 thus in breach of Article 14 in conjunction with Article 8 of the Convention (ibid., § 153).

140. In the case of *S.W. and Others v. Austria* (dec.), 2022, the third applicant who was in a registered partnership with the first applicant had successfully adopted her partner's child, the second applicant. However, the applicants complained that they had been discriminated against, on account of the fact that the parents were a same-sex couple, in relation to the birth certificate of the third applicant after second-parent adoption: the birth certificate disclosed which of them was the adoptive parent.

However, the Court noted that it was not discernible on the child's birth certificate whether there had been a second-parent adoption in a given case or not. This was the situation for children of both a same-sex and an opposite-sex couple. It was also significant that the term adoptive parent had been removed from the certificates in 2015. As far as the entry of a same-sex couple as "parents" indicates that at least one of them must be an adoptive parent, this situation was not comparable to that of an opposite-sex couple. The Court thus concluded that there had been no appearance of discrimination in the present case.

4. Child custody, access and other matters related to children

141. Awarding parental and/or custody rights to a parent, to the exclusion of the other, based solely or decisively on considerations regarding sexual orientation is not acceptable under the Convention, and led to a violation of Article 14 in conjunction with Article 8 in *Salgueiro da Silva Mouta v. Portugal*, 1999, § 36, and *X v. Poland*, 2021, §§ 92-93.

142. A similar breach was found in *A.M. and Others v. Russia*, 2021, § 74-81, where the influence of the applicant's gender identity was a decisive factor leading to the decision to restrict her contact with her children. In particular, the domestic courts had not engaged in an examination of the possible danger to the applicant's children, the nature and severity of the restriction of parental rights, the consequences it might have for a child's health and development, or any other relevant circumstances. Thus, the Court found that, in restricting the applicant's parental rights and contact with her children without doing a proper evaluation of the possible harm to the applicant's children, the domestic courts relied on her gender transition, singled her out on the ground of her status as a transgender person and made a distinction which was not warranted in the light of the existing Convention standards (ibid., §§ 74-80). However, in *P.V. v. Spain*, 2010, §§ 34-37, where the child's best interests had prevailed, leading the domestic courts to choose a more restrictive contact arrangement that would allow a child to become gradually accustomed to his father's gender reassignment, the Court found no cause for discrimination and therefore no violation of Article 14 in conjunction with Article 8 of the Convention. The contact arrangements had been ordered on a gradual and reviewable basis, in accordance with the recommendations made by experts, and the applicant's transsexuality had not been the decisive factor of those decisions[24].

143. Requiring a non-resident divorced parent, who was in a same-sex relationship, to pay child-support for her children's upbringing of a higher amount than if he or she had been in a different-sex relationship was found to be an unjustified difference of treatment, in violation of Article 14 in conjunction with Article 1 of Protocol No. 1 in *J.M. v. the United Kingdom*, 2010, §§ 56-58.

144. In relation to entries in a birth certificate, the Court found that, the applicants (two women who had been living together in a registered same-sex civil partnership when the second applicant had given birth to a child) were not in a relevantly similar situation to that of a married different-sex couple in which the wife had given birth to a child, in respect of the entries made in the birth certificate at the time of birth (*Boeckel and Gessner-Boeckel v. Germany* (dec.), 2013). The Court noted that a rebuttable presumption that the man who was married to the child's mother at the time of birth was indeed the child's biological father was not called into question by the fact that it might not always reflect the true descent. However, in case one partner of a same-sex partnership gives birth to a child, it can be ruled out on biological grounds that the child descended from the other partner. The first

[24] In *Bonnaud and Lecoq v. France* (Committee decision), 2018, §§ 43-45, the Court also found nothing discriminatory in a refusal by the domestic courts to allow for the mutual delegation of the exercise of parental authority in a specific case, given that the law had made no distinction on the basis of sexual orientation. The decision in their case was based on the factual circumstances of the case and the assessment made by the domestic courts that the conditions had not been met for a mutual delegation of parental authority to be granted.

applicant's complaint that she had been discriminated against given the refusal to put her name on the child's birth certificate was therefore manifestly ill-founded.

