



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

## FIRST SECTION

### **CASE OF PRZYBYSZEWSKA AND OTHERS v. POLAND**

*(Applications nos. 11454/17 and 9 others)*

### JUDGMENT

Art 8 • Positive obligations • Absence of any form of legal recognition and protection for same-sex couples • Respondent State's failure to comply with positive obligation to ensure legal recognition and protection of such couples through specific legal framework • Application of principles established in *Fedotova and Others v. Russia* • Absence of official legal recognition resulted in same-sex partners being unable to regulate fundamental aspects of their lives • Public-interest grounds put forward not prevailing over applicants' interests • Margin of appreciation overstepped

Prepared by the Registry. Does not bind the Court.

STRASBOURG

12 December 2023

*This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.*



**In the case of Przybyszewska and Others v. Poland,**

The European Court of Human Rights (First Section), sitting as a Chamber composed of:

Alena Poláčková, *President*,

Krzysztof Wojtyczek,

Péter Paczolay,

Ivana Jelić,

Gilberto Felici,

Erik Wennerström,

Raffaele Sabato, *judges*,

and Renata Degener, *Section Registrar*,

Having regard to:

the applications (nos. 11454/17 and nine others) against the Republic of Poland lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by ten Polish nationals (“the applicants”) on the various dates indicated in the appended table;

the decision to give notice to the Polish Government (“the Government”) of the applications;

the observations submitted by the Government and the observations in reply submitted by the applicants;

the comments submitted by Ms Dunja Mijatović, the Council of Europe Commissioner for Human Rights, who exercised her right to intervene in the proceedings (Article 36 § 3 of the Convention and Rule 44 § 2 of the Rules of Court);

the comments submitted by the following organisations, all of which had been granted leave to intervene by the President of the Section:

- 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);

the Chamber’s decision not to hold a hearing in the case;

Having deliberated in private on 21 November 2023,

Delivers the following judgment, which was adopted on that date:

## INTRODUCTION

1. The applicants are five same-sex couples who complained of a lack of any form of legal recognition and protection for their respective relationships. The case raises an issue under Article 8 of the Convention.

## THE FACTS

2. The applicants live in committed, stable relationships. The details concerning the applicants and their representatives before the Court may be found in the appended table. As regards case no. 25891/17, by a letter dated 13 August 2020, the applicant's lawyer notified the Court that the applicant had changed his name to Alcer. The Court advised the parties that it would continue processing the application under the case name of *Łoś v. Poland*. This corresponded to the applicant's name as referred to in the domestic court proceedings in issue, as well as in his application lodged with the Court.

3. The Polish Government were represented by their Agent, Mr J. Sobczak, of the Ministry of Foreign Affairs.

4. On various dates the applicants each declared before the head of their local Civil Status Office (*kierownik urzędu stanu cywilnego*) that there were no impediments preventing them from marrying their same-sex partner. This declaration is a condition for getting married in Poland. In each case the head of the Civil Status Office issued a notice refusing to accept their declarations, relying on the domestic law, which defined marriage only as a union between a man and a woman.

5. The applicants appealed to the courts, contesting the Civil Status Office's respective decisions and the reasons given for them.

6. On various dates the relevant district courts upheld the decisions of the head of the Civil Status Office. The courts referred to, in particular, Article 18 of the Constitution and Article 1 of the Family and Custody Code (see paragraphs 13 and 17 below), which did not provide for the possibility of marriage between two persons of the same sex. The applicants lodged further appeals.

7. On various dates the relevant regional courts dismissed the applicants' appeals. The courts held that it was not possible to legally acknowledge same-sex marriages, as they were not recognised in the provisions of the Constitution or the Family and Custody Code. According to the courts, this did not constitute discrimination, as the applicants were free to make decisions about their family and private life.

8. By way of example, on 12 December 2017 the Łódź Regional Court gave a final judgment in the case of the ninth and tenth applicants. It held, *inter alia*:

“... it must be assumed that the applicants form a family within the meaning of the broad constitutional understanding of this concept and that they enjoy the protection of

the Republic of Poland under Articles 18 and 47 of the Constitution of the Republic of Poland.

However, it has escaped the applicants' attention that the fact that Article 47 of the Constitution protects so-called privacy and prohibits the legislature from unjustifiably interfering in the sphere of family relationships and personal life does not imply that it is possible to make a *contra legem* interpretation of the unequivocal provision of Article 18 of the Constitution of the Republic of Poland and of the provisions of the Family Code relating to marriage.

There is, of course, no obstacle to individual member States permitting homosexual couples to be entitled not only to civil partnerships but also to marriage, but they are not obliged to do so under Article 12 of the Convention. It should be noted that in *Schalk and Kopf v. Austria* (no. 30141/04, ECHR 2010), the [Court] held that the Convention did not oblige a member State to legislate on or recognise marriages between persons of the same sex, but for the first time expressly accepted homosexual couples as a form of 'family life'. The [Court] ruled that the Convention required that same-sex couples enjoy legal recognition but did not require the opening up of marriage to same-sex couples."

9. On various dates in 2017 the first eight applicants lodged constitutional complaints (all registered under case no. SK 12/17). They complained that Article 1 § 1 of the Family and Custody Code was incompatible with Article 47 of the Constitution, in conjunction with Article 31 § 3 and Article 32 §§ 1 and 2 and with Article 30 in so far as "it made it impossible for two persons of the same sex to marry and did not at least provide for any other form of legal recognition of relationships between two persons of the same sex".

On 17 June 2017 the Constitutional Court decided to proceed with the constitutional complaint (*nadać skardze dalszy bieg*) in case no. SK 12/17, finding that the complaint had fulfilled the formal requirements of admissibility (*spełnia wymogi formalne*).

10. On various dates in 2018 the applicants requested that Judge M. Muszyński be excluded from the panel that would examine their case pending before the Constitutional Court. The applicants asserted that the judge had been unlawfully elected to the Constitutional Court. On 30 October 2018 the Constitutional Court gave a ruling dismissing their request for the exclusion of Mr M. Muszyński.

11. On 30 April 2018 the ninth and tenth applicants also lodged a constitutional complaint with the Constitutional Court (case no. SK 9/19). They relied on the same grounds, namely that Article 1 § 1 of the Family and Custody Code was incompatible with Article 47 of the Constitution, in conjunction with Article 31 § 3 and Article 32 §§ 1 and 2 and with Article 30 in so far as "it [did] not allow for marriage between two persons of the same sex, or at least [did] not provide for any legal form of institutionalisation of unions formed by persons of the same sex".

On 18 December 2018 the Constitutional Court decided to proceed with the constitutional complaint, finding that the complaint had fulfilled the formal requirements of admissibility.

12. On 15 December 2021 the Constitutional Court discontinued the proceedings in case no. SK 9/19. The court sat in a composition including Judge K. Pawłowicz. The Constitutional Court first emphasised that it could examine the formal requirements of the constitutional complaint at any stage, including after it had decided to proceed with a case. The court held:

“In view of the fact that during the examination of the present case doubts arose as to how to characterise the lack of regulation in Article 1 § 1 of the Family and Custody Code of the right of persons in same-sex unions to marry, the Constitutional Court reiterates that there are two different situations in this regard: a legislative omission (*zaniechanie prawodawcze*) and a legislative oversight (*pominiecie prawodawcze*).

