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Sexual orientation discrimination and Article 14 of the European Convention on Human Rights: the problematic approach of the European Court of Human Rights

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Abstract

Gay and lesbian people have long looked to Article 14 of the European Convention on Human Rights to challenge and address odious forms of discrimination against them. Article 14 ECHR, which prohibits discrimination in respect of the enjoyment of the rights and freedoms contained in the ECHR, has been invoked in a wide range of complaints about sexual orientation discrimination in the European Court of Human Rights since the early 1980s. Although, over time, the Court has developed important protections for gay and lesbian people through its evolving case law, its approach to Article 14 ECHR in respect of sexual orientation discrimination has remained inconsistent. This article critically explores the inconsistencies in the Court's approach to applying and interpreting Article 14 ECHR in relation to sexual orientation discrimination. The article explains why the Court's approach is problematic for gay and lesbian people in terms of the protection of their human rights.

Introduction

I have a question for the European Court of Human Rights (the Court): when gay and lesbian people are treated differently to heterosexual people solely on the grounds of their sexual orientation and, as a consequence, suffer a detriment to their human rights, why does the Court not consistently recognize this as discrimination that is incompatible with Article 14 of the European Convention on Human Rights (ECHR)? In other words, why, when gay and lesbian people are discriminated against in the enjoyment of their human rights, because of their sexual orientation, does the Court not routinely recognize that this amounts to a violation of Article 14 ECHR?

I ask this question because, although the Court has held for over two decades that sexual orientation is "undoubtedly" covered by Article 14 ECHR,[1] it frequently fails to recognize that discrimination based on sexual orientation violates Article 14 ECHR. For example, the Grand Chamber of the Court recently found a violation of Article 10 ECHR in respect of restrictions imposed on a book to limit access by children to information which depicted same-sex relationships as being essentially equivalent to different-sex relationships – restrictions recognized to reinforce stigma and prejudice and encourage homophobia – whilst also concluding that there was "no cause […] for a separate examination of the same facts from the standpoint of Article 14" ECHR.[2]

In this article, in order to explain why the Court does not consistently recognize that discrimination against gay and lesbian people amounts to a violation of Article 14 ECHR, I provide a critical historical overview of the Court's application and interpretation of Article 14 ECHR in respect of cases concerning sexual orientation discrimination. The history of the Court's case law, as I show below, has two key elements. First, the Court has a long history of stubbornly refusing to recognize that discrimination against gay and lesbian people is a violation of Article 14 ECHR, even in cases when it recognizes that such treatment amounts to a violation of other substantive provisions of the ECHR. Second, and relatedly, although the Court has evolved its approach of applying and interpreting Article 14 ECHR in sexual orientation discrimination cases, which has resulted in the Court more routinely finding that sexual orientation discrimination amounts to a violation of Article 14 ECHR, its approach in such cases is inconsistent. As I show below, the Court's inconsistent application and interpretation of Article 14 ECHR in cases concerning sexual orientation discrimination limits the potential of the ECHR to raise the standards of protection of the human rights of gay and lesbian people throughout the 46 States of the Council of Europe.

An outline of the scope and application of Article 14 ECHR

Article 14 ECHR states:

[1] *Salgueiro da Silva Mouta v Portugal* (App. No.33290/96), judgment of 21 December 1999 at [28].
[2] *Macatė v Lithuania* [GC] (App. No.61435/19), judgment of 23 January 2023 at [221].

> The enjoyment of the rights and freedoms set forth in this 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.

Article 14 ECHR enshrines the prohibition of discrimination in respect of the "enjoyment of the rights and freedoms" contained in the ECHR and, as the Court has repeatedly said, "only complements the other substantive provisions" of the ECHR and has "no independent existence" from those provisions.[3] This means that Article 14 ECHR does not provide a free-standing right not to be discriminated against, in contrast to the general prohibition of discrimination contained in Article 1 of Protocol No. 12 ECHR which, currently, is in force in fewer than half of Council of Europe States.[4] Although "sexual orientation" is not mentioned in the list of grounds on which discrimination is prohibited, the Court has determined that the list set out in Article 14 ECHR is illustrative and not exhaustive, as is shown by the words "any ground such as", and that sexual orientation is "a concept which is undoubtedly covered by Article 14" ECHR.[5] Indeed, the Court has stressed that discrimination based on sexual orientation is as serious as discrimination based on "race, origin or colour".[6]

The application of Article 14 ECHR does not necessarily presuppose the violation of one of the substantive rights protected by the ECHR. For Article 14 ECHR to apply, the Court has determined that it is "necessary but it is also sufficient" for the facts of a case to fall "within the ambit" of one or more of the Articles of the ECHR.[7] As a consequence, the Court has also established that Article 14 ECHR extends beyond the enjoyment of the rights and freedoms which the ECHR requires States to guarantee and "applies also to those additional rights, falling within the general scope of any Convention Article, for which the State has voluntarily decided to provide".[8]

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[3] *E.B. v France* [GC] (App. No.43546/02), judgment of 22 January 2008 at [47].
[4] Protocol No. 12 ECHR entered into force on 1 April 2005 but only 20 of the 46 States of the Council of Europe have ratified and acceded to it.
[5] *Salgueiro da Silva Mouta v Portugal* (App. No.33290/96), judgment of 21 December 1999 at [28]. See also *Sutherland v the United Kingdom* (App. No.25186/94), Commission report of 1 July 1997 at [51].
[6] *Vejdeland and Others v Sweden* (App. No.1813/07), judgment of 9 February 2012 at [55].
[7] *E.B. v France* [GC] (App. No.43546/02), judgment of 22 January 2008 at [47].
[8] *Stec and Others v the United Kingdom* [GC] (App. Nos 65731/01 and 65900/01), decision of 6 July 2005 at [40].

Where Article 14 ECHR is applicable to the facts of a case, the Court usually applies a two-stage test to determine whether there has been discrimination in violation of Article 14 ECHR. The Court will first apply the comparator test which, in principle, involves determining whether there has been a difference in the treatment of persons in analogous or relevantly similar situations, or a failure to treat differently persons in relevantly different situations.[9] If so, the Court will then apply the objective and reasonable justification test which, in principle, involves determining whether the treatment in question does "not pursue a legitimate aim" or if there is "not a reasonable relationship of proportionality between the means employed and the aim sought to be realised".[10]

The Court has established that States enjoy a certain margin of appreciation in assessing whether and to what extent differences in treatment are justified. The Court has held that differences based on sexual orientation require particularly serious reasons by way of justification, but that a wide margin of appreciation is usually allowed to the State when it comes to general measures of economic or social strategy.[11] The scope of the margin of appreciation will, therefore, "vary according to the circumstances, the subject matter and its background" and, in this respect, "one of the relevant factors may be the existence or non-existence of common ground between the laws of the Contracting States".[12]

The source of the problem: the Court's approach in *Dudgeon*

Given the scope of Article 14 ECHR it would be reasonable to assume that, when the Court was first presented with a complaint about a detrimental difference in treatment based solely on sexual orientation, it would have applied Article 14 ECHR and, having assessed the merits of the complaint, reached a conclusion on whether Article 14 ECHR had been violated. That reasonable assumption was central to the complaint made by Jeffrey Dudgeon to the former European Commission of Human Rights (the Commission) in 1976 about the blanket prohibition of male same-sex sexual acts in Northern Ireland enforced through criminal laws regulating buggery and gross indecency between males.[13] Mr Dudgeon complained that the

[9] *Church of Jesus Christ of Latter-Day Saints v the United Kingdom* (App. No.7552/09), judgment of 4 March 2014 at [27] and [28].
[10] *Taddeucci and McCall v Italy* (App. No.51362/09), judgment of 30 June 2016 at [87].
[11] *Schalk and Kopf v Austria* (App. No.30141/04), judgment of 24 June 2010 at [97].
[12] *Schalk and Kopf v Austria* (App. No.30141/04), judgment of 24 June 2010 at [98].
[13] *Dudgeon v the United Kingdom* (1978) 11 DR 117. The published decision refers to the applicant as 'X.' because, at this stage, he was anonymous.