145. Conversely, a woman who is in a same-sex relationship, who will care for the child of her same-sex partner, is in a similar situation to that of a biological father in a heterosexual relationship in such a context. In *Hallier and Others v. France* (Committee decision), 2017, § 29, the Court found that the applicant in such a situation had suffered a difference of treatment, as unlike a father she had not been allowed paternity leave. However, it considered that the purpose of paternity leave was not discriminatory whether on the basis of sex or of sexual orientation, as it was based on the biological link – a choice which at the time appeared to be within the State's margin of appreciation. Moreover, the law had already changed to grant persons in the applicant's situation a carer's leave which was equivalent to paternity leave. Thus, the applicant's complaint under Article 14 in conjunction with Article 8 was rejected as being manifestly ill-founded.

5. Social rights

146. A blanket exclusion of persons living in a homosexual relationship from succession to a tenancy or insurance cover was not accepted by the Court as necessary for the protection of the family viewed in its traditional sense in the absence of compelling reasons justifying such distinction. In such circumstances the Court found a breach of Article 14 in conjunction with Article 8 (*Karner v. Austria*, 2003, § 41; *Kozak v. Poland*, 2010, § 99; *P.B. and J.S. v. Austria*, 2010, § 42; see conversely, in the context of a survivor's pension, the earlier decision of the Court in *Mata Estevez v. Spain* (dec.), 2001). However, 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. Thus formulating the condition to access insurance cover concerning the raising of children in the common household in a neutral way, and where the law does not provide that homosexuals are excluded from caring for children, is not discriminatory (*P.B. and J.S. v. Austria*, 2010, §§ 47 and 50).

147. At the same time the Court has also found that a survivor of a same-sex union, who had been denied a survivor's pension or a tax exemption because he had not been married to his partner (at a time when neither marriage nor civil partnerships were available), is not in a comparable situation to that of surviving spouse (widow/er) (*M.W. v. the United Kingdom*, (dec.), 2009; *Courten v. the United Kingdom* (dec.), 2008). This was so also in the case where the same-sex union had been officialised by means of a civil partnership (*Manenc c. France* (dec.), 2010). In the latter case, it was noted that in France civil partnerships, unlike marriage, did not have the same rights and obligations in relation to financial support in case of decease. The mere fact that marriage was not a possibility open to the applicant did not alter that conclusion. Moreover, anyone who had undertaken a civil partnership was excluded from this succession, irrespective of their sexual orientation. Thus, the legislator's choice to limit such benefit to married couples was not manifestly without reasonable foundation and the applicant's complaint found to be manifestly ill-founded.

148. The Court also considered in *Aldeguer Tomás* v. *Spain*, 2016, § 87, that a survivor of a *de facto* same-sex union, who had been denied a survivor's pension because he had not been married to his partner (at a time when same-sex marriage was not allowed) had not been discriminated against in comparison to unmarried heterosexual couples who had been unable to marry before divorce was legalized. This was so because the legal impediment to marry was of a different nature and therefore the situations were not comparable. Indeed, Article 8 cannot be interpreted as guaranteeing the right to a specific social welfare benefit, such as a survivor's pension (due to the death of a same-sex partner), especially when the applicant could not expect such a pension under domestic law at the relevant time (*Zanola v. Italy* (dec.), 2023, § 26).

6. Residence permits

149. 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 exercise its 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 subject to discrimination (*Novruk and Others v. Russia*, 2016, § 83).

150. The Court has held that a restrictive interpretation of the concept of "family member" (which excludes homosexual partners who cannot get married or enter into a civil partnership under the law of the receiving State) results in homosexual couples facing an insurmountable obstacle to obtaining a residence permit for family reasons (*Taddeucci and McCall v. Italy*, 2016, § 83). In particular, according to the Court, a homosexual couple who cannot obtain legal recognition of their union (because it is not provided for in the law of the receiving State) is not in an analogous situation to that of an unmarried heterosexual couple who chose not to regularise their union. Thus, a failure to apply different treatment to such homosexual couples may be in breach of Article 14 of the Convention (ibid., § 98).