A legislative omission occurs when the legislature has an obligation to regulate a certain area but fails to fulfil it, leaving a certain issue outside legal regulation, which ‘results from an intended (or even tolerated) legislative policy’ ... A legislative oversight, on the other hand, occurs when – from the point of view of constitutional principles – a regulation has too narrow a scope of application or overlooks content that is relevant to its object and purpose ... The Constitutional Court has already expressed its opinion on many occasions, indicating that it cannot adjudicate on a legislative omission. It is not the role of the Constitutional Court to take the place of the legislature in a situation in which the legislature has neglected to regulate an issue, even if the obligation to regulate it is imposed by the Constitution ... The review of the constitutionality of legislative omissions is inadmissible, as the powers of the Constitutional Court do not include the adjudication of issues which the legislature has left outside legal regulation, intentionally leading to the creation of a legal loophole ...

In turn, the assessment of the constitutionality of a legislative oversight falls within the competence of the Constitutional Court and is carried out from the point of view of whether provisions are lacking which, if they were in place, would have an impact on the constitutionality of a given regulation. Thus, an allegation of unconstitutionality levelled at a legislative oversight concerns not what the lawmaker has regulated in a given act, but what he [or she] has overlooked, and the assessment of the Constitutional Court is extended to the entire normative content of the provision in question, and thus also to the absence of certain normative elements ...

The Constitutional Court has repeatedly pointed out that the unequivocal classification of a specific normative state of affairs into one of the above-mentioned categories may, in practice, pose difficulties ...

Transposing the above reservations into the subject of the complaint in the present case, it should first of all be noted that the Constitution does not contain a provision prescribing the regulation of the institution of same-sex marriages. The Constitutional Court has already commented on this issue, indicating that ‘[m]arriage as a union between a man and a woman’ has been given a separate constitutional status in the domestic law of the Republic of Poland determined by the provisions of Article 18 of the Constitution. A change in this status would only be possible within the procedure for amending the Constitution ...

In the opinion of the Constitutional Court, the regulation contained in Article 1 § 1 of the Family and Custody Code was a fully conscious and deliberate decision of the legislature. ... The wording of that provision ... clearly indicates that the provision constitutes a complete, compact normative element of the Code.

Pursuant to Article 18 of the Constitution, marriage as a union between a man and a woman is protected by the Republic of Poland. According to case-law and legal

commentators, this provision unequivocally states that in the Polish legal system the institution of marriage is reserved exclusively for a couple formed by a man and a woman. There is also no doubt that Article 1 § 1 of the Polish Family and Custody Code should be interpreted, according to the requirement of pro-constitutional interpretation, in a manner compliant with Article 18 of the Constitution. This is due to the fact that that provision is an element of constitutional axiology ... . That is because it defines the fundamental values related to the institution of marriage and family and their role in society. The remaining constitutional provisions should be interpreted and applied in a manner allowing for the fullest possible consideration and realisation of these values. The same direction applies to the interpretation of all other provisions of law (see the Supreme Administrative Court's judgment of 7 December 2009). The process of such interpretation and application should be guided by an 'awareness of the value of the family in social life and of the importance of this basic unit for the existence and functioning of the nation'.

From the legislature's point of view, in the case under consideration there is no qualitative equivalence, or even a far-reaching similarity, between the matter regulated in Article 1 § 1 of the Family and Custody Code and the regulation allegedly lacking in that provision. ... [The applicants] indicated in their constitutional complaint: '[t]he couples live together, ... run a common household, ... [and] take decisions together in life and family matters'. This does not, however, prove that a same-sex relationship is identical to marriage, which differs from a same-sex relationship primarily in its potential for procreation. As the court's well-established case-law shows, '[t]he protection of the family implemented by public authorities must take into account the vision of the family adopted in the Constitution as a permanent union of a man and a woman directed towards motherhood and responsible parenthood' (see Article 18 of the Constitution). Indeed, the purpose of the constitutional regulations relating to the status of the family is to impose on the State, and in particular on the legislature, the obligation to take measures that 'strengthen the bonds between persons forming a family, and in particular the bonds existing between parents and children and between spouses' (see the judgment of the Constitutional Court of 12 April 2011, SK 62/08, paragraph 22). Therefore, in the context of the constitutional principle of equality and the established case-law of the Constitutional Court concerning legislative omission, it is difficult to assume that the matter of regulating same-sex unions is qualitatively identical to the matter of regulating marriage as defined in Article 1 § 1 of the Family and Custody Code.

Taking the above considerations into account, the Constitutional Court has concluded that the constitutional complaint under examination accused the legislature of a legislative omission; therefore, in the case initiated by the complaint, adjudication was inadmissible and the proceedings should have been discontinued."

## RELEVANT LEGAL FRAMEWORK AND PRACTICE

### I. RELEVANT DOMESTIC LAW AND PRACTICE

#### A. Constitution

13. The relevant provisions of the Constitution of the Republic of Poland of 1997 read as follows:

**Article 18**

“Marriage, as a union between a man and a woman as well as the family, motherhood and parenthood, shall be under the protection and care of the Republic of Poland.”

**Article 30**

“The inherent and inalienable dignity of the person shall constitute a source of the freedoms and rights of persons and citizens. It shall be inviolable. The respect and protection thereof shall be the obligation of public authorities.”

**Article 32**

“1. All persons shall be equal before the law. All persons shall have the right to equal treatment by public authorities.

2. No one shall be discriminated against in political, social or economic life for any reason whatsoever.”

**Article 33 § 1**

“Men and women shall have equal rights in family, political, social and economic life in the Republic of Poland.”

**Article 47**

“Everyone shall have the right to legal protection of his or her private and family life and of his or her honour and good reputation and to make decisions about his or her personal life.”

**B. Civil Code**

14. Article 691 of the Civil Code concerns entering into a tenancy relationship after a partner has died (for case-law concerning the application of this provision to same-sex couples, see paragraph 20 below).

“1. In the event of a tenant’s death, his or her spouse (if he or she is not a co-tenant), his or her [children] and his or her spouse’s children, other persons in respect of whom the tenant had maintenance obligations and any person who has lived in *de facto* cohabitation with the tenant shall succeed to the tenancy agreement.

2. The persons referred to in paragraph 1 shall enter into the tenancy relationship in respect of the premises in question if they permanently resided with the tenant until his or her death.”

**C. Criminal Code**

15. Article 115 of the Criminal Code provides a glossary of terms:

“11. The closest person (*osoba najbliższa*) is a spouse, an ascendant, a descendant, a sibling, a relative in the same line or degree, a person in an adoptive relationship and his or her spouse and a person living in cohabitation.”



## **D. Code of Criminal Procedure**

16. Article 182 of the Code of Criminal Procedure allows a person closest to an accused to refuse to testify against him or her (for case-law concerning same-sex couples, see paragraph 24 below). Article 182 reads as follows, in so far as relevant:

“1. The person closest to the accused may refuse to testify ...”

## **E. Family and Custody Code**

17. The relevant provision of the Family and Custody Code (*Kodeks rodzinny i opiekuńczy*) of 25 February 1964 reads as follows:

### **Article 1 § 1**

“A marriage is established when a man and a woman are both present before the head of a civil status office and make a declaration that they enter with each other into a marital union.”

18. The relevant provision of the Law on Civil Status Records (*Prawo o aktach stanu cywilnego*) of 28 November 2014 provides as follows:

### **Section 81(1)**

“If a marriage is to be established ... the head of the civil status office, on the basis of the declarations made, shall issue a written certificate affirming the absence of impediments to the marriage ...”

