



ADF INTERNATIONAL

**From: Lorcán Price**

**Date: 19 January 2023.**

**Re: *Fedotova and Others v. Russia*, Application no. 40792/10 (Grand Chamber).**

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### **(a) Background**

1. On 17 January 2023, the Grand Chamber of the European Court of Human Rights (“ECtHR”) gave a judgment in the case of *Fedotova and Others v Russia*, a case involving a complaint against Russia under Article 8 (right to private and family life) and Article 14 (freedom from discrimination) of the European Convention on Human Rights (“the Convention”).
2. The six applicants formed three same-sex couples who sought to register their relationships with the domestic Russian registry offices. There is no provision for civil partnerships in Russia, therefore the applicants sought to register their relationships as 'marriages'. The domestic registry offices rejected their applications on various dates in 2009 and 2013. The authorities relied on Article 1 of the Russian Family Code, which defines marriage as a “voluntary marital union between a man and a woman”.
3. The applicants challenged the authority’s refusal to register their relationship as a 'marriage' before the domestic courts. On various dates in 2013 and 2014 the domestic courts dismissed their applications as being inadmissible and contrary to domestic law pertaining to marriage, running counter to established national traditions.<sup>1</sup>
4. On 23 September 2014 the Constitutional Court of Russia held in a case on similar issues (not taken by the applicants in the instant proceedings), “[i]n so far as one of the roles of the family is [to ensure] the birth and upbringing of children, an understanding of marriage as the union of a man and a woman underlies the legislative approach to resolving demographic and social issues in the area of family relations in the Russian Federation.”<sup>2</sup>

### **(b) Judgment of the Grand Chamber**

*Preliminary issues - jurisdiction*

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<sup>1</sup> *Fedotova and Others v. Russia*, Application no. 40792/10 (GC), at paragraph 40.

<sup>2</sup> *Ibid*, at paragraph 45.

5. The Grand Chamber dealt with the preliminary jurisdiction point arising since Russia ceased to be a member of the Council of Europe on 16 September 2022. On the question of the Court's jurisdiction to deal with the applications before it, the Court held, *suo motu*, that according to Article 58 of the Convention and the Court's own resolution<sup>3</sup> passed in the aftermath of the Russia declaration of withdrawal, the Court "remain[ed] competent to deal with applications directed against the Russian Federation in relation to acts or omissions capable of constituting a violation of the Convention provided that they occurred until 16 September 2022."<sup>4</sup>

#### *Preliminary issues – intervenors*

6. There were a significant number of intervenors in the case, including over 17 NGOs and the Council of Europe (COE) Commissioner for Human Rights, unsurprisingly, all of whom argued in favour of recognition of same-sex relationships.
7. The COE Human Rights Commissioner claimed that legal recognition of same-sex couples was "of the utmost importance if those concerned were to be able to enjoy the right to respect for their private and family life effectively and without discrimination." She invited the Court to engage in further activism and legislate from the bench to set out provisions which should be included in law by member states when recognising these relationships, "[t]o be truly effective, legal recognition of same-sex couples should be governed by a clear legal framework, be easily accessible and expressly spell out the rights of those concerned."<sup>5</sup>

#### *Preliminary issues – international law*

8. The Grand Chamber of the Court engaged in its usual review of various international soft law sources from the United Nations, Council of Europe, the Inter-American Court of Human Rights. In relation to the Inter-American Court of Human Rights the Strasbourg Court cited an advisory opinion on, inter-alia, same-sex relationships<sup>6</sup>
9. As the Strasbourg Court refers to this Inter-American Court decision subsequently in the judgment, it is appropriate to note the findings of the Inter-American Court concerning homosexual relationships. In response to the question posed by the Costa Rican court, namely, "[Should the] State guarantee the protection of all patrimonial rights derived from a relationship between persons of the same sex", in response, the Inter-American Court stated:

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<sup>3</sup> "Resolution of the European Court of Human Rights on the consequences of the cessation of membership of the Russian Federation to the Council of Europe in light of Article 58 of the European Convention on Human Rights", adopted on 22 March 2022

<sup>4</sup> *Fedotova and Others v. Russia*, Application no. 40792/10 (GC), at paragraph 72.

<sup>5</sup> *Ibid* at paragraph 121.

<sup>6</sup> Inter-American Court of Human Rights, Advisory Opinion of 24 November 2017 (no. OC-24/17) sought by Costa Rica on "Gender Identity, Equality and Non-Discrimination of same-sex couples."