151. In this connection, Article 14 may sometimes require positive action. According to the Court's established case-law, 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 such inequality through different treatment may, in itself, give rise to a breach of Article 14. This was the case in *Taddeucci and McCall v. Italy*, 2016, §§ 95-98, where the Court found that 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. Thus, the State had 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.

152. However, if domestic law recognises both extramarital relationships of different-sex couples and of same-sex couples, the situation is more straightforward. In such case, a partner in a same-sex relationship, who applied for a residence permit for family reunification so he or she could pursue the intended family life in that State, 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 (*Pajić v. Croatia*, 2016, § 73). In such a situation, in the absence of convincing and weighty reasons to justify such a difference in treatment, the Court has considered that a blanket exclusion of persons living in a same-sex relationship from the possibility of obtaining family reunification, was not compatible with the standards under the Convention (ibid., § 84).

7. Positive obligations under Article 14

153. As noted previously, States have a positive obligation to secure the effective enjoyment of Convention rights and freedoms. This obligation is of particular importance for persons holding unpopular views or belonging to minorities, because they are more vulnerable to victimisation (*Beizaras and Levickas v. Lithuania*, 2020, § 108). In particular, the authorities' duty to prevent the infliction of hatred-motivated violence (whether physical attacks or verbal abuse) and to investigate the existence of any possible discriminatory motive behind such violence can fall under the positive obligations enshrined under an Article of the Convention, but may also be seen as forming part of the authorities' positive responsibilities under Article 14 of the Convention to secure the fundamental values protected by other Articles without discrimination[25].

[25] Such complaints, in conjunction with Article 3 of the Convention, were discussed above in Section "Obligations in the context of ill-treatment" of this Guide and others in connection with Article 11 have been discussed above in Section "Freedom of expression and association".

154. For example, *Stoyanova-Tsakova v. Bulgaria*, 2022, concerned the duty under Articles 2 and 14 of the Convention to investigate and punish violent attacks (resulting in death) by private persons motivated by hostility towards the victim's actual or presumed sexual orientation and, in particular, whether Bulgarian criminal law and its application by the Bulgarian courts in respect of this case made it possible to respond appropriately to the homophobic motives for the attack. The Court found a violation of Article 14 taken together with Article 2 of the Convention because, under the Bulgarian Criminal Code, murder motivated by hostility towards the victim on account of his or her actual or presumed sexual orientation was not considered "aggravated" or otherwise treated as a more serious offence on account of the special discriminatory motive which underlies it. In practice, although the Bulgarian courts clearly established that the attack on the applicant's son had been motivated by the attackers' hostility towards people whom they perceived to be homosexuals, they had not attached to that finding any tangible legal consequences.

155. The Court has also decided some of those cases in the context of Article 8 together with Article 14 of the Convention. In this context it must be recalled that according to the Court's case-law positive obligations on the State are inherent in the right to effective respect for private life under Article 8; these obligations may involve the adoption of measures even within the sphere of the relations of individuals between themselves. While the choice of the means to secure compliance with Article 8 within the sphere of protection against acts committed by individuals in principle falls within the State's margin of appreciation, effective deterrence against grave acts where essential aspects of private life are at stake requires efficient criminal-law provisions (*Beizaras and Levickas v. Lithuania*, 2020, §§ 106-116).