## **F. Domestic practice**

### *1. Constitutional Court*

19. The relevant part of the Constitutional Court’s judgment of 9 November 2010 (case no. SK 10/08) reads as follows:

“As regards the allegation of a violation of the principle of protection of the family, it should be stated that Article 18 of the Constitution, in expressing this principle, has the nature of a policy standard (*norma programowa*). This means that no substantive rights can be directly derived from it ... . In judgment SK 21/99 the Constitutional Court stated that Article 18 of the Constitution could not constitute the basis for individual enforcement of claims and could not be the basis for a constitutional complaint (which does not prevent it from being referred to as a benchmark in other proceedings for the review of constitutionality). It is further pointed out in the doctrine of constitutional law that the only normative element that may be taken from Article 18 of the Constitution is the establishment of the principle of the heterosexual nature of marriage ... . However, this aspect remains unrelated to the case at hand.”

### *2. Tenancy (Article 691 of the Civil Code)*

20. The Supreme Court’s (Civil Chamber) resolution of 28 November 2012 (case no. III CZP 65/12) stated as follows:

“[A] person living in cohabitation with the tenant (*osoba pozostająca we wspólnym pożyciu z najemcą*) within the meaning of Article 691 § 1 of the Civil Code is a person who has an emotional, physical and economic bond with the tenant, including a person of the same sex.”

21. The Warsaw Court of Appeal, in a judgment of 26 June 2014 (case no. I ACa 40/14), concluded as follows:

“There are no convincing reasons in the case-law or any sociological or psychological arguments in favour of distinguishing on a legal basis between the effects resulting from heterosexual and homosexual cohabitation (*konkubinat*); on the contrary, the emotional, physical and economic bonds arising from such cohabitation are the same in both cases and can create an equally strong bond.

At present, the concept of cohabitation refers to the permanent common life of two persons, regardless of their sex. Constitutional considerations, that is, the guarantee of equal treatment established in Article 32 of the Constitution of the Republic of Poland and the corresponding prohibition of any discrimination on the grounds of, *inter alia*, sexual orientation, support the recognition that a refusal to provide insurance cover to same-sex persons who are cohabitating constitutes discrimination on grounds of sexual orientation.”

### 3. *Housing benefits*

22. On 10 January 2008 the Gliwice Regional Administrative Court gave a judgment (case no. IV SA/Gl 534/07) in which it dealt with housing benefits. The court held:

“Within the meaning of section 4 of the Act of 21 June 2001 on housing benefits, the circle of persons permanently residing in and running a household with a person applying for a housing allowance... may include persons regardless of the family relationship between them and the applicant, including persons in a *de facto* relationship with the applicant, regardless of their sex.”

### 4. *Taxes*

23. In a case concerning tax liability in relation to a donation between unmarried (opposite-sex) partners living in cohabitation, the Supreme Administrative Court held as follows (judgment of 11 March 2016, case no. II FSK 1682/14):

“It should also be explained that it follows from the case-law of the Supreme Court that the provisions of the Family and Custody Code relating to married persons cannot be applied to cohabiting partners ... . The provisions on matrimonial property regimes cannot be appropriately applied to relations between cohabitants, even when their relationship corresponds in substance to marriage. Such a position, initiated by the resolution of 2 July 1955 ... , still remains valid in the case-law of the Supreme Court ... . A lawfully contracted marriage is a legal institution which is subject to special protection enshrined in the Constitution of the Republic of Poland (Article 18) and which is expressed in, *inter alia*, the special regulation of property relations between spouses. On the other hand, cohabitation is a specific factual state to which the provisions of civil law do not attach specific consequences in terms of property relations. This means that the nature and consequences of the property relationships created in connection with the *de facto* cohabitation of cohabiting spouses should be

assessed on the basis of norms appropriate to the type and content of those relationships. The protection of marriage manifests itself in, *inter alia*, the fact that the legal effects of marriage do not apply to other unions and that the interpretation and application of provisions that would lead to legal equality of marriage and other forms of cohabitation are not allowed.

In view of the constitutional principle of protection of marriage and the lack of grounds for considering the lack of legal regulation of non-marital unions to constitute a loophole in the law, it is inadmissible to apply the provisions of the law concerning marriages (including joint property and division of inheritance), even by way of analogy, to relationships characterised by the existence of personal and property ties other than marriage. This consistent and uniform position has, with the approval of legal commentators, been adopted in the case-law of the Supreme Court with respect to property settlements of persons who have been cohabiting.”

### 5. *Criminal law*

24. The resolution of seven judges of the Supreme Court (Criminal Chamber) of 25 February 2016 (case no. IKZP 20/15) stated as follows:

“The expression ‘person living in cohabitation’ (*osoba pozostająca we wspólnym pożyciu*) in Article 115 § 11 of the Criminal Code describes a person who has an actual relationship with another person in which there are emotional, physical and economic (common household) ties between them ... [and] being of different sexes is not a condition for recognising them as remaining in cohabitation.”

### 6. *Resolutions on “counteracting the LGBT ideology”*

25. On 28 June 2022 the Supreme Administrative Court (case no. III OSK 3746/21) delivered a final ruling in a case initiated by a complaint lodged by the Polish Commissioner for Human Rights (see paragraph 84 below) against a resolution of the Istebna Municipal Council (*Rada Gminy*) concerning “counteracting the LGBT ideology”. The court dismissed appeals lodged by the prosecutor and the intervener *Ordo Iuris* against the judgment of the Gliwice Regional Administrative Court, which had declared that resolution null and void (*stwierdził nieważność*). The Supreme Administrative Court considered that the resolution exceeded the boundaries of freedom of expression of a local government body, holding:

“The Supreme Administrative Court agrees with the assessment set out in the grounds of the contested judgment that the resolution of the Istebna Municipal Council of 2 September 2019, no. X/78/2019, on the subject of counteracting LGBT ideology is an authoritative act. This is evidenced by the passages in which the Council states: ‘we will not agree to the unlawful installation of political correctness officers in schools ...’; ‘we will do everything to prevent those interested in the early sexualisation of Polish children according to the so-called WHO standards from entering the schools’; and ‘we will not allow the exertion of administrative pressure to apply political correctness (sometimes rightly called, simply, “*homopropaganda*”) in selected professions’. The Regional Administrative Court rightly considered that such formulations attested to the authoritative character of the act, as they set directives of action addressed to the executive body and the organisational units subordinate to the municipality. They

constitute guidelines for the application of the law, which is a sufficient basis for considering a resolution to constitute an empowering act ...

A comprehensive analysis of the above position, which has been collectively described under the slogan ‘Municipality of Istebna free of LGBT ideology’, leads to the conclusion that the essence of the message contained in the declaration is a *de facto* negation of equality and anti-discrimination activities in the public space and of the actual freedom of action of persons belonging to the LGBT community ...

The State is a community of all citizens of the Republic of Poland, irrespective of their nationality, gender, social position, religion or political convictions. They must all have the same personal, political and social rights and the same obligations towards the State. No one in the Republic of Poland may be discriminated against for any reason.

It should be borne in mind that Poland is a party to a number of international treaties on human rights, including [the Convention] and the Charter of Fundamental Rights of the European Union, and has also transposed EU directives against discrimination in employment, including on the basis of sexual orientation. Public authorities are therefore legally obliged to protect the rights of Polish citizens, in particular those belonging to different types of minorities. The constitutional principle of respect for binding international law (Article 9 of the Constitution) makes it necessary to fulfil, in good faith, the obligations incumbent on the State as a subject of the international legal order ...”

26. On the same date, 28 June 2022, the Supreme Administrative Court dismissed appeals in three other cases concerning similar resolutions on “counteracting LGBT ideology” issued by the municipalities of Serniki, Osiek and Klwów.