existence of such law violated his right to respect for his private life under Article 8 ECHR and, furthermore, constituted a difference in treatment "on sexual grounds" (because male same-sex sexual acts were subject to greater restrictions than female same-sex and different-sex sexual acts) and on grounds of his residence or presence in Northern Ireland (because "male homosexuals" elsewhere in the UK were not subject to the same restrictions) which amounted to discrimination in violation of Article 14 ECHR taken in conjunction with Article 8 ECHR.[14] Although, for the first time in its history, the Commission found that the legal prohibition of private consensual male same-sex sexual acts (between men over 21 years of age) violated Article 8 ECHR,[15] it also found that it was unnecessary to examine the question of whether this prohibition violated Article 14 ECHR taken in conjunction with Article 8 ECHR.[16]

When the Court considered the case in 1981 – its first case involving a gay applicant complaining about sexual orientation discrimination – it reached the same conclusion as the Commission, stating that was not necessary to examine the case under Article 14 ECHR:

> Once it has been held that the restriction on the applicant's right to respect for his private sexual life give rise to a breach of Article 8 […] by reason of its breadth and absolute character […], there is no useful legal purpose to be served in determining whether he has in addition suffered discrimination as compared with other persons who are subject to lesser limitations on the same right. This being so, it cannot be said that a clear inequality of treatment remains a fundamental aspect of the case.[17]

The Commission and Court, in reaching their conclusions on Article 14 ECHR, relied on the Court's previously established doctrine that where a substantive Article of the ECHR has been invoked both on its own and together with Article 14 ECHR and a separate breach has been found of the substantive Article, it is not generally necessary also to examine the case under Article 14 ECHR unless "a clear inequality of treatment in the enjoyment of the right in question is a fundamental aspect of the case".[18] One member of the Commission and five judges

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[14] *Dudgeon v the United Kingdom* (1978) 11 DR 117, 128 and 129.
[15] *Dudgeon v the United Kingdom* (App. No.7525/76), Commission report of 13 March 1980 at [116].
[16] *Dudgeon v the United Kingdom* (App. No.7525/76), Commission report of 13 March 1980 at [125]. The Commission also concluded that the legal prohibition of private consensual male same-sex sexual acts involving men under 21 years of age did not violate Article 8 ECHR, or Article 14 ECHR taken in conjunction with Article 8 ECHR.
[17] *Dudgeon v the United Kingdom* (App. No.7525/76), judgment of 22 October 1981 at [69].
[18] *Dudgeon v the United Kingdom* (App. No.7525/76), judgment of 22 October 1981 at [67].

in the Court dissented from the view that it was unnecessary to examine the case under Article 14 ECHR taken in conjunction with Article 8 ECHR. For example, Judges Evrigenis and Garcia De Enterria argued that the Court's "restrictive" interpretation of Article 14 ECHR "deprives this fundamental provision in great part of its substance and function in the system of substantive rules established under the Convention",[19] and Judge Matscher was critical of the Court for "employing formulas that are liable to limit excessively the scope of Article 14 […] to the point of depriving it of all practical value".[20]

The Court's refusal to examine Mr Dudgeon's complaints under Article 14 ECHR cannot be seen solely as an outcome of its application of a restrictive doctrine. Rather, the Court's unwillingness to recognize that the difference in treatment that Mr Dudgeon complained of amounted to "discrimination" in violation of Article 14 ECHR should be seen as an expression of the long-standing acceptance that detrimental differences in treatment based on sexual orientation were acceptable under the ECHR. The Commission had, since 1955, rejected numerous complaints under Article 14 ECHR about discrimination on the grounds of sexual orientation and, as recently as 1978, had held that criminalizing male same-sex sexual acts but not female same-sex sexual acts did not amount to discrimination under Article 14 ECHR because it was objective and reasonable in light of the "specific social danger […] of masculine homosexuality" created by "the fact that masculine homosexuals often constitute a distinct socio-cultural group with a clear tendency to proselytise adolescents".[21] This view of gay men was reflected in the Court's judgment in *Dudgeon*, in respect of the question of the legitimacy of maintaining a higher "age of consent" for male same-sex sexual acts, when the Court "acknowledged the legitimate necessity in a democratic society for some degree of control over homosexual conduct notably in order to provide safeguards against the exploitation and corruption of those who are specially vulnerable by reason, for example, of their youth".[22]

The unwillingness of the Court in *Dudgeon* to consider the complaint under Article 14 ECHR therefore reflected the long-established view of the Commission that detrimental differences in treatment based on sexual orientation were acceptable under the ECHR. For the remainder of

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[19] *Dudgeon v the United Kingdom* (App. No.7525/76), judgment of 22 October 1981, Dissenting Opinion of Judges Evrigenis and Garcia De Enterria.
[20] *Dudgeon v the United Kingdom* (App. No.7525/76), judgment of 22 October 1981, Dissenting Opinion of Judge Matscher.
[21] *X. v the United Kingdom* (App. No.7215/75), Commission report of 12 October 1978 at [168], citing general remarks made in *X. v Federal Republic of Germany* (1975) 3 DR 46, 56.
[22] *Dudgeon v the United Kingdom* (App. No.7525/76), judgment of 22 October 1981 at [62].

the 1980s, following *Dudgeon*, the Commission and the Court continued to fail to recognize that a difference in treatment based on sexual orientation amounted to discrimination in violation of Article 14 ECHR. During this period only one other complaint about a difference in treatment based on sexual orientation was upheld and the applicant himself did not invoke Article 14 ECHR.[23] When applicants did make complaints under Article 14 ECHR about differences in treatment based on sexual orientation they were declared inadmissible. The approach of the ECHR organs in the 1980s can therefore be characterised by a stubborn refusal to move beyond *Dudgeon* and recognize that the wide range of detriments suffered by individuals because of sexual orientation amounted to discrimination contrary to Article 14 ECHR.

It was during the 1990s that the Commission and the Court began to change their approach to sexual orientation discrimination and Article 14 ECHR. In 1997, the Commission departed from its previous case law and found that arguments in favour of a higher "age of consent" for male same-sex sexual acts (compared to different-sex sexual acts) did not offer a reasonable and objective justification for maintaining such a difference or that such a difference was proportionate to any legitimate aim served.[24] The Commission concluded that the higher age of consent amounted to discriminatory treatment in violation of Article 8 ECHR taken in conjunction with Article 14 ECHR,[25] but the merits of this were not considered by the Court because the case was struck out on the basis that the complaint had been resolved by changes to domestic legislation.[26] However, in 1999, the Court held, in response to a complaint that the Lisbon Court of Appeal had based a decision not to award parental responsibility for a child to its father on the basis of his sexual orientation, that it was "forced" to conclude that there had been a difference of treatment based on sexual orientation[27] and that a distinction based on considerations of sexual orientation was not acceptable.[28] It was the absence of a reasonable relationship of proportionality between the means employed and the aim pursued that led the Court to find, for the first time in a case relating to sexual orientation discrimination, that there had been a violation of Article 8 ECHR taken in conjunction with Article 14 ECHR.[29]

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[23] *Norris v Ireland* (App. No.10581/83), judgment of 26 October 1988.
[24] *Sutherland v the United Kingdom* (App. No.25186/94), Commission report of 1 July 1997 at [64].
[25] *Sutherland v the United Kingdom* (App. No.25186/94), Commission report of 1 July 1997 at [66] and [67].
[26] *Sutherland v the United Kingdom* [GC] (App. No.25186/94), judgment (striking out) of 27 March 2001.
[27] *Salgueiro da Silva Mouta v Portugal* (App. No.33290/96), judgment of 21 December 1999 at [28].
[28] *Salgueiro da Silva Mouta v Portugal* (App. No.33290/96), judgment of 21 December 1999 at [36].
[29] *Salgueiro da Silva Mouta v Portugal* (App. No.33290/96), judgment of 21 December 1999 at [36].