156. In *Beizaras and Levickas v. Lithuania*, 2020, the applicants, two men, had posted a photograph of the couple kissing on Facebook (in "public" mode); this was intended to accompany the announcement of their relationship and to trigger a debate on the rights of LGBT persons in Lithuanian society. This online post went viral and received hundreds of virulent homophobic comments (containing, for example, calls to "castrate", "kill" and "burn" the applicants). The applicants complained before the Court about the authorities' refusal to prosecute the authors of serious homophobic comments on Facebook without an effective investigation beforehand. The Court found that the hateful comments including undisguised calls for violence by private individuals directed against the applicants and the homosexual community in general were instigated by a bigoted attitude towards that community. Moreover, the Court also found that that discriminatory state of mind was at the core of the failure on the part of the relevant public authorities to discharge their positive obligation to effectively investigate whether the comments regarding the applicants' sexual orientation posted on Facebook constituted incitement to hatred and violence. By downgrading the danger of such comments, the authorities had, at least, tolerated such comments. The Court thus considered it established that the applicants had suffered discrimination on the grounds of their sexual orientation, there had therefore been a violation of Article 14 in conjunction with Article 8 (ibid., § 129). The Court also found a violation of Article 13 because the generally effective remedies had not operated effectively due to discriminatory attitudes negatively affecting the application of national law (ibid., § 156).

157. Following the judgment in *Beizaras and Levickas v. Lithuania*, in *Valaitis v. Lithuania*, 2023, which also concerned hate speech directed towards the applicant and persons of homosexual orientation, the Court found that the domestic authorities had drawn "the necessary conclusions" from the judgment in *Beizaras and Levickas* and, by applying the domestic law in the light of the principles as formulated by the Court in that judgment, "addressed the cause of the Convention violation". The adopted guidelines and recommendations by the domestic authorities, as well as the comprehensive approach when tackling hate crimes, including a number of decisions by prosecutors and courts, demonstrated that the authorities' discriminatory attitude – identified by the Court in *Beizaras and Levickas* – was no longer apparent and that effective remedies regarding the prevention, detection and prosecution of hate crimes might also come about through domestic practice. There was

therefore no violation of Article 13 as the applicant had had an effective remedy for his complaint under Article 14 taken in conjunction with Article 8 of the Convention.

158. The case of *Nepomnyashchiy and Others v. Russia*, 2023, concerned homophobic statements made by state officials against members of the LGBTI community. The Court found that, even assuming that the existing domestic legal framework had in theory been capable of offering protection against stigmatising statements, those legal provisions were not applied in the applicants' case as the domestic courts had failed to strike a fair balance between competing Article 8 and 10 rights in criminal proceedings and to even engage in such a balancing exercise in civil proceedings. They had therefore failed to comply with their obligation to respond adequately to discriminatory statements and to secure respect for the applicants' private life in breach of Article 14 read in conjunction with Article 8 of the Convention (§§ 80-85).

159. *Association ACCEPT and Others v. Romania*, 2021, concerned an incident during the screening of a movie portraying a same-sex family, in a cinema, organised by the applicant organization which promoted the interests of the LGBT community in Romania. The Court also examined the case under Article 8 together with Article 14 of the Convention. It found that the police officers had not prevented the individual applicants from being bullied and insulted by the intruders. According to the Court, the authorities' attitude and decision to remain aside, despite being aware of the content of the slurs being uttered against the individual applicants, seemed to indicate a certain bias against homosexuals. They had therefore failed to offer adequate protection in respect of the individual applicants' dignity (and more broadly, their private life). Furthermore, the domestic authorities had been confronted with *prima facie* indications of verbal abuse motivated or at least influenced by the applicants' sexual orientation. According to the Court's case-law, that required for an effective application of domestic criminal-law mechanisms capable of elucidating the possible hate motive with homophobic overtones behind the violent incident and of identifying and, if appropriate, adequately punishing those responsible. Nevertheless, the authorities had failed to effectively investigate the real nature of the homophobic abuse directed against them. There had therefore been a violation of Article 14 in conjunction with Article 8 of the Convention.

160. In *Genderdoc-M and M.D. v. the Republic of Moldova*, 2021, §§ 23-26, the applicant association (representing the interests of LGBT persons) had complained, under Articles 10 and 14, of a lack of protection from the State authorities against hate speech uttered against its members. The Court, being the master of characterisation to be given in law to the facts of a case, requalified it to one under Articles 8 and 14. It concluded that the applicant organisation could not be considered to be a direct or indirect victim of the alleged violation which affected the rights and freedoms of its individual members who could lodge complaints with the Court in their own name.