“Pursuant to the right to the protection of private and family life (Article 11(2)), as well as the right to protection of the family (Article 17), the American Convention protects the family ties that may derive from a relationship between persons of the same sex...with *no discrimination as regards to heterosexual couples, pursuant to the right to equality and non-discrimination.*”<sup>7</sup> (Emphasis added).

10. The Grand Chamber also considered European Union *acquis* as part of its analysis of comparative jurisprudence. The Court had regard to the Charter of Fundamental Rights of the European Union (“the Charter”) at Article 7, which is an analogue to Article 8 of the Convention and protects private and family life. In a similar manner, Article 9 of the Charter protects the “right to marry” as an analogue to Article 12 of the Convention. The Court also noted Article 21 of the Charter prohibiting discrimination, including on grounds of “sexual orientation.”
11. Turning to the case-law of the Court of Justice of the European Union (CJEU) the Grand Chamber cited the decision in *Parris* affirming that definition of marriage is a competence of the Member States, “[t]he member States are thus free to decide whether or not to allow marriage for persons of the same sex.”<sup>8</sup>
12. The Grand Chamber Court noted the limited nature of the guarantee in *Coman v. Romania*,<sup>9</sup> the Court noted the findings of the CJEU in *Coman* held:

[T]he obligation for a Member State to recognise a marriage between persons of the same sex concluded in another Member State in accordance with the law of that state, for the sole purpose of granting a derived right of residence to a third-country national, ...Such recognition does not require that Member State to provide, in its national law, for the institution of marriage between persons of the same sex.
13. The Grand Chamber noted that at the time of giving judgment, sixteen member states of the Council of Europe, in addition to the Russian Federation, have not introduced civil partnership or civil unions, the Court’s phraseology is telling, “[in these countries] same-sex couples currently have no opportunity to have their relationship recognised by law”.<sup>10</sup>

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<sup>7</sup> *Ibid*, at paragraph 199.

<sup>8</sup> Court of Justice of the European Union, judgment of 24 November 2016 in *Parris*, C-443/15, EU:C:2016:897, paragraph 59.

<sup>9</sup> *Coman and Others*, judgment of 5 June 2018, C-673/16, (EU:C:2018:385).

<sup>10</sup> *Fedotova and Others v. Russia*, Application no. 40792/10 (GC), at paragraph 67. The countries not providing for same-sex relationships in law are: The Russian Federation, Albania, Armenia, Azerbaijan, Bosnia and Herzegovina, Bulgaria, Georgia, Latvia, Lithuania, the Republic of Moldova, North Macedonia, Poland, Romania, Serbia, Slovakia, Türkiye and Ukraine.

### *Preliminary issues – Chamber judgment*

14. The Grand Chamber noted the Chamber decision, which ruled that Russia had failed to identify "any prevailing community interest that could outweigh the applicants' individual interests, the Chamber found that the respondent State had failed to justify the lack of any opportunity for the applicants to have their respective relationships formally acknowledged."<sup>11</sup>
15. The Chamber held that Russia had overstepped the margin of appreciation it enjoyed in choosing the most appropriate form of recognition of same-sex couples, since domestic law did not provide any legal framework capable of protecting such couples. It therefore concluded that there had been a violation of Article 8 of the Convention.
16. The application before the Chamber centered on the submission that same-sex partners should be entitled to inheritance rights, to state welfare support and housing benefits for families, visitation rights to a partner in prison, etc. All of the foregoing were rights granted only to married heterosexual couples and from which homosexual couples were excluded in Russia. In the foregoing list, "the availability of assisted reproduction" was mentioned only in passing. The Grand Chamber judgment did not address this point, or any other matter pertaining to legal parentage rights and homosexual couples.
17. In their referral to the Grand Chamber, the Russia Government argued that "extending marriage to same-sex couples would be contrary to the Russian Constitution and public policy." Furthermore, the Russian Government argues that "introducing a new form of legal union similar to ...marriage in the domestic system would be unreasonable from a legal perspective, as provided in Article 38 of the Constitution, family, motherhood and childhood, constituted fundamental values in the Russian domestic system and required special protection and preservation."<sup>12</sup>

### *The Court's assessment of Article 8*

18. The Grand Chamber was satisfied that Article 8 was engaged in this case, both in the context of the 'private life' and 'family life' dimensions of the Article.
19. In relation to the 'private life' limb of Article 8, the Court reiterated its view "that the notion of "private life" within the meaning of Article 8 of the Convention is a broad concept which does not lend itself to exhaustive definition and encompasses the

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<sup>11</sup> *Fedotova and Others v. Russia*, Application no. 40792/10 (GC), at paragraph 101.