The willingness of the Court in one case, in 1999, to find a violation of Article 14 ECHR in respect of sexual orientation discrimination was not immediately reflected across its wider case law. That same year, in respect of discrimination against members of the UK armed forces on the grounds of sexual orientation, for which the Court found a violation of Article 8 ECHR, the Court, relying on *Dudgeon*, held that no separate issue arose under Article 14 ECHR taken in conjunction with Article 8 ECHR[30] – a position it reiterated in 2002.[31] Similarly, in 2000, again relying on *Dudgeon,* the Court found it was not necessary to examine a case under Article 14 ECHR, having found a violation of Article 8 ECHR, in respect of the existence and enforcement of law criminalizing consensual and private male same-sex sexual acts which did not apply to female same-sex or different-sex sexual acts.[32] Therefore, the Court, when presented with clear evidence of a difference in treatment based on sexual orientation, continued to fail to consider such a difference as discrimination under Article 14 ECHR.

Evolution: the *Kozak* principles

In 2003, the Court changed its approach to complaints about detrimental differences in treatment based on sexual orientation and has, since then, routinely found violations of Article 14 ECHR in such cases. This change coincided with increased interest in the Parliamentary Assembly of the Council of Europe with strengthening the role of the ECHR in addressing discrimination on the grounds of sexual orientation.[33] In two judgments in 2003 against Austria, regarding complaints about law enforcing a different "age of consent" for male same-sex sexual acts brought under Article 8 ECHR alone and in conjunction with Article 14 ECHR, the Court stated that it deemed it appropriate to "examine the case directly under Article 14, taken

[30] *Smith and Grady v the United Kingdom* (App. Nos 33985/96 and 33986/96), judgment of 27 September 1999; *Lustig-Prean and Beckett v the United Kingdom* (App. Nos 31417/96 and 32377/96), judgment of 27 September 1999. In *Smith and Grady* the Court also held that there had been no violation of Article 3 ECHR taken either alone or in conjunction with Article 14 ECHR, and that it was not necessary to examine the applicants' complaints under Article 10 ECHR taken either alone or in conjunction with Article 14 ECHR.

[31] *Perkins and R. v the United Kingdom* (App. Nos 43208/98 and 44875/98), judgment of 22 October 2002; *Beck, Copp and Bazeley v the United Kingdom* (App. Nos 48535/99, 48536/99 and 48537/99), judgment of 22 October 2002.

[32] *A.D.T. v the United Kingdom* (App. No.35765/97), judgment of 31 July 2000.

[33] See Council of Europe, Parliamentary Assembly, Recommendation 1474 (2000); Council of Europe, Parliamentary Assembly, Opinion 216 (2000). For a discussion see P. Johnson, "LGBT Rights at the Council of Europe and the European Court of Human Rights", in J. Marshall (ed), *Personal Identity and the European Court of Human Rights* (London: Routledge, 2022).

together with Article 8" ECHR.[34] The consequence of this approach was that the Court applied its Article 14 ECHR tests and, having done so, concluded that the law complained of "embodied a predisposed bias on the part of a heterosexual majority against a homosexual minority" and that "these negative attitudes cannot of themselves be considered by the Court to amount to sufficient justification for the differential treatment".[35] Having found that there were no convincing and weighty reasons justifying the impugned law and, therefore, that there had been a violation of Article 14 ECHR taken in conjunction with Article 8 ECHR, the Court did not consider it necessary to rule on the question of whether there had been a violation of Article 8 ECHR taken alone.[36]

The approach adopted by the Court in these two cases against Austria, which reversed the approach taken in *Dudgeon*, is important for two key reasons. First, this approach requires the State to provide "particularly serious reasons by way of justification"[37] for differences based on sexual orientation under Article 14 ECHR, rather than merely demonstrating why an interference with an individual's right to respect for private life is necessary in a democratic society under Article 8 ECHR. This places a very significant burden on the State to demonstrate that, in treating a person differently and detrimentally because of their sexual orientation, there is a reasonable relationship of proportionality between the means employed and the aim sought to be realised. Secondly, and relatedly, where a State cannot provide the required justification and, as a consequence, the difference in treatment becomes regarded by the Court as discrimination in violation of Article 14 ECHR, the execution of the Court's judgment will usually require the State to demonstrate that it has taken individual and/or general measures to rectify the matter complained of and to prevent any further discrimination from occurring.

Since 2003, the Court has regularly found a violation of Article 14 ECHR in cases relating to discrimination on the grounds of sexual orientation. In most such cases, a violation of Article 14 ECHR has been found in conjunction with Article 8 ECHR in respect of complaints about discrimination in areas such as housing tenure,[38] criminal prosecutions/convictions,[39] adoption

[34] *S.L. v Austria* (App. No.45330/99), judgment of 9 January 2003 at [28]. See also *L. and V. v Austria* (App. Nos 39392/98 and 39829/98), judgment of 9 January 2003 at [35].
[35] *S.L. v Austria* (App. No.45330/99), judgment of 9 January 2003 at [44].
[36] *S.L. v Austria* (App. No.45330/99), judgment of 9 January 2003 at [45] to [47].
[37] *S.L. v Austria* (App. No.45330/99), judgment of 9 January 2003 at [37].
[38] *Karner v Austria* (App. No.40016/98), judgment of 24 July 2003; *Kozak v Poland* (App. No.13102/02), judgment of 2 March 2010.
[39] *B.B. v the United Kingdom* (App. No.53760/00), judgment of 10 February 2004; *Woditschka and Wilfling v Austria* (App. Nos 69756/01 and 6306/02), judgment of 21 October 2004; *Ladner v Austria* (App. No.18297/03),

of a child,[40] parental rights,[41] exclusion from certain benefits,[42] legal recognition of same-sex relationships,[43] residence rights,[44] and the response to instances of homophobic hatred.[45] The Court has also developed its Article 14 ECHR jurisprudence in respect of a number of issues relating to sexual orientation discrimination in conjunction with Article 2 ECHR,[46] Article 3 ECHR,[47] Article 10 ECHR,[48] Article 11 ECHR,[49] and Article 1 of Protocol No. 1 ECHR,[50] thereby strengthening the protection of sexual minorities from wide ranging discrimination across Contracting States.

By evolving its Article 14 ECHR jurisprudence in this way, the Court has progressively established some important core principles relating to sexual orientation discrimination. One of the strongest articulations of these principles is contained in a judgment of 2010 against Poland, in response to a complaint about discrimination on the grounds of sexual orientation in

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judgment of 3 February 2005; *Wolfmeyer v Austria* (App. No.5263/03), judgment of 26 May 2005; *H.G. and G.B. v Austria* (App. Nos 11084/02 and 15306/02), judgment of 2 June 2005; *R. H. v Austria* (App. No.7336/03), judgment of 19 January 2006. See also *E.B. and Others v Austria* (App. No.31913/07 and four others), judgment of 7 November 2013.

[40] *E.B. v France* [GC] (App. No.43546/02), judgment of 22 January 2008; *X and Others v Austria* [GC] (App. No.19010/07), judgment of 19 February 2013.

[41] *X v Poland* (App. No.20741/10), judgment of 16 September 2021.

[42] *P.B. and J.S. v Austria* (App. No.18984/02), judgment of 22 July 2010.

[43] *Vallianatos and Others v Greece* [GC] (App. Nos 29381/09 and 32684/09), judgment of 7 November 2013; *Maymulakhin and Markiv v Ukraine* (App. No.75135/14), judgment of 1 June 2023.

[44] *Pajić v Croatia* (App. No.68453/13), judgment of 23 February 2016; *Taddeucci and McCall v Italy* (App. No.51362/09), judgment of 30 June 2016.

[45] *Beizaras and Levickas v Lithuania* (App. No.41288/15), judgment of 14 January 2020; *Association ACCEPT and Others v Romania* (App. No.19237/16), judgment of 1 June 2021; *Nepomnyashchiy and Others v Russia* (App. Nos 39954/09 and 3465/17), judgment of 30 May 2023.

[46] *Stoyanova v Bulgaria* (App. No.56070/18), judgment of 14 June 2022.

[47] *X v Turkey* (App. No.24626/09), judgment of 9 October 2012; *Identoba and Others v Georgia* (App. No.73235/12), judgment of 12 May 2015; *M.C. and A.C. v Romania* (App. No.12060/12), judgment of 12 April 2016; *Aghdgomelashvili and Japaridze v Georgia* (App. No.7224/11), judgment of 8 October 2020; *Sabalić v Croatia* (App. No.50231/13), judgment of 14 January 2021; *Genderdoc-M and M.D. v the Republic of Moldova* (App. No.23914/15), judgment of 14 December 2021; *Women's Initiatives Supporting Group and Others v Georgia* (App. Nos 73204/13 and 74959/13), judgment of 16 December 2021; *Oganezova v Armenia* (App. Nos 71367/12 and 72961/12), judgment of 17 May 2022; *Ivanov v Russia* (App. No.72144/14), judgment of 10 January 2023; *Beus v Croatia* (App. No.16943/17), judgment of 21 March 2023.