161. In *Semenya v. Switzerland**, 2023, the Court examined a complaint brought by a professional athlete who had been required under non-State regulations to lower her natural testosterone levels in order to be allowed to compete in the women's category in international competitions. The Court found a violation of Article 14 taken in conjunction with Article 8 on account of the limited institutional and judicial review, notably, of the grounds relied upon to justify the impugned regulations or of the side-effects of the hormonal treatment on the applicant (§§ 163-202).

8. Assembly, association and expression

162. As noted above (Section on "Demonstrations"), a failure to protect demonstrators from homophobic violence also amounts to a violation of the State's positive obligations under Article 14. Complaints about discrimination in connection with Articles 10 and 11 are not limited to positive obligations: the Court has found, for example, in *Zhdanov and Others v. Russia*, 2019, § 182, that refusals to register the applicant organisations on the ground that they promoted rights of LGBT persons could not be said to be a reasonably or objectively justified interference.

163. In *Bayev and Others v. Russia*, 2017, which concerned the legislative ban on the promotion of non-traditional sexual relations among minors which the Court considered was an example of predisposed bias, the Court found a violation of Article 14 in conjunction with Article 10 in so far as the legislation affirmed the inferiority of same-sex relationships compared to opposite-sex relationships, no convincing and weighty reasons justifying such treatment (ibid., § 91).

164. In *Bączkowski and Others v. Poland*, 2007, the decisions refusing the applicants' request for permission to hold the demonstrations against homophobia had been given by the municipal authorities on the Mayor's behalf after he had already made public his opinion on the matter. The Court found that his opinions may have affected the decision-making process and consequently infringed in a discriminatory manner the applicants' right to freedom of assembly (ibid., § 100).

165. In practice, when the main reason for a ban imposed on a pride march or a demonstration was the authorities' disapproval of demonstrations which they considered to promote homosexuality, the Court found that the applicants had suffered discrimination on the grounds of their sexual orientation in violation of Article 14 in conjunction with 11 of the Convention (*Alekseyev v. Russia*, 2010, § 109; *Genderdoc-M v. Moldova*, 2012, § 53-54).

List of cited cases

The case-law cited in this Guide refers to judgments or decisions delivered by the Court and to decisions or reports of the European Commission of Human Rights ("the Commission").

Unless otherwise indicated, all references are to a judgment on the merits delivered by a Chamber of the Court. The abbreviation "(dec.)" indicates that the citation is of a decision of the Court and "[GC]" that the case was heard by the Grand Chamber.

Chamber judgments that are not final within the meaning of Article 44 of the Convention are marked with an asterisk in the list below. Article 44 § 2 of the Convention provides: "The judgment of a Chamber shall become final (a) when the parties declare that they will not request that the case be referred to the Grand Chamber; or (b) three months after the date of the judgment, if reference of the case to the Grand Chamber has not been requested; or (c) when the panel of the Grand Chamber rejects the request to refer under Article 43". In cases where a request for referral is accepted by the Grand Chamber panel, the Chamber judgment does not become final and thus has no legal effect; it is the subsequent Grand Chamber judgment that becomes final.

The hyperlinks to the cases cited in the electronic version of the Guide are directed to the HUDOC database (http://hudoc.echr.coe.int) which provides access to the case-law of the Court (Grand Chamber, Chamber and Committee judgments and decisions, communicated cases, advisory opinions and legal summaries from the Case-Law Information Note), and of the Commission (decisions and reports) and to the resolutions of the Committee of Ministers.

The Court delivers its judgments and decisions in English and/or French, its two official languages. HUDOC also contains translations of many important cases into more than thirty non-official languages, and links to around one hundred online case-law collections produced by third parties. All the language versions available for cited cases are accessible via the 'Language versions' tab in the HUDOC database, a tab which can be found after you click on the case hyperlink.