### 7. *Financial disputes*

27. The Białystok Regional Court, in a judgment of 23 February 2007, dealt with the resolution of a financial dispute concerning the division of assets between two same-sex partners after the end of their relationship. It held:

“1. Cohabitation (*konkubinat*) should be understood as a stable, *de facto* personal and material community of two people. Gender is irrelevant in this context.

2. There are no grounds for applying different rules to the settlement of homosexual cohabitation from those applicable to heterosexual cohabitation.”

28. In the same case, following a cassation appeal, the Supreme Court gave judgment on 6 December 2007. It upheld the earlier ruling, holding:

“... the constitutional protection of marriage does not mean that forms of cohabitation other than marriage are prohibited by law. There is also no doubt that property settlements between persons in non-marital unions are permissible and that such persons may claim protection with regard to property relations arising during the existence of such a union.

Polish law does not contain any comprehensive or even fragmentary regulations of non-marital relationships of a personal and property nature and for that reason they are treated as legally indifferent *de facto* unions.

Owing to the fact that the law does not regulate the status of such unions and that it is inadmissible to apply to them the provisions on property relations in respect of married couples, it is necessary to seek grounds for settlement within the civil law. This requires in each case that the circumstances of the case and the specific aspects resulting from the intertwining of personal and property relations formed within the framework of the relationship in question be taken into account. This is precisely the method of settlement – contrary to the unfounded allegations of the appellant – that the Court of Appeal applied.”

The court concluded:

“The property settlement after the cessation of a *de facto* same-sex personal relationship is made on the basis of the provisions of the Civil Code relevant to the content of the relations formed in the relationship in question.”

#### 8. *Change of surname*

29. On 21 October 2015 the Łódź Regional Administrative Court dismissed an application submitted by the second applicant to have her name changed to that of her same-sex partner, the first applicant. It held:

“To accept, as [the applicant] wishes, that the fact that a person remains in a same-sex relationship constitutes a valid reason for changing one’s surname to that of one’s partner is not possible as the law currently stands. A change of the family name determining a person’s descent can, as a rule, only take place upon marriage. Therefore, to apply such a broad interpretation, as sought by the applicant, of the concept of ‘important reasons’ and to consider that one such important reason is being in a stable partnership with another person would be misleading in social contacts and legal dealings as to the type of family ties (in the legal sense) linking the partners. In the case of a relationship between persons of different sexes (heterosexual cohabitation), it would suggest that one is dealing with a marriage, and in the case of same-sex relationships, for example, with siblings. In essence, this would also constitute a circumvention of the law, as it would be a substitute for marriage (as presented by the applicant). The applicant’s lawyer himself admitted that the change of the applicant’s surname was intended to legitimise her relationship with another person and create the impression of a relationship.

To sum up, as the law stands, it follows that the fact of living in cohabitation, whether in a same-sex or a heterosexual relationship, but in a relationship other than a marriage, does not constitute an ‘important reason’ to change the surname of one partner to that of the other partner within the meaning of [the Act on the changing of surnames].”

30. In the same case, following a cassation appeal, on 10 October 2017 the Supreme Administrative Court upheld the Regional Administrative Court’s judgment (case no. II OSK 293/16). The court held that “to consider that a civil partnership – unknown in the Polish legal system – could be among the valid reasons for a person’s change of name violates this legal system”.

## II. EUROPEAN AND INTERNATIONAL LAW AND PRACTICE

31. The most recent relevant comparative and international law material was set out in *Fedotova and Others v. Russia* ([GC], nos. 40792/10 and 2 others, §§ 46, 48-52, 54 and 56-67, 17 January 2023).

32. In its report on Poland, adopted on 20 March 2015 and published on 9 June 2015, the European Commission against Racism and Intolerance (ECRI) recommended that the Polish authorities “draft and submit to Parliament legislation, or amendments to existing legislation, in order to enshrine in Polish law the equality and dignity of LGBT persons in all areas of life”.

33. In its most recent report on Poland, adopted on 27 June 2023 and published on 18 September 2023, ECRI noted as follows:

“32. ECRI recalls that the Polish law does not provide for same-sex marriage or civil partnership. Recognition of same-sex marriages concluded abroad or of children of same-sex couples born abroad remain sensitive issues. ... At the same time, ECRI learned that, due to the lack of recognition of same-sex partnerships, same-sex partners cannot benefit from family reunification and that if a *de facto* partner dies, the surviving partner has no heritage rights or other contextual rights, such as choosing the place for the funeral. ECRI encourages the authorities to address this issue.

33. In the field of healthcare, the Polish authorities explained that in accordance with Article 3(1)(2) of the Act of 6 November 2008 on Patients’ Rights and the Commissioner for Patients’ Rights, the term ‘next of kin’ encompasses a cohabitee or a person indicated by the patient, which means that a same-sex ‘partner’ may be considered next of kin in a healthcare context.

34. That said, one of the most striking setbacks against LGBTI equality in Poland in the last few years was the adoption by more than one hundred municipal or regional councils of so-called anti-LGBTI resolutions. Some of these resolutions have taken the form of ‘Family Charters’. Reportedly, the adoption of such charters was promoted by supporters of the ruling government coalition and some local council members were taken by surprise when the adoption of the charters was put on local council meeting agendas, without any prior consultation.”

34. On 28 June 2023 ECRI adopted its General Policy Recommendation No. 17 on preventing and combating intolerance and discrimination against LGBTI persons (published on 28 September 2023). ECRI made the following recommendations to the governments of the member States under the heading “Policies and Institutional Co-ordination” in relation to private and family life:

“...

16. extend legal recognition and protection to LGBTI people, and ensure that couples, who have formalised their same-sex relationship, have equal access to the same rights and benefits as individuals in legally recognised different-sex relationships, including property, maintenance and inheritance rights. Transgender and intersex people should have the right to form legal relationships in accordance with their legally recognised gender;

17. provide an effective legal framework for the recognition of LGBTI partnerships and other family ties of LGBTI people in cross-border situations; ...”

35. In the “Memorandum on the stigmatisation of LGBTI people in Poland”, issued on 3 December 2020, the Council of Europe Commissioner for Human Rights stated, in so far as relevant:

“The Commissioner notes that current trends in Europe are towards an increasingly hardening consensus in favour of legal recognition for same-sex couples. Indeed, at the time of writing, 30 of the 47 Council of Europe member states provide for such legal recognition in one form or another. Considering that the absence of legal recognition for same-sex couples violates their right to private and family life and that it is a form of discrimination on the ground of sexual orientation, she encourages Poland to grant effective and non-discriminatory legal recognition to same-sex couples in the form of same-sex marriage, civil unions or registered partnerships.”

36. A 2019 Fundamental Rights Agency survey of LGBTI people found that 73% of Polish respondents did not live openly and did not disclose their sexual orientation and gender identity. The survey also found that 50% of Polish LGBTI respondents were in a stable and committed relationship, with 31% of respondents living together with their partner and 10% raising children. Furthermore, the survey found that 68% of LGBTI respondents – the highest percentage in the countries of the European Union by a wide margin – believed that prejudice and intolerance against LGBTI people had increased in Poland over the past five years.

## THE LAW

### I. JOINDER OF THE APPLICATIONS

37. Having regard to the similar subject matter of the applications, the Court finds it appropriate to examine them jointly in a single judgment (Rule 42 § 1 of the Rules of Court).

### II. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

38. The applicants complained of a total lack of recognition of their relationships as couples in Poland, in that it was impossible for them to enter together into any type of legally recognised union. In their view, this amounted to a violation of their right to respect for their private and family life as protected by Article 8 of the Convention, which provides:

#### Article 8

“1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the

country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.”