<sup>12</sup> *Ibid* at paragraph 115.

right to personal development”,<sup>13</sup> in this context the Court held that “sexual orientation” falls within the personal sphere protected by Article 8 of the Convention. Thus, “the unavailability of a legal regime for recognition and protection of same-sex couples affects both the personal and the social identity of the applicants as homosexual people.”<sup>14</sup>

20. On the ‘family life’ aspect the Court deemed it to be “essentially a question of fact depending upon the existence of close personal ties”, this has been the Strasbourg Court’s view since the 1970’s.<sup>15</sup> Thus, ‘family life’ is deemed to concern marriage-based relationships, but also “other de facto “family ties”, for example where the parties are living together outside marriage.”<sup>16</sup>
21. The Court was clear that Article 8 does not impose a duty on the state in respect of marriage, and consistent with earlier decisions the Court held that “Article 8 of the Convention has to date not been interpreted as imposing a positive obligation on the States Parties to make marriage available to same-sex couples.”<sup>17</sup>
22. However, on the critical question of whether the Article 8 of the Convention imposes a duty on States to provide a legal regime of recognition, not described as marriage, for homosexual couples, the Grand Chamber turned to its interpretive methods of ‘evolutive’ meaning of the convention and ‘emerging consensus’ type reasoning.
23. On the evolutive interpretation of the Convention, as it relates more specifically to persons of the same sex, the Grand Chamber cited the Court’s decision of more than forty years ago in *Dudgeon*,<sup>18</sup> “[a]s compared with the era when that legislation was enacted, there is now a better understanding, and in consequence an increased tolerance, of homosexual behaviour”. The Grand Chamber applied this “better understanding” to the instant circumstances, stating “[i]n other words, what may have been regarded as “permissible and normal” at the time when the Convention was drafted may subsequently prove to be incompatible with it.”<sup>19</sup>
24. On the emerging consensus analysis, the Grand Chamber asserted, “far as the present case is concerned, the Court has taken note, through its case-law, of an *ongoing trend* towards legal recognition and protection of same-sex couples in the States Parties”<sup>20</sup> (Emphasis added). The Grand Chamber also took note of

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<sup>13</sup> *Fedotova and Others v. Russia*, Application no. 40792/10 (GC), at paragraph 141.

<sup>14</sup> *Ibid* at paragraph 142.

<sup>15</sup> See *Marckx v. Belgium*, 13 June 1979, § 31, Series A no. 31.

<sup>16</sup> *Fedotova and Others v. Russia*, Application no. 40792/10 (GC), at paragraph 146.

<sup>17</sup> *Ibid* at paragraph 165.

<sup>18</sup> *Dudgeon v. the United Kingdom*, 22 October 1981, § 67, Series A no. 45.

<sup>19</sup> *Fedotova and Others v. Russia*, Application no. 40792/10 (GC), at paragraph 170.

<sup>20</sup> *Ibid* at paragraph 171.

developments at international level, in particular the decision of the Inter-American Court of Human Rights, in its advisory opinion cited above.

25. The Article 8 review was concluded by clear position that, according to the Grand Chamber of the Court, Article 8 of the European Convention on Human Rights now requires that “in accordance with their positive obligations under Article 8 of the Convention, the member States are required to provide a legal framework allowing same-sex couples to be granted adequate recognition and protection of their relationship.”<sup>21</sup>

#### *What does the new Article 8 ‘positive obligation’ entail?*

26. The new obligation imposed on approximately sixteen Council of Europe Member States (who do not legally recognize homosexual relationships) by the Grand Chamber in this decision is presented by the Court in opaque terms. The Grand Chamber posits that States have the “choice of the means” in discharging their new “positive obligation inherent in Article 8” of the Convention. The Court holds that the “discretion afforded to States in this respect relates both to the form of recognition and to the content of the protection to be granted to same-sex couples.”<sup>22</sup>
27. However, the Grand Chamber warns that the recognition afforded to homosexual relationships must be “adequate”, in this connection the Court employed its standard formula stating that “the Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective.”<sup>23</sup> The Court offered no guidance as to the nature of ‘adequacy’ with regard to legal recognition of homosexual relationships, but cryptically noted that the State, in its choice of means to “protect the family and secure respect” has an obligation “[to] 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”<sup>24</sup> [Emphasis added].