—A—

A.D. and Others v. Georgia, nos. 57864/17 and 2 others, 1 December 2022
A.D.T. v. the United Kingdom, no. 35765/97, ECHR 2000-IX
A.E. v. Finland (dec.), no. 30953/11, 22 September 2015
A.H. and Others v. Germany, no. 7246/20, 4 April 2023
A.M. and Others v. Russia, no. 47220/19, 6 July 2021
A.N. v. France (dec.), no. 12956/15, 19 April 2016
A.P., Garçon and Nicot v. France, nos. 79885/12 and 2 others, 6 April 2017
A.S.B. v. the Netherlands (dec.), no. 4854/12, 10 July 2012
A.T. v. Sweden (dec.), no. 78701/14, 25 April 2017
Aghdgomelashvili and Japaridze v. Georgia, no. 7224/11, 8 October 2020
Aldeguer Tomás v. *Spain*, no. 35214/09, 14 June 2016
Alekseyev v. Russia, nos. 4916/07 and 2 others, 21 October 2010
Association ACCEPT and Others v. Romania, no. 19237/16, 1 June 2021

—B—

B and C v. Switzerland, nos. 889/19 and 43987/16, 17 November 2020

B. v. France, 25 March 1992, Series A no. 232-C
Bączkowski and Others v. Poland, no. 1543/06, 3 May 2007
Bayev and Others v. Russia, nos. 67667/09 and 2 others, 20 June 2017
Beizaras and Levickas v. Lithuania, no. 41288/15, 14 January 2020
Berkman v. Russia, no. 46712/15, 1 December 2020
Bonnaud and Lecoq v. France (dec.), no. 6190/11, 06 Feburary 2018
Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland [GC], no. 45036/98, ECHR 2005-VI
Buhuceanu and Others v. Romania, nos. 20081/19 and 20 others, 23 May 2023

—C—

C.E. and Others v. France, nos. 29775/18 and 29693/19, 24 March 2022
C8 (Canal 8) v. France, nos. 58951/18 and 1308/19, 9 February 2023
Chapin and Charpentier v. *France*, no. 40183/07, 9 June 2016
Christine Goodwin v. the United Kingdom [GC], no. 28957/95, ECHR 2002-VI
Cossey v. the United Kingdom, 27 September 1990, Series A no. 184
Courten v. the United Kingdom (dec.), no. 4479/06, 04 November 2006

—D—

D.B. and Others v. Switzerland, nos. 58817/15 and 58252/15, 22 November 2022
Dudgeon v. the United Kingdom, 22 October 1981, Series A no. 45

—E—

E.B. v. France [GC], no. 43546/02, 22 January 2008
E.S. v. Spain (dec.), no. 13273/16, 26 September 2017
Emonet and Others v. Switzerland, no. 39051/03, 13 December 2007
Eweida and Others v. the United Kingdom, nos. 48420/10 and 3 others, ECHR 2013 (extracts)

—F—

F. v. the United Kingdom (dec.), no. 17341/03, 22 June 2004
Fedotova and Others v. Russia [GC], nos. 40792/10 and 2 others, 17 January 2023
Fretté v. France, no. 36515/97, ECHR 2002-I

—G—

Gas and Dubois v. France, no. 25951/07, ECHR 2012
Gas and Dubois v. France (dec.), no. 25951/07, 31 August 2010
Genderdoc-M v. Moldova, no. 9106/06, 12 June 2012
Genderdoc-M and M.D. v. the Republic of Moldova, no. 23914/15, 14 December 2021
Grant v. the United Kingdom, no. 32570/03, ECHR 2006-VII

—H—

H. v. the United Kingdom (dec.), no. 32185/20, 31 May 2022
Hallier and Others v. France (dec.), no. 46386/10, 12 December 2017
Hämäläinen v. Finland [GC], no. 37359/09, ECHR 2014
Honner v. France, no. 19511/16, 12 November 2020