[48] *Bayev and Others v Russia* (App. No.67667/09 and two others), judgment of 20 June 2017; *Isakov v Russia* (App. No.21226/14), judgment of 10 January 2023.

[49] *Bączkowski and Others v Poland* (App. No.1543/06), judgment of 3 May 2007; *Alekseyev v Russia* (App. No.4916/07 and two others), judgment of 21 October 2010; *Genderdoc-M v Moldova* (App. No.9106/06), judgment of 12 June 2012; *Identoba and Others v Georgia* (App. No.73235/12), judgment of 12 May 2015; *Alekseyev and Others v Russia* (App. No.14988/09 and 50 others), judgment of 27 November 2018; *Zhdanov and Others v Russia* (App. No.12200/08 and two others), judgment of 16 July 2019; *Alekseyev and Others v Russia* (App. No.26624/15 and 76 others), judgment of 16 January 2020; *Berkman v Russia* (App. No.46712/15), judgment of 1 December 2020; *Association ACCEPT and Others v Romania* (App. No.19237/16), judgment of 1 June 2021; *Women's Initiatives Supporting Group and Others v Georgia* (App. Nos 73204/13 and 74959/13), judgment of 16 December 2021; *Sutyagin and Gavrikov v Russia* (App. Nos 13518/10 and 32190/20), judgment of 15 December 2022.

[50] *J.M. v the United Kingdom* (App. No.37060/06), judgment of 28 September 2010.

respect of housing tenure. The applicant in this case, Mr Kozak, complained, under Article 14 ECHR taken in conjunction with Article 8 ECHR, that his sexual orientation had been the single ground on which he had been denied the right to succeed to the tenancy of the flat in which he had lived with his late partner. In its consideration of the merits of the complaint, which resulted in a finding of a violation of Article 14 ECHR taken in conjunction with Article 8 ECHR, the Court set out the following principles:

> In the enjoyment of the rights and freedoms guaranteed by the Convention, Article 14 affords protection against different treatment, without an objective and reasonable justification, of persons in similar situations […]
>
> Not every difference in treatment will amount to a violation of this provision; thus, Contracting States enjoy a margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a different treatment in law. For the purposes of Article 14, it must be established that there is no objective and reasonable justification for the impugned distinction, which means that it does not pursue a "legitimate aim" or that there is no "reasonable proportionality between the means employed and the aim sought to be realised" […]
>
> Sexual orientation is a concept covered by Article 14. Furthermore, when the distinction in question operates in this intimate and vulnerable sphere of an individual's private life, particularly weighty reasons need to be advanced before the Court to justify the measure complained of. Where a difference of treatment is based on sex or sexual orientation the margin of appreciation afforded to the State is narrow and in such situations the principle of proportionality does not merely require that the measure chosen is in general suited for realising the aim sought but it must also be shown that it was necessary in the circumstances. Indeed, if the reasons advanced for a difference in treatment were based solely on the applicant's sexual orientation, this would amount to discrimination under the Convention […][51]

In *Kozak,* the Court therefore established the very clear and strict principle that, in respect of the enjoyment of the rights and freedoms guaranteed by the ECHR, if a person is treated

[51] *Kozak v Poland* (App. No.13102/02), judgment of 2 March 2010 at [91] and [92].

differently to other people in a similar situation for reasons based solely on that person's sexual orientation then this will amount to discrimination in violation of Article 14 ECHR. This principle is of powerful importance because, in most complaints to the Court by gay and lesbian applicants about differences in treatment relating to sexual orientation, it is the applicants' sexual orientation that is the sole reason for the difference in treatment complained of. Therefore, on the basis of this principle, it should be an absolute certainty that in any case where the reason for a difference in treatment between people in analogous situations is based solely on a person's sexual orientation – providing that the facts of the case fall within the ambit of one or more of the Articles of the ECHR – that the Court will find a violation of Article 14 ECHR. This is a reasonable conclusion given that the Court has now repeatedly said in the starkest terms that "[d]ifferences based solely on considerations of sexual orientation are unacceptable under the Convention".[52]

Going back to the problem: the Court's continuing inconsistent application and interpretation of Article 14 ECHR

Although *Kozak* and other cases have established a very clear and simple approach to the application and interpretation of Article 14 ECHR in respect of differences based on sexual orientation, the Court has not consistently applied this approach. As such, the Court's approach to adjudicating complaints about sexual orientation discrimination under Article 14 ECHR remains haphazard. Nowhere, as I outline below, is this haphazardness clearer than in the Court's case law on the discrimination against same-sex couples created by the lack of legal recognition of their relationships. But, as I also show, haphazardness is present in other areas of the Court's case law relating to sexual orientation discrimination.

The Court's haphazard approach to discrimination in respect of the legal recognition of same-sex relationships

The Court's approach to adjudicating complaints under Article 14 ECHR about discrimination against same-sex couples created by the lack of legal recognition of their relationships is haphazard. This case law began in 2010 in a case against Austria, when the Court established that Article 14 ECHR taken in conjunction with Article 8 ECHR was applicable to a complaint

[52] *Maymulakhin and Markiv v Ukraine* (App. No.75135/14), judgment of 1 June 2023 at [62].

by a same-sex couple who alleged that they were discriminated against because, firstly, they did not have access to marriage and, secondly, they had no alternative means of legal recognition available to them prior to the entry into force of legislation, in 2010, which enabled same-sex couples to form a registered partnership.[53] Because the Court had already concluded that Article 12 ECHR did not impose an obligation on States to grant same-sex couples access to marriage, it stated that Article 14 ECHR taken in conjunction with Article 8 ECHR could not be interpreted as imposing such an obligation either.[54] In considering the lack of alternative legal recognition, the Court declined to examine whether any such lack would constitute a violation of Article 14 ECHR taken in conjunction with Article 8 ECHR if it still obtained and, instead, limited its consideration to whether the State should have provided the couple with an alternative means of legal recognition of their partnership any earlier than it did.[55] In light of the fact that a majority of States did not at that time provide legal recognition for same-sex couples, the Court stated that "[t]he area in question must therefore still 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" and, therefore, that the State could not be reproached for not having introduced registered partnerships any earlier.[56] The Court concluded, therefore, that there had been no violation of Article 14 ECHR taken in conjunction with Article 8 ECHR. Three judges dissented from this conclusion, arguing that the Court should have found a violation of Article 14 ECHR taken in conjunction with Article 8 ECHR because, "in the absence of any cogent reasons offered by the respondent Government to justify the difference of treatment, there should be no room to apply the margin of appreciation".[57]

Three years later, in 2013, the Grand Chamber, in a case against Greece, again concluded that Article 14 ECHR taken in conjunction with Article 8 ECHR was applicable in a case relating to the lack of legal recognition available to same-sex couples.[58] In this case, the Grand Chamber was considering a complaint about the exclusion of same-sex couples from civil unions, a form of legal relationship recognition that was available only to different-sex couples. The Grand Chamber's key focus, therefore, was whether the State was entitled, from the standpoint of

[53] *Schalk and Kopf v Austria* (App. No.30141/04), judgment of 24 June 2010.
[54] *Schalk and Kopf v Austria* (App. No.30141/04), judgment of 24 June 2010 at [101].
[55] *Schalk and Kopf v Austria* (App. No.30141/04), judgment of 24 June 2010 at [103] and [104].
[56] *Schalk and Kopf v Austria* (App. No.30141/04), judgment of 24 June 2010 at [105] and [106].
[57] *Schalk and Kopf v Austria* (App. No.30141/04), judgment of 24 June 2010, Joint Dissenting Opinion of Judges Rozakis, Spielmann and Jebens at [8].
[58] *Vallianatos and Others v Greece* [GC] (App. Nos 29381/09 and 32684/09), judgment of 7 November 2013.