## **A. Admissibility**

### *1. Applicability of Article 8 of the Convention*

39. The Court notes, firstly, that the Government did not dispute that Article 8 was applicable to the facts of the case. Indeed, the Court has confirmed on several occasions that Article 8 of the Convention was applicable under both its “private life” and “family life” aspects in cases concerning the alleged lack of legal recognition and/or protection for same-sex couples (see *Schalk and Kopf v. Austria*, no. 30141/04, § 94, ECHR 2010; *Oliari and Others v. Italy*, nos. 18766/11 and 36030/11, § 169, 21 July 2015; *Orlandi and Others v. Italy*, nos. 26431/12 and 3 others, § 143, 14 December 2017; *Pajić v. Croatia*, no. 68453/13, § 68, 23 February 2016; *Chapin and Charpentier v. France*, no. 40183/07, § 44, 9 June 2016; and *Taddeucci and McCall v. Italy*, no. 51362/09, § 58, 30 June 2016).

Moreover, the Court has held that the unavailability of a legal regime for recognition and protection of same-sex couples affects both the personal and the social identity of the applicants as homosexual people wishing to have their relationships as couples legitimised and protected by law (see *Fedotova and Others v. Russia* [GC], nos. 40792/10 and 2 others, § 144, 17 January 2023).

40. The Court accordingly concludes that Article 8 of the Convention is applicable in the present case under both its “private life” and “family life” aspects.

### *2. The Government’s preliminary objections*

41. The Government raised two preliminary objections: of non-exhaustion of domestic remedies and lack of significant disadvantage.

#### **(a) Non-exhaustion of domestic remedies**

##### *(i) The parties’ submissions*

42. The Government argued that the applicants had not given the Polish authorities the opportunity to address, or possibly redress, the alleged violations of the Convention. They submitted that all the applicants should have obtained a ruling by the Constitutional Court, since a constitutional complaint constituted an effective remedy capable of challenging the provisions of domestic law. The Government noted that the applicants had lodged constitutional complaints which had been accepted by the Constitutional Court and registered. In the case registered under case no. SK 12/17, pleadings had been received from the Prosecutor General and the *Sejm* of the Republic of Poland. The proceedings have been pending before



the Constitutional Court since 2017 in respect of the first eight applicants and since 2018 in respect of the last two applicants. In accordance with the principle of subsidiarity, the applicants should have first resorted to that measure prior to applying to the Court.

43. In the event of a favourable judgment by the Constitutional Court, all the applicants would have been entitled to reopen the proceedings in their cases and seek compensation under Article 417<sup>1</sup> § 1 of the Civil Code for damage caused by the enactment of unconstitutional laws.

44. The applicants contested the Government's objection. They argued that the Constitutional Court no longer served as an independent and impartial judicial authority and that the proceedings before it could not be considered an effective remedy for the purposes of Article 35 of the Convention. They referred to the Court's case-law, in particular the judgment in *Xero Flor w Polsce sp. z o.o. v. Poland* (no. 4907/18, 7 May 2021).

45. The first eight applicants submitted that their cases would most probably have been examined by a bench of the court which would have included Judge M. Muszyński, who had been unlawfully elected to the Constitutional Court. Their requests to have that judge removed from the bench had been dismissed by the Constitutional Court on 30 October 2018 (see paragraph 10 above). Moreover, the applicants had lodged their constitutional complaints already in 2017 and no decision had been given by the Constitutional Court, which indicated that the remedy in question was no longer effective.

46. The applicants further argued that the Constitutional Court was not impartial, given comments about the LGBT community – which they characterised as hateful – made by K. Pawłowicz, a current judge of that court. She had stated:

“[LGBT persons] are sexually disturbed persons who are simply ill and should be undergoing treatment (*osoby zaburzone seksualnie, chore po prostu, które powinny się leczyć*); [they] represent wickedness ... evil, hatred, the greatest baseness imaginable (*są przedstawicielstwem diabelstwa ... zła, nienawiści, podłości nawiększej, jaką można sobie wyobrazić*). ... LGBT groups encourage punishable and pathological sexual behaviours (*środowiska LGBT nawołują do karalnych i patologicznych zachowań seksualnych*) [and] these pathological communities believe that there is no morality (*te środowiska patologiczne uważają, że nie ma moralności*).”

The applicants asserted that making such unacceptable statements was unworthy of a judge; moreover, the judge in question might be called on to adjudicate in their cases which were pending before the Constitutional Court.

47. The applicants also noted that their constitutional complaints might be rejected if the Constitutional Court considered that the matter had amounted to a “legislative omission” which that court was not empowered to deal with.

*(ii) The Court's assessment*

48. The Court notes, firstly, that all the applicants in the instant case lodged their constitutional complaints in 2017 and 2018. The complaints lodged by the first eight applicants and registered under case no. SK 12/17 have not yet been examined.

49. However, the proceedings concerning the complaints lodged by the last two applicants and registered under case no. SK 9/19 were discontinued on 15 December 2021 (see paragraph 12 above). The Court notes that the parties did not inform it about this ruling of the Constitutional Court and that the Government's objection of non-exhaustion of domestic remedies in respect of all the applications had been made prior to the ruling. The Court will therefore examine the Government's objection on the ground of failure to obtain a final ruling from the Constitutional Court only in respect of the first eight applicants, whose constitutional complaints are still pending.

50. In the decision to discontinue case no. SK 9/19, the Constitutional Court considered that the matter of the impossibility of same-sex partners marrying should be characterised as a legislative omission, the examination of which was outside the competence of the Constitutional Court. The Court notes that the constitutional complaints in the cases of the first eight applicants were phrased in almost identical terms to the complaint in relation to which the proceedings were discontinued with final effect in December 2021. The Court thus finds that there are strong doubts as to the admissibility of the constitutional complaints that are still pending. Moreover, the Government have failed to submit any examples where the Constitutional Court was able to offer redress in cases raising an issue of a similar nature.

51. In addition, the Court has held that the speed of the procedure for remedial action may also be relevant to whether it is practically effective in the particular circumstances of a given case for the purposes of Article 35 § 1 (see *Mikalauskas v. Malta*, no. 4458/10, § 50, 23 July 2013). Bearing in mind the number of years that have already passed since the applicants' constitutional complaints were lodged, the Court considers that such a remedy would be unable to put a swift end to the situation complained of.

52. Lastly, the Court has already established that the whole sequence of recent events in Poland vividly demonstrated that successive judicial reforms were aimed at weakening judicial independence, starting with the grave irregularities in the election of judges of the Constitutional Court in December 2015 (see *Grzęda v. Poland* [GC], no. 43572/18, § 348, 15 March 2022). In another case, the Court held that there had been a violation of Article 6 § 1 as regards the right to a "tribunal established by law" on account of the participation in the proceedings before the Constitutional Court of Judge M.M., whose election it found to have been vitiated by grave irregularities (see *Xero Flor w Polsce sp. z o.o.*, cited above, §§ 4-63).

The Court notes that the same judge was appointed to the panel to deal with the applicants' pending constitutional complaint and their request to

remove Judge M. Muszyński from the panel was dismissed on 30 October 2018 (see paragraph 10 above). The Court thus agrees with the applicants that the effectiveness of their constitutional complaint also has to be seen in conjunction with the general context in which the Constitutional Court had operated since the end of 2015 (see *Advance Pharma sp. z o.o v. Poland*, no. 1469/20, § 319, 3 February 2022).

53. In the light of the foregoing, the Court dismisses the Government’s objection regarding the failure of the first eight applicants to wait for the outcome of their constitutional complaints.

