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# **EUROPEAN COURT: Same-sex marriage: Fedotova and Others v. Russia**

## **Same-sex marriage and the case Fedotova and Others v. Russia**

*'Until social norms say 'I do': How the Grand Chamber taketh and giveth away in Fedotova and Others v. Russia*

By Claire Poppelwell-Scevak

[Strasbourg Observers](#) (12.04.2023) – As we continue 2023, with the rise of the far right, the war in Ukraine and Russia's absence at the Council of Europe, it may be difficult to be optimistic. However, I think that with the Grand Chamber's judgment in [Fedotova and Others v. Russia](#), there can be, at least, a sense of hope that the Court's case-law on the recognition of same-sex couples is (slowly) moving forward.

Some may discount the importance of this judgment as, on the one hand, Russia is no longer a party to the Council and a brief glimpse over the Respondent State's response is indicative of a (former) State Party that has appeared to have lost steam in putting forward its case before the Grand Chamber. On the other hand, you could see this case as simply continuing the trend of [Oliari and Others v. Italy](#) and [Orlandi and Others v. Italy](#) where the Court found that there is a positive obligation under Article 8 for Member States to afford some sort of recognition and protection to same-sex couples.

There may be some bias in my opinion as I co-wrote [the third-party intervention](#), submitted by the Human Rights Centre, to the Grand Chamber; however, I believe that this case should be studied further for two reasons. First, it provides a damning insight into the Court's inability to clarify what protections should be afforded to couples – regardless of whether they are different or same-sex. Second, it concretely foreshadows the impending clash between the consensus doctrine and traditional values as determinants to the width of the margin of appreciation.

### ***Facts and decision***

Two same-sex couples (note that there were initially three, however, one couple was struck out when this case went before the Grand Chamber) gave notice of marriage at their respective local Registry offices. Their notices were rejected as the authorities relied on the definition of marriage – by the

Russian Family Code – to be a ‘voluntary marital union between a man and a woman’.

Due to Russia’s exit from the Council of Europe, the Grand Chamber quickly stated that it still had jurisdiction to examine this case. It then moved to an examination of Article 8, immediately finding that the applicants’ claims are applicable under both the private and family life aspects of Article 8. Note that this section will focus on Article 8 (alone) as the Court found that there was no need to examine any arguments under Article 14 taken in conjunction with Article 8.

Referencing its judgments in *Oliari* and *Orlandi* in particular, the Grand Chamber started its analysis by confirming that Article 8 ‘has already been interpreted as requiring a State Party to ensure legal recognition and protection for same-sex couples by putting in place a “specific legal framework”’. However, this positive obligation does not (yet) extend to marriage available to same-sex couples.

Before turning to the margin of appreciation, the Grand Chamber engaged in a lengthy reasoning on the evolutive interpretation of the Convention, citing its previous case-law on this issue. In particular, the Grand Chamber held that there is ‘a clear ongoing trend with the States Parties towards legal recognition of same-sex couples (through the institution of marriage or other forms of partnership)’ with a ‘number of international bodies’ supporting this position.

With the above in mind, the Grand Chamber turned to determining the scope of the margin of appreciation. Given that an aspect of the applicants’ identity was at stake and in light of the ‘clear ongoing trend’ in favour of recognising same-sex couples, the Grand Chamber quickly found that Russia’s margin of appreciation was ‘significantly reduced’. However, the Grand Chamber added that ‘States Parties have a more extensive margin of appreciation in determining the exact

nature of the legal regime to be made available to same-sex couples'. This ability to choose extends 'both to the form of recognition and to the content of the protection to be granted to same-sex couples'.

Here, the Grand Chamber shifted its stance on the consensus doctrine by finding that 'while a clear ongoing trend is emerging towards legal recognition and protection for same-sex couples, no similar consensus can be found as to the form of such recognition and the content of such protection'. Thus, this issue remains in the domain of States Parties to decide. The caveat to this finding though, is that the protection chosen by the States Parties 'should be adequate'. Reference is made by the Grand Chamber to a legal framework that would provide protection for same-sex couples, and specifies 'material (maintenance, taxation or inheritance) or moral (rights and duties in terms of mutual assistance) that are integral to life as a couple and would benefit from being regulated within [such] a legal framework'.

The Grand Chamber then looked to whether Russia had struck a fair balance between the public interests and those of the applicants. According to the applicants, they had experienced a legal vacuum by not being legally recognised. Similarly, the Grand Chamber accepted that 'gaining official recognition for their relationship has an intrinsic value for the applicants...[which] forms part of the development of both their personal and their social identity as guaranteed by Article 8'.

From the Russian Government's perspective, the absence of such a legal framework was first based on the necessity to 'preserve the traditional institutions of marriage and the family'. Whilst the Grand Chamber repeated its 'support and encouragement of the traditional family', such an aim was also 'rather abstract and a broad variety of concrete measures may be used', as well as the 'concept of family [being] necessarily evolutive'. Moreover, the Grand Chamber held that

providing protection for same-sex couples does not 'harm families constituted in the traditional way' or 'prevent different-sex couples from marrying or founding a family'.

Russia's second justification was that the Grand Chamber had departed from its reasoning in *Oliari* where it had taken into consideration the public's attitude towards same-sex couples. The Grand Chamber noted that public opinion in *Oliari* was not a decisive factor in its reasoning. Additionally, the Grand Chamber was unconvinced by this justification as it has 'consistently declined to endorse policies and decisions which embodied a predisposed bias on the part of a heterosexual majority against a homosexual minority' and that 'traditions, stereotypes and prevailing social attitudes in a particular country cannot, by themselves, be considered to amount to sufficient justification for a difference in treatment based on sexual orientation'.

The final justification was the protection of minors. The Grand Chamber summarily dismissed this argument with reference to *Bayev and Others v. Russia*. Thus, the Grand Chamber found that there had been a violation of Article 8 as Russia to provide protection and recognition of the applicants' relationships.

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