Article 14 ECHR taken in conjunction with Article 8 ECHR, to enact a law introducing a new registered partnership scheme, as an alternative to marriage, that was limited to different-sex couples and thus excluded same-sex couples.[59] The Grand Chamber concluded that the arguments advanced by the State – that same-sex couples could already access the rights and obligations afforded by civil unions by entering into legal contracts, and that civil unions were designed to achieve several goals related to strengthening the institutions of marriage and the family in the traditional sense – were not convincing and weighty reasons capable of justifying the exclusion of same-sex couples from the scope of civil unions.[60] The Grand Chamber paid particular attention to the fact that "same-sex couples would have a particular interest in entering into a civil union since it would afford them, unlike different-sex couples, the sole basis […] on which to have their relationship legally recognised".[61] The Grand Chamber concluded, therefore, that excluding same-sex couples from civil unions amounted to a violation of Article 14 ECHR taken in conjunction with Article 8 ECHR.

In the context of the Grand Chamber's 2013 judgment against Greece, it is striking that in two further cases concerning a lack of legal recognition for same-sex couples in Italy the Court, in judgments given in 2015[62] and 2017,[63] decided it was not necessary to examine whether there had been a violation of Article 14 ECHR. In the first case, the Court examined the complaint that, in light of the fact that same-sex couples had no means of legally safeguarding their relationships, because it was impossible to enter into any type of civil union, that same-sex couples were being discriminated against in breach of Article 14 ECHR taken in conjunction with Article 8 ECHR.[64] The Court stated that both Article 8 ECHR alone and Article 14 ECHR taken in conjunction with Article 8 ECHR applied,[65] and then proceeded to conduct its assessment of the merits in respect of Article 8 ECHR alone. Having found a violation of Article 8 ECHR – because the government had overstepped their margin of appreciation and failed to fulfil their positive obligation to make available a specific legal framework providing

[59] *Vallianatos and Others v Greece* [GC] (App. Nos 29381/09 and 32684/09), judgment of 7 November 2013 at [75].
[60] *Vallianatos and Others v Greece* [GC] (App. Nos 29381/09 and 32684/09), judgment of 7 November 2013 at [92].
[61] *Vallianatos and Others v Greece* [GC] (App. Nos 29381/09 and 32684/09), judgment of 7 November 2013 at [90].
[62] *Oliari and Others v Italy* (App. Nos 18766/11 and 36030/11), judgment of 21 July 2015.
[63] *Orlandi and Others v Italy* (App. No.26431/12 and three others), judgment of 14 December 2017.
[64] *Oliari and Others v Italy* (App. Nos 18766/11 and 36030/11), judgment of 21 July 2015 at [99]. Two applicants invoked Article 8 ECHR alone, and all six applicants invoked Article 14 ECHR taken in conjunction with Article 8 ECHR.
[65] *Oliari and Others v Italy* (App. Nos 18766/11 and 36030/11), judgment of 21 July 2015 at [103].

for the recognition and protection of same-sex unions[66] – the Court unanimously concluded that it was not necessary to examine whether there had also been a violation of Article 14 ECHR in conjunction with Article 8 ECHR.[67] In the second case, which concerned a complaint about the refusal to register same-sex marriages contracted abroad and the lack of access of same-sex couples to marriage or to any other legal recognition of their family union, the Court adopted a similar approach.[68] The Court stated that Article 8 ECHR and Article 14 ECHR taken in conjunction with Article 8 ECHR (and Article 12 ECHR) applied,[69] proceeded to conduct its assessment of the merits in respect of Article 8 ECHR alone, found a violation of Article 8 ECHR alone,[70] and concluded that it was not necessary to examine whether there had also been a violation of Article 14 ECHR in conjunction with Article 8 ECHR (or Article 12 ECHR).[71] In these two cases, therefore, the Court did not establish that the failure to provide same-sex couples with a specific legal framework, other than marriage, to recognize and protect their unions amounted to discrimination in violation of Article 14 ECHR.

In 2023, the Grand Chamber, in a case against Russia, continued the approach adopted in the two aforementioned cases against Italy.[72] Following an earlier chamber judgment,[73] the Grand Chamber considered complaints by same-sex couples that it was impossible for them to have their relationships recognised and protected by law in Russia and stated that, like the chamber, it would focus its examination of the complaints under Article 8 ECHR and under Article 14 ECHR taken in conjunction with Article 8 ECHR.[74] Like the chamber, the Grand Chamber conducted an assessment of the merits under Article 8 ECHR alone and, after an extensive analysis, found that none of the public-interest grounds put forward by the State – the protection of the traditional family, the feelings of the majority of the Russian population, and the protection of minors from promotion of homosexuality – prevailed over the interest of same-sex couples in having their relationships adequately recognised and protected by law and, on this basis, concluded that the State had "overstepped its margin of appreciation and has failed

[66] *Oliari and Others v Italy* (App. Nos 18766/11 and 36030/11), judgment of 21 July 2015 at [185].
[67] *Oliari and Others v Italy* (App. Nos 18766/11 and 36030/11), judgment of 21 July 2015 at [188]. The Court also rejected complaints under Article 12 ECHR alone, and under Article 14 ECHR taken in conjunction with Article 12 ECHR, as manifestly ill-founded.
[68] *Orlandi and Others v Italy* (App. No.26431/12 and three others), judgment of 14 December 2017.
[69] *Orlandi and Others v Italy* (App. No.26431/12 and three others), judgment of 14 December 2017 at [146].
[70] *Orlandi and Others v Italy* (App. No.26431/12 and three others), judgment of 14 December 2017 at [211].
[71] *Orlandi and Others v Italy* (App. No.26431/12 and three others), judgment of 14 December 2017 at [212].
[72] *Fedotova and Others v Russia* [GC] (App. No. 40792/10 and two others), judgment of 17 January 2023.
[73] *Fedotova and Others v Russia* (App. No. 40792/10 and two others), judgment of 13 July 2021.
[74] *Fedotova and Others v Russia* [GC] (App. No. 40792/10 and two others), judgment of 17 January 2023 at [84].

to comply with its positive obligation to secure the applicants' right to respect for their private and family life".[75] In finding a violation of Article 8 ECHR,[76] the Grand Chamber then concluded by a majority that it was not necessary to examine separately whether there had been a violation of Article 14 ECHR taken in conjunction with Article 8 ECHR.[77] Four judges voted against the majority's conclusion in respect of Article 14 ECHR, including Judge Pavli, joined by Judge Motoc, who astutely argued that the majority's conclusion implied that, as in *Dudgeon* over forty years earlier, "the claim based on inequality of treatment does not constitute 'a fundamental aspect of the case'".[78] In disagreeing with this implication, and advancing a case for why the Grand Chamber should have addressed the discrimination complaints separately under Article 14 ECHR taken in conjunction with Article 8 ECHR, Judge Pavli stated:

> […] laws have a moral dimension and they help shape a society's moral views. They tell their beneficiaries that they are not invisible, that they are seen and valued as equal members of that society, irrespective of their differences. Conversely, national legal regimes that discriminate on impermissible grounds do the contrary: they tend to reinforce prejudice and social segregation, causing harm that goes above and beyond the violation of particular individuals' Article 8 rights. There is, therefore, great inherent value in a Court judgment that confirms the "equal enjoyment of rights" imperative.[79]

Judge Pavli concluded that "[w]hether or not the Court chooses to employ the prism of Article 14 of the Convention in a particular case, the pull of its gravity can hardly be avoided in this context".[80] Judge Pavli's comments make clear the importance and value of the Court examining complaints by sexual minorities about discrimination under Article 14 ECHR and how, in doing so, this allows the Court to articulate an absolute rejection of prejudice and an absolute insistence on equality.

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[75] *Fedotova and Others v Russia* [GC] (App. No. 40792/10 and two others), judgment of 17 January 2023 at [224].
[76] *Fedotova and Others v Russia* [GC] (App. No. 40792/10 and two others), judgment of 17 January 2023 at [225].
[77] *Fedotova and Others v Russia* [GC] (App. No. 40792/10 and two others), judgment of 17 January 2023 at [230].
[78] *Fedotova and Others v Russia* [GC] (App. No. 40792/10 and two others), judgment of 17 January 2023, Partly Dissenting Opinion of Judge Pavli, Joined by Judge Motoc at [2].
[79] *Fedotova and Others v Russia* [GC] (App. No. 40792/10 and two others), judgment of 17 January 2023, Partly Dissenting Opinion of Judge Pavli, Joined by Judge Motoc at [5] (reference omitted).
[80] *Fedotova and Others v Russia* [GC] (App. No. 40792/10 and two others), judgment of 17 January 2023, Partly Dissenting Opinion of Judge Pavli, Joined by Judge Motoc at [8].