**(b) Lack of significant disadvantage**

54. The Government argued that the applications should be declared inadmissible, as no significant disadvantage had been suffered by the applicants. According to the Government, although the authorities had refused to accept the applicants’ declarations with a view to marrying their same-sex partners, such decisions had not triggered any negative consequences for their lives and had not precluded them from enjoying their rights under Article 8 of the Convention. Should the applicants ever encounter any impediments caused by the lack of legal recognition of their relationship they could have recourse to a variety of legal measures allowing them to arrange their everyday lives.

55. The applicants contested the Government’s objection. They reiterated that same-sex couples in Poland had no access to core rights that were relevant to any couple in a stable relationship. The applicants pointed to a series of clear disadvantages that they had experienced on account of the lack of formal recognition of their unions.

56. The Court finds that the objection of no significant disadvantage is closely linked to the merits of the complaint that the applicants’ Convention rights were breached by the lack of legal recognition of same-sex unions. Accordingly, it joins that objection to the merits.

*3. Conclusion*

57. It follows that the applications are neither manifestly ill-founded nor inadmissible on any other grounds listed in Article 35 of the Convention. They must therefore be declared admissible.

**B. Merits**

*1. The parties’ submissions*

**(a) The applicants**

58. The applicants argued that a European consensus had emerged in Europe since the Court’s judgment in *Schalk and Kopf* (cited above) and that currently the vast majority of Contracting States offered same-sex couples

a right to marry or to enter into some form of registered civil union. The Court had further clarified in *Oliari and Others* (cited above) that the States which still had not provided for any form of legal recognition of stable same-sex unions were obliged to take active steps to eliminate this discrimination. At present, therefore, member States should be considered under a legal obligation to grant some sort of recognition to same-sex couples. The Polish legal framework still did not offer any legal recognition and this could no longer be perceived as an acceptable choice under the Convention.

59. The applicants asserted that they had suffered a multitude of disadvantages on account of the lack of any proper recognition of their relationship. In the field of taxation, they were not covered by an exemption from taxes on inheritance and donations which was enjoyed by married spouses. Same-sex partners did not enjoy other rights which were granted to married couples, such as statutory inheritance, the right to submit a joint tax declaration and the right to be granted maintenance payments in the event of a divorce. Same-sex couples could not opt for the communal marital assets regime, which offered fiscal advantages. In the field of social rights, same-sex partners did not enjoy benefits and payments that could be claimed by married partners, for instance in the event of the death of a partner. In all those circumstances the relevant rights and privileges were explicitly reserved for married spouses and other close family members. In the field of family law, same-sex partners could not adopt a child of one partner, even if they were raising the child together. The applicants had been directly and concretely affected by the obstacles mentioned above, which had practical and measurable consequences for their lives. Some of the applicants had taken mortgages together and were raising children, while fearing that in the event of the death of one of them, their children could be removed from the family and placed in public care.

60. The applicants further argued that non-heterosexual persons were members of Polish society and the relationships they created were undeniable social facts. Their number in Poland was estimated at four million. Those persons should have the rights to respect for their private and family life and to make decisions in respect of their personal life, which should be supported by the State in the fulfilment of its positive obligations under the Convention. The Government's arguments relying on the protection of the public interest and public morals (see paragraph 68 below) should be rejected as arbitrary, unjustified and unsubstantiated. It was difficult to see any reasons why public interest and morals had been offended by their wish to legally formalise their relationship. On the contrary, the recognition of any relationship reinforced the stability of human relations in a society, safeguarded the partners and protected their rights.

61. The applicants argued that granting legal protection and recognition of stable and committed same-sex relationships would not interfere with the rights of other persons or the protection of the morals of members of society.

Nor could the need to protect the “traditional model of a family,” as advanced by the Government, be considered a legitimate argument for the failure to recognise same-sex unions. The applicants emphasised that neither the Constitution nor any laws prohibited the legal recognition of same-sex couples in Poland. The failure to regulate such recognition, leaving same-sex couples in a legal limbo, should be seen as unacceptable.

62. The applicants submitted that Polish society in general supported the introduction of laws regulating the recognition of same-sex relationships. According to the available statistical data, support for same-sex relationships was growing and the majority of Poles were currently in favour of same-sex unions and the rights of LGBT persons in general. For instance, an Ipsos poll from 2017 showed that 52% of Poles were in favour of same-sex partnerships. Two years later, the same pollster had noted a 4% increase, to 56% of respondents supporting same-sex partnerships and almost 41% declaring support for same-sex marriage. The applicants argued that publicly available data clearly contradicted the Government’s assertion that there had been no development in Poles’ support for LGBT rights which would require the introduction of amendments to domestic law. Also, research by the NGO Love Does Not Exclude Association in 2015 showed that more than 50% of Poles supported legal regulations allowing the granting of rights to same-sex couples in respect of receiving information about a partner in hospital (64% in favour), deciding on the burial of a partner (62% in favour), joint tax declarations (56% in favour) and survivor’s pensions (54% in favour). Polls and social research clearly indicated that Poles were continuously and increasingly in favour of granting rights to LGBT persons and institutionalising their unions. Moreover, formalising such unions could accelerate this process further, as had been the case in Malta, where, after same-sex civil unions had been introduced, support for same-sex marriage had risen from 18% to 65%. The applicants further submitted that the legal recognition of same-sex relationships would serve an important social need for legal inclusion of same-sex couples in a positive-law system, safeguarding their basic rights and freedoms.

63. In addition, the case-law of the Polish courts indicated their recognition of, in so far as possible within the limits of domestic law, the existence of same-sex relationships. The rulings of the domestic courts in support of same-sex couples had been possible on account of the wording of some of the relevant statutes which allowed recognition of “a person remaining in cohabitation”. However, this protection could be applied only in limited and exceptional circumstances. This showed that there was a pressing social need for the introduction of legal recognition of same-sex relationships. The applicants contended that there was no legal obstacle to introducing legal recognition of same-sex relationships in the domestic law.

64. The applicants further asserted that the authorities’ unwillingness to introduce legal recognition and protection of stable and committed

relationships between same-sex partners had recently evolved into open hostility towards LGBT persons.

65. With respect to the Government's arguments that the applicants' *de facto* unions could be regulated by private contractual agreements, the applicants contended that such agreements were of limited scope and lacked guarantees of effectiveness and enforcement, especially in exceptional and urgent circumstances.

66. The applicants submitted that the Government could not rely on the State's margin of appreciation simply because the case concerned the sphere of moral and ethical judgments. The applicants emphasised that the case concerned only the possibility of protecting stable and committed same-sex relationships by granting them legal recognition in law and basic legal protection. Those issues were of a serious and systemic nature. The Polish authorities' continual refusal to formally recognise their stable and committed relationships amounted to a breach of the applicants' right to respect for their private and family life protected by Article 8 § 1 of the Convention.

**(b) The Government**

67. The Government asserted, firstly, that Polish law and legal doctrine maintained a traditional understanding of marriage as a union of a man and a woman. This was in accordance with Articles 8 and 12 of the Convention, as the Court's case-law had clearly left the question of whether to allow the marriage of two persons of the same sex to the State's appreciation.

68. The domestic legal system therefore provided legal protection only to marriage as the union of a man and a woman, whereas "civil partnerships of same-sex or opposite-sex couples were not recognised under domestic law". This approach protecting the institutions of marriage and family in their traditional sense was supported in the Constitution, in particular by Article 18, and in the case-law of the Constitutional Court. In consequence, the authorities' refusal to accept the applicants' declaration with a view to marrying their same-sex partners had been in accordance with the law. The refusal had served the legitimate aim of protecting morals and the rights of others – the vast majority of Poles supporting the heterosexual concept of marriage – as well as safeguarding the traditional model of the family.