#### *Conclusion*

28. The Grand Chamber, by a majority of fourteen votes to three found that Russia had violated Article 8 by failing to legally recognize the applicants same-sex relationship. Notably the Court did not examine separately if there had been any discrimination under Article 14, taken in conjunction with Article 8. This was consistent with the decision of the Chamber to limit the findings to Article 8, however it leaves open the question of how ‘discrimination’ (vis-à-vis heterosexual marriages) will be assessed in future cases.

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<sup>21</sup> *Fedotova and Others v. Russia*, Application no. 40792/10 (GC), at paragraph 178.

<sup>22</sup> *Ibid* at paragraph 188.

<sup>23</sup> *Ibid* at paragraph 208.

<sup>24</sup> *Ibid* at paragraph 209.

### (c) Analysis

29. Four Judges gave separate opinions in this case, Judge Pavli of Albania and Judge Motoc of Romania were in support of the majority but complained that the Court did not go further in finding a breach of Article 14. While Judge Pavlai and Judge Motoc joined the majority in finding a breach of Article 8, they dissented from the majority on their decision not to examine the complaints under Article 14, “[h]owever, I wish that the Court had gone a step further by outlining, at least in broad brushes, the outer limits of that margin when it comes to the nature of the legal protections that are owed to same-sex couples.”<sup>25</sup> It is anticipated that the question of ‘discrimination,’ particularly in the areas of access to adoption, assisted human reproduction and parental rights generally will be the focus of future litigation in this area. Future applicants will undoubtedly complain that states who introduce new laws providing legal recognition for same-sex relationships failed to equalize entitlements in all areas to those enjoyed by married heterosexual couples.
30. Methodologically, this decision is, to quote Justice Byron White of the US Supreme Court, “an exercise of raw judicial power”. Judge Wojtyczek of Poland dissented from the majority on finding a breach of Article 8. In essence he stated that his colleagues had engaged in the use of “legislative power”, to enact primary legal rules, and especially legal rules concerning fundamental societal issues, “[that] should therefore be vested in an elected parliament.”
31. Judge Wojtyczek was particularly critical of the idea of the Convention as a living instrument, he states that this approach “as understood by the majority, is a legal technique which transfers a significant part of treaty-making power from the democratically elected authorities within the States to the European Court of Human Rights. It is a limitation upon democratic decision-making in the States Parties to this treaty.”<sup>26</sup>
32. Judge Wojtyczek’s criticism is undoubtedly correct. In one sense this decision resolves an ongoing ambiguity in the Court’s caselaw as to whether Article 8 imposed an obligation on States to introduce legal recognition of same-sex relationships (a so-called ‘positive obligation’).<sup>27</sup> However, this decision breaks new

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<sup>25</sup> *Fedotova and Others v. Russia*, Application no. 40792/10 (GC). Partly Dissenting Opinion of Judge Pavli (Albania), joined by Judge Motoc (Romania), at paragraph 5.

<sup>26</sup> *Fedotova and Others v. Russia*, Application no. 40792/10 (GC). Dissenting Opinion of Judge Wojtyczek at paragraph 3.

<sup>27</sup> See *Schalk and Kopf v. Austria*, Application no. 30141/04 (2010), *Vallianatos v. Greece*, Application nos. 29381/09 and 32684/09 (2013), *Oliari v. Italy*, Application nos. 18766/11 and 36030/11, (2015), *Taddeucci and McCall v. Italy*, Application no. 51362/09 (2016). In these cases it was at least arguable that the Strasbourg Court’s findings that Article 8 required the introduction of legal recognition of same-sex relationship was a finding specific to the particular facts in the case, and was not, as was noted in the concurring opinions of Judges Mahoney, Tsotsoria and Vehabović in *Oliari*, a general obligation but was “confined” to the peculiar situation of Italy in the context of the decisions of the domestic courts.

ground in making a finding that all Member States of the Council of Europe now need to introduce a legal regime for the recognition of homosexual relationships. As Judge Wojtyczek noted, this decision is not about the clarification of existing rights, “but about adding new rights to the Convention”, and this yet another example of the European Court of Human Rights engaging in “norm-making power in respect of fundamental societal issues” that “cannot be exercised by a judicial body, [such as] the European Court of Human Rights.”<sup>28</sup>

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<sup>28</sup> *Ibid.*