Four months after this Grand Chamber judgment against Russia, a chamber of the Court issued a judgment in a similar case concerning complaints by same-sex couples regarding their lack of opportunity to have their relationships formally recognised in Romania.[81] Following the Grand Chamber judgment against Russia, the Court found a violation of Article 8 ECHR[82] and that there was no need to examine the complaints under Article 14 ECHR taken in conjunction with Article 8 ECHR.[83] Judge Guerra Martins dissented from the majority's finding in respect of Article 14 ECHR, stating "[f]irst and foremost, I firmly believe that discrimination on the ground of sexual orientation is a fundamental aspect of this case and that it should therefore have been addressed".[84] Judge Guerra Martins went on to state that Judge Pavli's reasoning, in his dissent on Article 14 ECHR in the Grand Chamber judgment against Russia, was "more accurate than the reasoning of the majority" and that had she been part of the composition of the Grand Chamber in that case she would have joined in that partly dissenting opinion.[85] Judge Guerra Martins stated that, although her partly dissenting opinion did not change anything in the current case against Romania, "it might pave the way for the future evolution of the Court's case-law regarding Article 14" ECHR.[86]

Somewhat astonishingly, nine days after the Court's judgment in the case against Romania, a chamber of the Court, when examining a similar complaint about the absence of any form of legal recognition and protection for same-sex couples in Ukraine, did not, to use Judge Pavli's words, avoid the pull of the gravity of Article 14 ECHR.[87] For no discernible reason, other than noting that the applicants had formulated their complaint under Article 14 ECHR taken in conjunction with Article 8 ECHR rather than relying on Article 8 ECHR alone,[88] the Court decided to conduct its assessment of the merits of the complaints under Article 14 ECHR taken in conjunction with Article 8 ECHR, and unanimously found a violation of those Articles.[89] To reach this finding, the Court applied its standard Article 14 ECHR tests and determined that the State had failed to provide any justification for treating the applicants differently as a same-

[81] *Buhuceanu and Others v Romania* (App. No.20081/19 and 20 others), judgment of 23 May 2023.
[82] *Buhuceanu and Others v Romania* (App. No.20081/19 and 20 others), judgment of 23 May 2023 at [84].
[83] *Buhuceanu and Others v Romania* (App. No.20081/19 and 20 others), judgment of 23 May 2023 at [86].
[84] *Buhuceanu and Others v Romania* (App. No.20081/19 and 20 others), judgment of 23 May 2023, Partly Dissenting Opinion of Judge Guerra Martins at [3].
[85] *Buhuceanu and Others v Romania* (App. No.20081/19 and 20 others), judgment of 23 May 2023, Partly Dissenting Opinion of Judge Guerra Martins at [7].
[86] *Buhuceanu and Others v Romania* (App. No.20081/19 and 20 others), judgment of 23 May 2023, Partly Dissenting Opinion of Judge Guerra Martins at [8].
[87] *Maymulakhin and Markiv v Ukraine* (App. No.75135/14), judgment of 1 June 2023.
[88] *Maymulakhin and Markiv v Ukraine* (App. No.75135/14), judgment of 1 June 2023 at [42].
[89] *Maymulakhin and Markiv v Ukraine* (App. No.75135/14), judgment of 1 June 2023 at [81].

sex couple compared with different-sex couples.[90] Although the Court ultimately reached the same overall conclusion as the Grand Chamber in the case against Russia – that the ECHR is violated by denying same-sex couples access to a legal framework allowing adequate recognition and protection of their relationships – it is significant that the Court found, in the case against Ukraine, that Article 14 ECHR had been violated. It is significant because it reiterates, in line with the *Kozak* principles, that differences based on sexual orientation require particularly convincing and weighty reasons by way of justification and, vitally, that differences based solely on considerations of sexual orientation are unacceptable under the ECHR.[91]

Disappointingly, three months after the judgment in the case against Ukraine, the Court, in a judgment in a case against Bulgaria, returned to the position of refusing to examine a complaint made under Article 14 ECHR about the absence of any form of legal recognition and protection of the relationships of same-sex couples.[92] The Court unanimously found a violation of Article 8 ECHR alone[93] but, by a majority, held that it was not necessary to examine the admissibility and merits of the complaints under Article 14 ECHR taken in conjunction with Article 8 ECHR and Article 12 ECHR.[94] Judge Pavli again dissented in respect of the finding on Article 14 ECHR, repeating the essence of his dissent in the case against Russia discussed above.[95] Judge Pavli argued that the decision of whether or not to examine a complaint made under Article 14 ECHR, after having already concluded that there has been a violation of another provision of the ECHR, is a choice to be made on a case by case basis and that the decision of the majority of the Grand Chamber in the case against Russia should not settle that question for all future cases.[96]

It is important that the Court continues to use the approach adopted in the case against Ukraine and examine complaints under Article 14 ECHR about States that deny same-sex couples the full legal recognition and protection of their relationships that is enjoyed by different-sex

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[90] *Maymulakhin and Markiv v Ukraine* (App. No.75135/14), judgment of 1 June 2023 at [79].
[91] *Maymulakhin and Markiv v Ukraine* (App. No.75135/14), judgment of 1 June 2023 at [62].
[92] *Koilova and Babulkova v Bulgaria* (App. No.40209/20), judgment of 5 September 2023.
[93] *Koilova and Babulkova v Bulgaria* (App. No.40209/20), judgment of 5 September 2023 at [66].
[94] *Koilova and Babulkova v Bulgaria* (App. No.40209/20), judgment of 5 September 2023 at [68].
[95] *Koilova and Babulkova v Bulgaria* (App. No.40209/20), judgment of 5 September 2023, Partly Dissenting Opinion of Judge Pavli.
[96] *Koilova and Babulkova v Bulgaria* (App. No.40209/20), judgment of 5 September 2023, Partly Dissenting Opinion of Judge Pavli at [1].

couples. This approach is particularly important while the Court continues to hold that Article 12 ECHR does not impose an obligation on a State to grant same-sex couples access to marriage,[97] because it can best ensure that same-sex couples are provided with an alternative form of legal recognition that affords protection and benefits equivalent to those afforded to different-sex couples. The application of Article 14 ECHR, in line with the *Kozak* principles, will be crucial in preventing States from using their margin of appreciation to provide same-sex couples with an alternative form of legal recognition that grants less protection and fewer benefits than those available to different-sex couples.[98] However, it remains to be seen, in the context of its currently haphazard case law, what approach the Court will favour in the future.

The Court's haphazard approach to other aspects of sexual orientation discrimination

The Court's inconsistent application of Article 14 ECHR in cases relating to a difference in treatment based on sexual orientation is not limited to complaints about a lack of recognition and protection of the relationships of same-sex couples. For example, in recent judgments in 2017[99] and 2022[100] against Russia relating to interferences with the rights to freedom of expression and freedom of assembly, in which complaints of discrimination based on sexual orientation were made under Article 14 ECHR, the Court found violations of the ECHR but held that it was not necessary to examine separately the complaints under Article 14 ECHR.[101] This approach is inconsistent with the Court's approach in, for example, a similar facts case against Russia in which, in 2010, it found that an interference with the right to peaceful assembly, which was based on discriminatory considerations of sexual orientation, amounted to a violation of Article 11 ECHR alone and Article 14 ECHR taken in conjunction with Article 11 ECHR.[102]

A recent judgment, in 2023, in a case in which the Grand Chamber found a violation of Article 10 ECHR in respect of restrictions imposed on a book to limit access by children to information which depicted same-sex relationships as being essentially equivalent to different-sex