69. In the Government's opinion, there were currently no legally binding obligations under the Convention requiring a State Party to grant legal recognition to same-sex relationships. Similarly, no such obligations stemmed from the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights or regional human rights instruments. The Charter of Fundamental Rights of the European Union, under Article 9, provided that the right to marry and to found a family was to be guaranteed in accordance with the national laws governing the exercise of these rights.

70. The Government emphasised that an evolutive interpretation of the Convention should not result in deriving from the Convention or its Protocols

rights that had not been included therein at the outset (they referred to *Johnston and Others v. Ireland*, 18 December 1986, § 57, Series A no. 112). Such an evolutive approach appeared to indicate that the most significant factor for the Court was that many other States had decided to go beyond the minimum benchmark originally set out in the Convention and had extended the level of protection. The Government acknowledged that the Court's approach to legal recognition of same-sex relationships had evolved over the last years. However, an emerging consensus towards support for same-sex unions and a growing tendency in a number of States to recognise *de facto*, stable relationships between same-sex partners could not constitute a source of international obligations for other States. The Government strongly objected to the approach that if many States decided to go beyond the minimum benchmark originally set in the Convention, that higher standard should automatically be applied to all Contracting Parties, affecting the scope of their international obligations.

71. The Government asserted that on the basis of the Court's well-established case-law on the implementation of their positive obligations under Article 8 of the Convention, States enjoyed a certain margin of appreciation. They contended that it was inconsistent that this margin would be wide when it came to granting same-sex couples the right to marry, whereas the margin of appreciation in granting such couples legal recognition in the form of a civil union – a right not even enshrined in the Convention – had been systematically reduced by the Court.

72. The Government further argued that there had been no developments in Polish society or changes in the perception of social and civil-status issues that would require the introduction of amendments in this area of law. It could not therefore be argued that there was discordance between social reality and the law in Poland. The Government relied on polls carried out in 2019 showing that in Poland the vast majority of the population did not support same-sex marriage or the legal recognition of same-sex partnerships. According to the Government, only 29% of the respondents supported same-sex marriage and 35% supported same-sex partnerships. A large majority of Poles were against amending the laws in this respect and the number of people in support of same-sex unions had even slightly decreased since 2017. The Government submitted that, at the same time, the majority of Poles were “expressing tolerance and acceptance towards their countrymen of non-heterosexual orientation”.

73. The Government also asserted that the applicants had failed to show that the lack of recognition of their relationships had affected their rights protected by the Convention. The applicants had not been excluded from the protection of Polish law and had been entitled to resort to various legal means in order to organise their lives and secure their legal interests on an equal basis with other persons. In particular, they could grant each other a power of attorney to facilitate arrangements in a broad spectrum of circumstances

under the civil law. Couples who were not legally recognised could sign agreements, be granted access to medical files and leave a will regulating inheritance matters. Under criminal law, cohabitants had a right to refrain from testifying against each other. The applicants did not find themselves in a legal vacuum and had not suffered any disadvantage on account of the lack of formal recognition of their relationships.

74. The Government concluded by stating that the situation in Poland differed substantially from that in Italy and that in the cases under consideration, the Court should not reach the same conclusions as in *Oliari and Others* (cited above). In Poland, the lack of recognition of same-sex relationships stemmed from the Constitution and from the traditional concept of family which constituted Poland's social and legal heritage and enjoyed the support of a vast majority of Polish society. Contrary to the applicants' submissions and the situation in *Oliari and Others* (cited above), the law and the case-law of the domestic courts did not permit the introduction of any modifications in this area, nor were there any indications of such need. The Government submitted that there was "coherence of the administrative and legal practices within the domestic system in cases relating either to conclusion of marriage by same-sex couples in Poland or registering marriage certificates concluded by such couples abroad". The Government contended that in accordance with Polish law, it was not permissible to apply the norms of family law relating to married persons to relations other than marriage (citing the judgment of the Supreme Administrative Court referred to in paragraph 23 above). The Government thus invited the Court not to rush to substitute its own judgment in place of that of the Polish authorities, who were best placed to assess and respond to the needs of Polish society.

According to the Government, there had therefore been no violation of Article 8 of the Convention with regard to the applicants' right to respect for their private and family life in so far as they had not had any possibility of having their relationships recognised by law.

**(c) Third-party observations**

*(i) The Council of Europe Commissioner for Human Rights*

75. The current Commissioner for Human Rights and her predecessor examined the issue of the recognition of same-sex partnerships in Europe. They repeatedly called on the authorities of the member States to introduce legal protection for same-sex couples, at a minimum in the form of a civil union or registered partnership capable of providing for the needs of couples in a stable and committed relationship. As had been stated by her predecessor, "providing access to legal recognition to same-sex couples boils down to



a simple concept: equality before the law”.<sup>1</sup> The Commissioner emphasised that whether they enjoyed legal recognition by the State or not, same-sex couples and their families existed and formed families which might or might not include children.

76. Without the possibility of legal recognition, same-sex couples were denied rights that were taken for granted by different-sex partners or spouses and were left to face serious problems in their everyday lives. For instance, they could be denied access to their partner’s health insurance and other benefits as well as to favourable rules with respect to taxation. They would not be entitled to take leave to care for their partner or their partner’s child in the event of sickness or disability and they did not enjoy the same rights and responsibilities in respect of the children in their care. Partners might also be unable to make medical decisions for their partner in the event of sickness or an accident or even be denied visiting rights in medical institutions. Not being recognised as next-of-kin meant that a person might not be entitled to a survivor’s pension or to continue living in their common home after the partner’s death. Same-sex couples might lack access to inheritance rights, even after a lifetime of acquiring and sharing property together. In the absence of legal recognition, there was no framework for regulating the maintenance rights and duties of the partners towards each other or their children in the event of separation. Same-sex couples could be restricted in their freedom of movement across Europe and beyond, as they might not be able to obtain residency rights or family reunification for all family members in another country.

77. The Commissioner stressed that access to legal recognition of same-sex partnerships was not a mere technicality or a matter of principle only. As outlined above, it concerned the human rights and dignity of real persons who experienced hardship in their daily lives because of the failure of the State to legally recognise them as a couple and protect them.

78. The Commissioner submitted that the movement towards legal recognition of same-sex couples observed by the Court in *Oliari and Others* (cited above) had continued to develop after that judgment. In a truly remarkable evolution, twenty-four Council of Europe member States currently provided for some form of registered partnership in addition to, or instead of, civil marriage. While the consensus on legal recognition in Europe was unambiguously increasing, some exceptions remained. Beyond Europe, a similar trend towards the recognition of same-sex partnerships could be observed. A report showed that 71% of member States of the Organisation for Economic Co-operation and Development (OECD) allowed same-sex marriage, whereas none had in 1999, and 83% of OECD countries provided for some form of legal recognition of same-sex partners.

---

<sup>1</sup> Human Rights Comment entitled “Access to registered same-sex partnerships; it’s a question of equality”, published in 2017 by the Council of Europe Commissioner for Human Rights.

*(ii) Associazione Radicale Centri Diritti*

79. The third-party intervener submitted that, given the growing consensus in favour of recognition of same-sex unions in Europe, the margin of appreciation that could be relied on by the member States was narrower.

80. The intervener also emphasised the importance of ensuring that the Court's ruling was properly implemented in the national legal order so that the rights guaranteed by the Convention did not remain theoretical and illusory but practical and effective, favourably affecting the lives of millions of people.

