

Lack of any form of legal recognition and protection for same-sex couples in Poland breaches the Convention

In today's **Chamber judgment**¹ in the case of [Przybyszewska and Others v. Poland](#) (applications nos. 11454/17 and 9 others) the European Court of Human Rights held, by six votes to one, that there had been:

a violation of Article 8 (right to respect for private and family life) of the European Convention on Human Rights.

The case concerned the alleged lack of any form of legal recognition and protection available for same-sex couples in Poland.

The Court considered that the Polish State had failed to comply with its duty to ensure that the applicants had a specific legal framework providing for the recognition and protection of their same-sex unions. That failure had resulted in the applicants' inability to regulate fundamental aspects of their lives and amounted to a breach of their right to respect for their private and family life.

A legal summary of this case will be available in the Court's database HUDOC ([link](#)).

Principal facts

The applicants are 10 Polish nationals who were born between 1963 and 1991. They form five same-sex couples in stable relationships and live in the Polish cities of Łódź, Cracow and Warsaw.

Since marriage is the only way to formalise a relationship in Poland, the couples independently decided to marry a few years ago and approached their local civil registry offices in order to carry out the necessary formalities to get married. The authorities refused their dossiers as under Polish law marriage can only be between a man and a woman.

Following appeals by the applicants to the courts contesting the registry offices' respective decisions and the reasons given for them, the relevant district and regional courts upheld the decisions, referring, in particular, to Article 18 of the Polish Constitution and Article 1 of the Family and Custody Code. Those provisions did not provide for the possibility of marriage between two persons of the same sex.

All the applicants lodged constitutional complaints in 2017-18, complaining that the provisions of the Family and Custody Code were incompatible with the Constitution. On various dates in 2018 eight applicants requested that one of the Constitutional Court judges, M. Muszyński, be excluded from the panel examining their cases, asserting that he had been unlawfully elected to that office. In October 2018 the Constitutional Court refused to exclude him from their case.

The constitutional complaints lodged by two applicants were dismissed on 15 December 2021, the Constitutional Court considering that the matter of the impossibility of same-sex partners marrying should be characterised as a legislative omission, the examination of which was outside its

1. Under Articles 43 and 44 of the Convention, this Chamber judgment is not final. During the three-month period following its delivery, any party may request that the case be referred to the Grand Chamber of the Court. If such a request is made, a panel of five judges considers whether the case deserves further examination. In that event, the Grand Chamber will hear the case and deliver a final judgment. If the referral request is refused, the Chamber judgment will become final on that day.

Once a judgment becomes final, it is transmitted to the Committee of Ministers of the Council of Europe for supervision of its execution. Further information about the execution process can be found here: www.coe.int/t/dghl/monitoring/execution.

competence. The constitutional complaints lodged by the other eight applicants have not yet been examined.

Complaints, procedure and composition of the Court

Relying on Article 8 (right to respect for private and family life) and Article 14 (prohibition of discrimination) in conjunction with Article 8, the applicants complained of a lack of any form of legal recognition and protection for same-sex couples in Poland. They argued that the vast majority of Council of Europe member States offered same-sex couples a right to marry or to enter into some form of registered civil union, and asserted that they were disadvantaged on account of the lack of any proper recognition of their relationships – for example in the fields of taxation, social rights and family law.

The applications were lodged with the European Court of Human Rights in 2017 and 2018.

The Court decided to examine the applications jointly in a single judgment.

Third-party interventions were received from the following: Council of Europe Commissioner for Human Rights; Associazione Radicale Centri Diritti; Commissioner for Human Rights of the Republic of Poland; International Lesbian, Gay, Bisexual, Trans and Intersex Association (ILGA) on behalf of the Fédération Internationale pour les Droits Humains (FIDH), European Region of the International Lesbian, Gay, Bisexual, Trans and Intersex Association (ILGA-Europe), Network of European LGBTIQ* Families Associations (NELFA) and European Commission on Sexual Orientation Law (ECSOL); Institute of Psychology, Polish Academy of Sciences; Ordo Iuris Institute for Legal Culture; Polish Society of Anti-Discrimination Law (on behalf of Campaign Against Homophobia and Love Does not Exclude Association).

Judgment was given by a Chamber of seven judges, composed as follows:

Alena **Poláčková** (Slovakia), *President*,
Krzysztof **Wojtyczek** (Poland),
Péter **Paczolay** (Hungary),
Gilberto **Felici** (San Marino),
Ivana **Jelić** (Montenegro),
Erik **Wennerström** (Sweden),
Raffaele **Sabato** (Italy),

and Renata **Degener**, *Section Registrar*.

Decision of the Court

The Court dismissed an objection by the Government that eight of the applicants had not exhausted all national legal avenues since their constitutional complaints were still pending. It noted that their complaints, which were almost identical to the ones in relation to which the proceedings had been discontinued, would probably result in the same outcome. Moreover, the effectiveness of their complaints had to be seen in the general context in which the Constitutional Court had operated since the end of 2015 (see [Advance Pharma Sp. z o.o v. Poland](#)) and the successive judicial reforms in Poland aimed at weakening judicial independence, starting with the grave irregularities in the election of judges of the Constitutional Court in December 2015 (see [Xero Flor w Polsce sp. z o.o. v. Poland](#) and [Grzęda v. Poland](#)).