[97] *Schalk and Kopf v Austria* (App. No.30141/04), judgment of 24 June 2010 at [63].
[98] For a discussion see *Fedotova and Others v Russia* [GC] (App. No.40792/10 and two others), judgment of 17 January 2023, Partly Dissenting Opinion of Judge Pavli, Joined by Judge Motoc at [6] to [8].
[99] *Lashmankin and Others v Russia* (App. No.57818/09 and 14 others), judgment of 7 February 2017.
[100] *Savelov and Others v Russia* (App. No.62815/10 and 5 others), judgment of 1 December 2022.
[101] *Lashmankin and Others v Russia* (App. No.57818/09 and 14 others), judgment of 7 February 2017 at [478]; *Savelov and Others v Russia* (App. No.62815/10 and 5 others), judgment of 1 December 2022 at [12].
[102] *Alekseyev v Russia* (App. No.4916/07 and two others), judgment of 21 October 2010 at [88] and [110].

relationships – which the Grand Chamber recognized to reinforce stigma and prejudice and encourage homophobia – demonstrated once again the inconsistent application of Article 14 ECHR.[103] In this case, the Grand Chamber concluded that there was "no cause […] for a separate examination of the same facts from the standpoint of Article 14" ECHR.[104] This produced an extensive dissent by five judges of the Grand Chamber, who stated that "[w]e firmly believe that discrimination is a fundamental aspect of this case and that it should have therefore been addressed" and, moreover, that the "case provided the Court with an invaluable opportunity – which has sadly been missed – to address one of the ways in which homophobic prejudice is often manifested nowadays".[105] These judges stated that the "reasoning of the Grand Chamber clearly demonstrates […] that discriminatory attitudes against the LGBTI community as a group constituted a fundamental aspect of the present case, which should accordingly have been addressed".[106] The view of these judges is supported by the fact that, six years earlier, the Court had held that a legislative ban on "propaganda of non-traditional sexual relations aimed at minors" amounted to a violation of Article 10 ECHR and a violation of Article 14 ECHR in conjunction with Article 10 ECHR.[107]

The continuing comparator problem

There is a further element of the Court's application of Article 14 ECHR in cases relating to differences in treatment based on sexual orientation that has created an enduring problem for gay and lesbian people attempting to challenge discrimination against them. This enduring problem concerns the comparator test which, as I outlined above, involves determining whether there has been a difference in the treatment of persons in analogous or relevantly similar situations, or a failure to treat differently persons in relevantly different situations. The vast majority of cases brought under the ECHR in the Court concerning a difference in treatment based on sexual orientation have involved claims of direct discrimination and, as such, the Court and the former Commission have usually applied the test of comparing complainants to others in relevantly similar, or analogous, situations. This test has often been applied in cases

[103] *Macatė v Lithuania* [GC] (App. No.61435/19), judgment of 23 January 2023.
[104] *Macatė v Lithuania* [GC] (App. No.61435/19), judgment of 23 January 2023 at [221].
[105] *Macatė v Lithuania* [GC] (App. No.61435/19), judgment of 23 January 2023, Joint Partly Dissenting Opinion of Judges Yudkivska, Lubarda, Guerra Martins and Zünd joined by Judge Kūris at [2] and [4].
[106] *Macatė v Lithuania* [GC] (App. No.61435/19), judgment of 23 January 2023, Joint Partly Dissenting Opinion of Judges Yudkivska, Lubarda, Guerra Martins and Zünd joined by Judge Kūris at [19].
[107] *Bayev and Others v Russia* (App. No.67667/09 and two others), judgment of 20 June 2017.

involving claims of direct discrimination against same-sex couples and has proved to be a major barrier for such couples.

For example, in 1992 the Commission issued a decision on a case brought by three applicants, a female same-sex couple and their child, about discrimination in Dutch law relating to the granting of parental authority.[108] The domestic courts had refused to grant the same-sex couple parental authority because, under Dutch law, unmarried parents could only be vested with parental authority if both had legal family ties with the child (and in this case only one of the parents, the biological mother, had legal family ties with the child) or by establishing legal family ties through "recognition", which was only available to a man.[109] The applicants claimed that they were victims of discrimination because, unlike different-sex couples, the parents could not establish parental authority over the child and, consequently, the child was treated differently on the grounds of his birth and status in comparison with legitimate children.[110] The Commission tersely stated that, "as regards parental authority over a child, a homosexual couple cannot be equated to a man and a woman living together" and, on this basis, declared the complaint to be manifestly ill-founded and inadmissible.[111] As such, for the purposes of Article 14 ECHR, the Commission would not accept that the unmarried same-sex couple were in a relevantly similar situation to an unmarried different-sex couple and, on this basis, would not consider the substance of the claim of discrimination.

The Court has since gone on to evolve its jurisprudence and establish that, for the purposes of Article 14 ECHR, it will compare an unmarried same-sex couple with an unmarried different-sex couple. For example, in a case brought by three applicants, a female same-sex couple and their child, the Grand Chamber considered a complaint about discrimination in respect of Austrian law that made it impossible for the partner of the child's biological mother to legally adopt the child as a second parent.[112] The applicants complained that Austrian law distinguished between different-sex and same-sex couples insofar as second-parent adoption was possible for married or unmarried different-sex couples but not for same-sex couples (who

[108] *Kerkhoven, Hinke and Hinke v the Netherlands* (App. No.15666/89), Commission decision of 19 May 1992.
[109] *Kerkhoven, Hinke and Hinke v the Netherlands* (App. No.15666/89), Commission decision of 19 May 1992, The Facts.
[110] *Kerkhoven, Hinke and Hinke v the Netherlands* (App. No.15666/89), Commission decision of 19 May 1992, The Law at [2].
[111] *Kerkhoven, Hinke and Hinke v the Netherlands* (App. No.15666/89), Commission decision of 19 May 1992, The Law at [2].
[112] *X and Others v Austria* [GC] (App. No.19010/07), judgment of 19 February 2013.

were, at the material time, unable to marry). In this case, the Grand Chamber accepted that the applicants were in a relevantly similar situation to an unmarried different-sex couple in which one partner wished to adopt the other partner's child[113] and went on to find a violation of Article 14 ECHR taken in conjunction with Article 8 ECHR on this basis.[114] However, the Grand Chamber was also very clear to reiterate its previously established view[115] that the applicants, a same-sex couple, were not in a relevantly similar situation to a married different-sex couple in respect of second-parent adoption and, therefore, concluded that there had been no violation of Article 14 ECHR taken in conjunction with Article 8 ECHR on that basis.[116] To reach that conclusion the Grand Chamber reiterated the Court's established view that "marriage confers a special status on those who enter into it" and that the exercise of the right to marry, as protected by Article 12 ECHR, "gives rise to social, personal and legal consequences".[117]

I have argued elsewhere that the Court's refusal to compare unmarried same-sex couples, who are prohibited from marrying by virtue of being same-sex couples, with married different-sex couples is perverse and obtuse because it means that same-sex couples are unable to challenge discrimination created by laws that reserve rights and benefits to married different-sex couples.[118] Although such discrimination is created solely on the basis of sexual orientation – which the Court has established is unacceptable under Article 14 ECHR – it has been repeatedly allowed by the Court. One of the strongest criticisms of the Court's approach was advanced by Justice Hellman in 2015 in a judgment of the Supreme Court of Bermuda when, having concluded that the prohibition in Bermuda on the adoption of a child by unmarried couples (which included same-sex couples, who were prohibited from marrying) was not justifiable, he declined to follow the reasoning of the Court that unmarried couples and married couples are not in a relevantly similar situation because marriage conferred a special status on those who enter it which gives rise to social, personal and legal consequences.[119] Justice Hellman stated,

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[113] *X and Others v Austria* [GC] (App. No.19010/07), judgment of 19 February 2013 at [112].
[114] *X and Others v Austria* [GC] (App. No.19010/07), judgment of 19 February 2013 at [153].
[115] See, for example, *Gas and Dubois v France* (App. No.25951/07), judgment of 15 March 2012.
[116] *X and Others v Austria* [GC] (App. No.19010/07), judgment of 19 February 2013 at [109] and [110].
[117] *X and Others v Austria* [GC] (App. No.19010/07), judgment of 19 February 2013 at [106].
[118] P. Johnson, "Adoption, homosexuality and the European Convention on Human Rights: *Gas and Dubois v France*" (2012) 75(6) *Modern Law Review* 1136.
[119] *A and B v Director of Child and Family Services and Attorney General* [2014] SC (Bda) 11 Civ (3 February 2015) at [32] to [34].