—I—

I. v. the United Kingdom [GC], no. 25680/94, 11 July 2002
I.I.N. v. the Netherlands (dec.), no. 2035/04, 09 December 2004
I.K. v. Switzerland (dec.), no. 21417/17, 19 December 2017
Identoba and Others v. Georgia, no. 73235/12, 12 May 2015

—J—

J.K. and Others v. Sweden [GC], no. 59166/12, 23 August 2016
J.M. v. the United Kingdom, no. 37060/06, 28 September 2010
Jeronovičs v. Latvia [GC], no. 44898/10, 5 July 2016

—K—

Kaos GL v. Turkey, no. 4982/07, 22 November 2016
Karner v. Austria, no. 40016/98, ECHR 2003-IX
Konstantin Markin v. Russia [GC], no. 30078/06, ECHR 2012 (extracts)
Kozak v. Poland, no. 13102/02, 2 March 2010

—L—

L. and v. v. Austria, nos. 39392/98 and 39829/98, ECHR 2003-I
L. v. Lithuania, no. 27527/03, ECHR 2007-IV
Lambdaistanbul LGBTI - Association de solidarité c. Turquie (dec.), no. 53335/08, 19 January 2021
Lapunov v. Russia, no.28834/19; 12 September 2023
Lashmankin and Others v. Russia, nos. 57818/09 and 14 others, 7 February 2017
Laskey, Jaggard and Brown v. the United Kingdom, 19 February 1997, *Reports of Judgments and Decisions* 1997-I
Lenis v. Greece (dec.), no. 47833/20, 27 June 2023
Lilliendahl v. Iceland (dec.), no. 29297/18, 12 May 2020
Lustig-Prean and Beckett v. the United Kingdom, nos. 31417/96 and 32377/96, 27 September 1999

—M—

M. v. France, (dec.), no. 42821/18, 24 April 2022
M.C. and A.C. v. *Romania*, no. 12060/12, 12 April 2016
M.C. v. Bulgaria, no. 39272/98, ECHR 2003-XII
M.E. v. *Sweden* (striking out) [GC], no. 71398/12, 8 April 2015
M.K.N. v. Sweden, no. 72413/10, 27 June 2013

M.W. v. the United Kingdom (dec.), no. 11313/02, 23 June 2009
Macatė v. Lithuania [GC], no. 61435/19, 23 January 2023
Manenc c. France (dec.), no. 66686/09, 21 September 2010
Marckx v. Belgium, 13 June 1979, Series A no. 31
Mata Estevez v. Spain (dec.), no. 56501/00, ECHR 2001-VI
Maymulakhin and Markiv v. Ukraine, no. 75135/14, 1 June 2023
Mladina d.d. Ljubljana v. *Slovenia*, no. 20981/10, 17 April 2014
Modinos v. Cyprus, 22 April 1993, Series A no. 259

—N—

N.D. and N.T. v. Spain [GC], nos. 8675/15 and 8697/15, 13 February 2020
Nepomnyashchiy and Others v. Russia, nos. 39954/09 and 3465/17, 30 May 2023
Norris v. Ireland, 26 October 1988, Series A no. 142
Novruk and Others v. Russia, nos. 31039/11 and 4 others, 15 March 2016
Nurmatov (Ali Feruz) v. Russia (dec.), no.56368/17, 02 October 2018

—O—

O.M. v. *Hungary*, no. 9912/15, 5 July 2016
O.H. and G.H. v. Germany, nos. 53568/18 and 54741/18, 4 April 2023
Oganezova v. Armenia, nos. 71367/12 and 72961/12, 17 May 2022
Oliari and Others v. Italy, nos. 18766/11 and 36030/11, 21 July 2015
Orlandi and Others v. Italy, nos. 26431/12 and 3 others, 14 December 2017