Article 8

The Court reiterated that the general principles concerning member States' duties ("positive obligations") in cases similar to the present one had been set out most recently in the Grand

Chamber judgment in *Fedotova and Others v Russia*. In particular, member States were required to provide a legal framework allowing same-sex couples to be granted adequate recognition and protection of their relationship. Previous judgments of the Court (including *Oliari and Others v. Italy*) referred to material aspects (maintenance, taxation or inheritance) or non-material aspects (rights and duties in terms of mutual assistance) that were relevant to any couple in a stable relationship and which would benefit from being regulated within a legal framework available to same-sex couples.

As regards the Government's argument that the State had wide discretion in this regard, and that the traditional concept of marriage as a union of a man and a woman constituted Poland's social and legal heritage, the Court noted that the present case did not concern same-sex marriage. In keeping with the Court's case-law, the member States were able to determine the exact nature of the legal regime to be made available to same-sex couples, but had significantly less discretion when it came down to legal recognition and protection in general, as was apparent in the clear ongoing trend towards legal recognition of same-sex couples observed within the Contracting Parties to the Convention. It was important that the protection afforded by member States to same-sex couples was adequate.

In this case, the Court concluded that the Polish legal framework could not be said to provide for the core needs of recognition and protection of same-sex couples in a stable and committed relationship. Same-sex partners were unable to regulate fundamental aspects of their life together, such as those concerning property, maintenance, taxation, and inheritance. Also, in the majority of situations, their relationship held no weight in dealings with the judicial or administrative authorities.

In examining the reasons put forward by the Government to justify the lack of any legal recognition and protection for same-sex couples, the Court noted that the reasons given had not differed substantially from those relied on by the Russian Federation and examined by the Court in *Fedotova and Others*. For instance, they had argued that the majority of Poles disapproved of same-sex unions but showed tolerance towards homosexual people. Disagreeing, the applicants had relied on different statistics showing growing support among Poles for same-sex partnerships.

At the same time, the Court took note of the parties' and third-party interveners' submissions indicating the increasingly hostile and homophobic attitudes towards sexual minorities displayed by high-ranking politicians from the ruling party, including resolutions "counteracting LGBT ideology" passed by some local government bodies in Poland. Hateful statements had also apparently been made by one of the current judges of the Constitutional Court about the LGBTI community.

In its case-law, the Court had consistently declined to endorse policies and decisions which embodied a predisposed bias on the part of a heterosexual majority against a homosexual minority. It had also held, under Article 14 of the Convention, that traditions, stereotypes and prevailing social attitudes in a particular country could not, by themselves, justify a difference in treatment based on sexual orientation. The allegedly negative, or even hostile, attitude on the part of the heterosexual majority could not be set against the applicants' interest in having their respective relationships adequately recognised and protected by law.

Similarly, although the Court had acknowledged that the protection of the family in the traditional sense was, in principle, a legitimate reason which might justify a difference in treatment, it had also held that there was no basis for considering that affording legal recognition and protection to same-sex couples in a stable and committed relationship could in itself harm families constituted in the traditional way or compromise their future or integrity. Indeed, securing rights to same-sex couples did not in itself entail weakening the rights secured to other people or opposite-sex couples. The Court found that none of the public-interest grounds put forward by the Government prevailed over the applicants' interest in having their respective relationships adequately recognised and protected by law.

In the light of the arguments put forward by the parties, the third-party interveners' comments and the Court's case-law as clarified and consolidated in *Fedotova and Others*, the Court considered that the Polish State had overstepped its discretion and had failed to comply with its duty to ensure that the applicants had a specific legal framework providing for the recognition and protection of their same-sex unions. That failure had resulted in the applicants' inability to regulate fundamental aspects of their lives and had amounted to a breach of their right to respect for their private and family life. By 6 votes to 1, the Court held that there had therefore been a violation of Article 8 of the Convention.

Article 14

With regard to its finding of a violation under Article 8, the Court did not find it necessary to examine the complaints under Article 14 in conjunction with Article 8.

Just satisfaction (Article 41)

The Court considered that the finding of a violation constituted in itself sufficient just satisfaction for any non-pecuniary damage sustained. In respect of costs and expenses, it held, unanimously, that Poland was to pay 20 euros (EUR) jointly to the applicants in applications nos. 11454/17 and 11810/17 and EUR 317 jointly to the applicants in applications nos. 15273/17 and 16898/17).

Separate Opinion

Judge Wojtyczek expressed a dissenting opinion, which is annexed to this judgment.

The judgment is available only in English.

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The European Court of Human Rights was set up in Strasbourg by the Council of Europe member States in 1959 to deal with alleged violations of the 1950 European Convention on Human Rights.