"I do not understand how that is supposed to provide a rational basis for prohibiting same-sex couples from adopting".[120]

The Court continues to routinely refuse to compare unmarried same-sex couples, who are prohibited from marrying, with married different-sex couples for the purposes of Article 14 ECHR. However, the Court engaged in a rare deviation from this approach in a case against Italy involving a cohabiting same-sex couple, comprising of an Italian and New Zealand national, who complained that the New Zealand national was unable to obtain a residence permit in Italy on family grounds because he did not meet the statutory criteria for being a "family member" which required him, in these circumstances, to be a "spouse" not a cohabitant.[121] As such, same-sex couples were exclude from the scope of these residence permits because they were reserved for married persons and same-sex marriage was not possible in Italy. In previous cases concerning sexual orientation discrimination, the Court has applied the test of whether there has been a difference in treatment of persons in relevantly similar situations and, in doing so, refused to accept that unmarried same-sex couples (who cannot marry) and married different-sex couples are in analogous situations. In this case, however, the Court chose to compare the unmarried same-sex couple with the situation of unmarried different-sex couples and, in doing so, stated:

> […] the applicants' situation cannot, however, be regarded as analogous to that of an unmarried heterosexual couple. Unlike the latter, the applicants do not have the possibility of contracting marriage in Italy. They cannot therefore be regarded as "spouses" under Italian law. Accordingly, as a result of a restrictive interpretation of the concept of "family member" only homosexual couples faced an insurmountable obstacle to obtaining a residence permit for family reasons […][122]

This approach led the Court to conclude that the same-sex couple were treated in the same way as persons in a significantly different situation from theirs, namely different-sex couples who had decided not to regularise their situation.[123] On this basis, having passed the comparator test, the Court went on to state that the fact that the same-sex couple were not treated differently

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[120] *A and B v Director of Child and Family Services and Attorney General* [2014] SC (Bda) 11 Civ (3 February 2015) at [35].
[121] *Taddeucci and McCall v Italy* (App. No.51362/09), judgment of 30 June 2016 at [82].
[122] *Taddeucci and McCall v Italy* (App. No.51362/09), judgment of 30 June 2016 at [83].
[123] *Taddeucci and McCall v Italy* (App. No.51362/09), judgment of 30 June 2016 at [85].

from unmarried different-sex couples, "who alone had access to a form of regularisation of their partnership", had no objective and reasonable justification and, therefore, amounted to a violation of Article 14 ECHR taken in conjunction with Article 8 ECHR.[124] Judge Spano, joined by Judge Bianku, in a concurring opinion, stated:

> […] although States are not under an obligation to afford same-sex couples access to the institution of marriage, that does not mean that these individuals are unable to find sanctuary in this Court when invoking the right to respect for their family lives in particular contexts. On the contrary, if States decide to exclude same-sex couples from being able to marry, such a decision may have consequences when this Court is called upon to examine a claim of unjustified discrimination within a specific context that falls within the ambit of the right to respect for family life under Article 8 taken in conjunction with Article 14 of the Convention.[125]

In a partly dissenting opinion, Judge Sicilianos stated that "[t]o say that the situation of unmarried homosexual couples is not comparable to that of unmarried heterosexual couples on the grounds that the latter can marry is tantamount to accepting *a contrario* that […] the situation of unmarried homosexual couples is comparable to that of married couples" and that this "does not appear to be consistent with the Court's case-law".[126] Judge Sicilianos is correct to point out this inconsistency and, in light of it, it remains to be seen whether, in the future, discrimination against same-sex couples created by their exclusion from marriage will give rise, as Judge Spano puts it, to "consequences" for States under Article 14 ECHR. It may be that the Court will consistently return to its established practice of refusing to compare unmarried same-sex couples, who cannot marry, with married different-sex couples and, in doing so, use this lack of a comparator to "convert a potentially challengeable ground of discrimination into one that is immune from judicial scrutiny".[127] Or it is possible – and perhaps likely – that an inconsistent approach will develop in the Court, leading to further haphazardness in the application and interpretation of Article 14 ECHR in cases relating to sexual orientation discrimination.

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[124] *Taddeucci and McCall v Italy* (App. No.51362/09), judgment of 30 June 2016 at [96] and [99].
[125] *Taddeucci and McCall v Italy* (App. No.51362/09), judgment of 30 June 2016, Concurring Opinion of Judge Spano, Joined by Judge Bianku at [2].
[126] *Taddeucci and McCall v Italy* (App. No.51362/09), judgment of 30 June 2016, Partly Dissenting Opinion of Judge Sicilianos at [6] and [10].
[127] *Ratzenböck and Seydl v Austria* (App. No.28475/12), judgment of 26 October 2017, Concurring Opinion of Judge Mits.

Conclusion

I began this article by asking the question why, when presented with evidence that gay and lesbian people are being treated differently to heterosexual people solely on the grounds of their sexual orientation and, as a consequence, suffering a detriment to their human rights, does the Court not consistently recognize this as discrimination that is incompatible with Article 14 ECHR? The answer to that question is that the Court has, historically, stubbornly refused to recognize that a difference in treatment based solely on sexual orientation amounts to a violation of Article 14 ECHR and, as its jurisprudence has evolved, its application and interpretation of Article 14 ECHR in respect of sexual orientation discrimination has become inconsistent and haphazard. It is undoubtedly the case that the Court's jurisprudence has evolved in ways that have expanded the protection for gay and lesbian people from discrimination across a wide range of areas. The Court's core Article 14 ECHR principle that "[d]ifferences based solely on considerations of sexual orientation are unacceptable under the Convention"[128] is of monumental importance for gay and lesbian people across Council of Europe States. But, as I have shown, the Court is not applying that principle consistently and, as a consequence, is letting gay and lesbian people down.

The Court is letting gay and lesbian people down when, in cases in which they complain about being singled out and treated differently because of their sexual orientation, the Court does not "name" this difference in treatment as "discrimination" in violation of Article 14 ECHR. Explicitly labelling a detrimental difference in treatment based solely on sexual orientation as "discrimination" matters for gay and lesbian people. It matters because it sends the clear and unequivocal message that a violation of human rights has occurred because of unacceptable prejudice. In contrast, when the Court says it is not necessary to examine a complaint about a difference in treatment based on sexual orientation under Article 14 ECHR, it fails to explicitly "call out" prejudice against gay and lesbian people. The failure to consistently use Article 14 ECHR to shine a light on and condemn sexual orientation discrimination means that the Court is limiting the potential of the ECHR system to fulfil its "mission" to "determine issues on public-policy grounds in the common interest, thereby raising the general standards of

[128] *Maymulakhin and Markiv v Ukraine* (App. No.75135/14), judgment of 1 June 2023 at [62].

protection of human rights and extending human rights jurisprudence throughout the community of Convention States".[129]

To ensure that it best meets its mission, the Court should, in respect of every admissible application concerning a difference in treatment based on sexual orientation complained of under Article 14 ECHR, examine the Article 14 ECHR complaint explicitly. In doing so, the Court should not apply restrictive comparator tests to avoid asking States to provide objective and reasonable justifications for differences in treatment based on sexual orientation. The Court should also discontinue its approach of concluding in sexual orientation discrimination cases that it is not necessary to separately consider Article 14 ECHR complaints. Putting an end to this approach will, again, require States to provide objective and reasonable justifications for differences in treatment based on sexual orientation. When attempting to provide such justifications, States should be required to meet the high bar that particularly weighty reasons need to be advanced and that, crucially, reasons based solely on sexual orientation are unacceptable.

If the Court does this and, as a consequence, ends its inconsistent application and interpretation of Article 14 ECHR it will increase judicial certainty and, in doing so, will instil confidence in gay and lesbian people that the Court will explicitly address discrimination against them. The Court will then better function, to use Judge Spano's word, as a "sanctuary" from the most odious forms of discrimination that rob gay and lesbian people of their human rights and fundamental freedoms solely because of their sexual orientation.

[129] *Karner v Austria* (App. No.40016/98), judgment of 24 July 2003 at [26].