—P—

P. v. Ukraine (dec.), no. 40296/16, 11 June 2019
P.B. and J.S. v. Austria, no. 18984/02, 22 July 2010
P.V. v. Spain, no. 35159/09, 30 November 2010
Pajić v. Croatia, no. 68453/13, 23 February 2016
Parry v. the United Kingdom (dec.), no. 42971/05, ECHR 2006-XV
Premininy v. Russia, no. 44973/04, 10 February 2011
Przybyszewska and others v. Poland, no. 11454/17, 12 December 2023

—R—

R.K. v. Hungary, no. 54006/20, 22 June 2023
R. and F. v. the United Kingdom (dec.), no. 35748/05, 28 November 2006
Rana v. Hungary, no. 40888/17, 16 July 2020
Ratzenböck and Seydl v. Austria, no. 28475/12, 26 October 2017
Rees v. the United Kingdom, 17 October 1986, Series A no. 106
Romanov and others v. Russia, no. 58358/14 and 5 others, 12 September 2023

—S—

S.A.C. v. the United Kingdom (dec.), no. 31428/18, 12 November 2019

S.-H. v. Poland (dec.), nos. 56846/15 and 56849/15, 16 November 2021
S.L. v. Austria, no. 45330/99, ECHR 2003-I (extracts)
S.W. and Others v. Austria (dec.), no. 1928/19, 6 September 2022
S.V. v. Italy, no. 55216/08, 11 October 2018
Sabalić v. Croatia, no. 50231/13, 14 January 2021
Salgueiro da Silva Mouta v. Portugal, no. 33290/96, ECHR 1999-IX
Santos Couto v. Portugal, no. 31874/07, 21 September 2010
Schalk and Kopf v. Austria, no. 30141/04, ECHR 2010
Schlumpf v. Switzerland, no. 29002/06, 8 January 2009
*Semenya v. Switzerland**, no. 10934/21, 11 July 2023
Sheffield and Horsham v. the United Kingdom, 30 July 1998, *Reports of Judgments and Decisions* 1998-V
Smith and Grady v. the United Kingdom, nos. 33985/96 and 33986/96, ECHR 1999-VI
Sousa Goucha v. *Portugal*, no. 70434/12, 22 March 2016
Stasi v. France, no. 25001/07, 20 October 2011
Stoyanova-Tsakova v. Bulgaria, no. 56070/18, 14 June 2022

—T—

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

—V—

Valaitis v. Lithuania, no. 39375/19, 17 January 2023
Valdís Fjölnisdóttir and Others v. Iceland, no. 71552/17, 18 May 2021
Vallianatos and Others v. Greece [GC], nos. 29381/09 and 32684/09, ECHR 2013 (extracts)
Van Kück v. Germany, no. 35968/97, ECHR 2003-VII
Vejdeland and Others v. Sweden, no. 1813/07, 9 February 2012

—W—

Women's Initiatives Supporting Group and Others v. Georgia, nos. 73204/13 and 74959/13, 16 December 2021

—X—

X and Others v. Austria [GC], no. 19010/07, ECHR 2013
X and Y v. Romania, no. 2145/16, 19 January 2021
X and Y v. the Netherlands, 26 March 1985, Series A no. 91
X v. France (dec.), no. 18367/06, 27 May 2008
X v. Poland, no. 20741/10, 16 September 2021
X and Others v. Austria [GC], no. 19010/07, ECHR 2013
X v. Turkey, no. 24626/09, 9 October 2012
X, Y and Z v. the United Kingdom, 22 April 1997, *Reports of Judgments and Decisions* 1997-II

—Y—

Y v. France, no. 76888/17, 31 January 2023
Y.T. v. Bulgaria, no. 41701/16, 9 July 2020
Y.Y. v. *Turkey*, no. 14793/08, ECHR 2015 (extracts)
Y v. Poland, no. 74131/14, 17 February 2022

—Z—

Zanola v. Italy (dec.), no. 59963/21, 21 November 2023
Zhdanov and Others v. Russia, nos. 12200/08 and 2 others, 16 July 2019