*(iii) The Commissioner for Human Rights of the Republic of Poland*

81. The Commissioner considered it beyond any dispute that there was a consensus among democratic societies on the acknowledgment and acceptance of the rights of non-heterosexual persons to live in same-sex relationships. Thirty member States of the Council of Europe allowed same-sex couples to legalise their relationships and sixteen had introduced marriage equality. The Commissioner cited the Court's case-law to the effect that in cases concerning the protection of the right to respect for the private and family life of persons living in committed same-sex relationships, the State's margin of appreciation should be narrow.

82. Polish law, however, failed to provide for any form of legal recognition of same-sex relationships. Since 2003 some nine bills had been submitted to Parliament but none of them had been discussed or adopted. Under the Family and Custody Code, marriage was limited to different-sex couples only; same-sex couples had no means of having their relationships legally recognised and protected by the State. This, according to the Commissioner, amounted to a clear breach of the positive obligations under Article 8 of the Convention to guarantee the protection of the private and family life of millions of Polish nationals.

83. The Commissioner noted that there was a legal debate on whether the current wording of Article 18 of the Constitution could be interpreted as allowing marriage between same-sex partners. What remained beyond discussion, however, was that the Constitution in its current wording was not an obstacle to formalising same-sex relationships.

84. Over the previous two years the situation of non-heterosexual persons had become a matter of heated public debate in Poland, instigated primarily by high-ranking politicians and public bodies targeting that social group. Moreover, several local governments had passed resolutions "counteracting LGBT ideology" on the basis of a belief that the LGBTI equality movement constituted a threat to Polish values and the traditional family model. The Commissioner had challenged some of those resolutions and four of them had been struck down by the administrative courts. In a judgment given by the Warsaw Regional Administrative Court on 15 July 2020, that court had noted

that the acceptance of a different family model was an element of Polish culture and tradition (for the final rulings in those cases, see paragraphs 25 and 26 above). Despite the homophobic attitudes of some public figures and part of society, the majority of Poles were in favour of granting same-sex couples the right to enter into civil partnerships (an Ipsos survey from February 2019 indicated that the figure was 56% and a Kantar survey from November 2019 indicated that it was 57%). According to a Eurobarometer study carried out in 2017, 45% of Poles considered that same-sex marriage should be allowed across all of Europe, an increase of 17% in two years. The Commissioner concluded that this showed high and growing support for legal recognition of same-sex relationships in Poland.

85. The Commissioner emphasised that different-sex couples could decide to marry in order to enjoy a range of rights and privileges unavailable to those living in informal relationships. Same-sex couples were, however, deprived of such options and had no means of otherwise having their relationship recognised. This clearly amounted to indirect discrimination on grounds of sexual orientation. The Commissioner referred to a series of rights granted only to married couples: joint tax returns, more favourable taxation on inheritance and donation, survivor pensions, the right to adopt (joint adoption or second-parent adoption) and the right to decide on the place of burial of a deceased spouse. In some limited circumstances, the domestic courts had recognised same-sex partners as cohabitants (interpreted by the Supreme Court as persons remaining in a factual relationship in which emotional, physical and economic ties existed simultaneously, irrespective of their gender).

86. The Commissioner submitted that civil partnerships for same-sex couples not only concerned tax reductions and other benefits, but would have far-reaching consequences related to the State's recognition of the relationship of two individuals and granting them the necessary protection.

*(iv) Polish Society of Anti-Discrimination Law on behalf of Campaign Against Homophobia and Love Does Not Exclude Association*

87. The third-party intervener submitted that same-sex couples enjoyed very few rights and were obliged to adapt as much as possible. For instance, they could give each other authorisations and powers of attorney securing the right to receive medical information and access to medical records. Such authorisation could cover other fields and other practical aspects of life, such as the right to collect post and handle tax or other matters with public administration bodies.

88. Same-sex couples could only inherit from each other if they had been indicated in a will, whereas married couples could inherit from each other by law. Inheritance between the members of a same-sex couple was subject to inheritance tax at the highest rate, as they were not considered close family, whereas married couples and other close family members were exempted

from any inheritance tax. A similar situation applied in relation to a donation within a close family circle, which was exempted from any tax; this exemption did not apply to same-sex couples. The right to make decisions on burial and cremation was given to a large number of persons in the extended family; however, it was not given to same-sex partners. Same-sex partners had practically no rights in the field of social welfare: only spouses could include each other in health insurance schemes, inherit the right to a disability pension or benefit, or receive a care benefit. If same-sex partners wished to change their name, they had to institute a separate set of proceedings and prove “important reasons” for the change and their application would not always be successful.

89. The most severe consequences of the lack of recognition of same-sex relationships affected the children born into those families. Polish law only recognised two parents of opposite sexes: a mother who gave birth and a father – a man. It was possible to register a child without indicating the name of the father and thus the parental rights would be vested solely with the mother; however, the reverse – registering a child indicating only the name of the father – was not possible. The same-sex partner other than the biological one had no possibility of obtaining parental rights over a child raised jointly within the couple; he or she could not adopt the child of his or her same-sex partner. Only spouses could adopt a child of the other spouse. In the event of the death of the partner who was the child’s biological parent, it was for a family court to decide on the custody of the children, with no guarantee that custody would be given to the partner who had jointly raised the child.

(v) *Professor Robert Wintemute on behalf of Fédération Internationale pour les Droits Humains (FIDH); the European Region of the International Lesbian, Gay, Bisexual, Trans and Intersex Association (ILGA-Europe); the Network of European LGBTIQ\* Families Associations (NELFA); and the European Commission on Sexual Orientation Law (ECSOL)*

90. The third-party intervener submitted that there was a growing consensus in Europe supporting an obligation to provide legal recognition to same-sex couples. The intervener referred to rulings by Supreme Courts in various US States, South Africa’s Supreme Court and Constitutional Court, Brazil’s Supreme Court of Justice, the Taiwan Constitutional Court and the Inter-American Court of Human Rights on the matter of equal access of same-sex couples to marriage and civil unions.

91. The intervener emphasised that the Council of Europe and European Union institutions had been calling for legal recognition of same-sex couples since at least 1994. The Court should therefore apply its reasoning, expressed in particular in *Oliari and Others* (cited above), to all member States of the Council of Europe and provide clear guidance regarding the core rights

relevant to couples in stable and committed relationships which should be included in the “specific legal framework”.

*(vi) Institute of Psychology, Polish Academy of Sciences*

92. The third-party intervener submitted that the current Polish government was openly xenophobic and homophobic and had officially condemned “LGBT ideology”. Recently, acts of homophobic violence, both in private and public spaces, had increased and become more widespread and dangerous. In view of the fact that same-sex couples had no possibility of formalising their union, they had sought various arrangements to reduce the difficulties. According to a study by the intervener, partners authorised each other to claim insurance benefits after their death (25% of respondents), formally allowed the partner to access his or her medical file and indicated the partner in his or her will (16% of respondents). The vast majority of respondents wanted to enter into a formal union, if that possibility were to be open to them (75% of respondents). Among the reasons for this were practical arrangements concerning joint taxation, the extension of health insurance to cover the partner, the securing of one partner in the event of the other’s death and the securing of the future of the children in the event of the biological parent’s death. The vast majority of respondents had indicated the importance of showing proof of their love and emotional engagement and demonstrating the importance of their relationship to their families and in their social environment (over 76% of respondents).

93. The intervener stated that, at present, same-sex couples faced a multitude of difficult and dramatic problems caused by the lack of formal recognition of their unions. Among the problems most often cited were gaining access to information concerning the health of a partner, having the right to visit him or her in a hospital and taking decisions concerning the partner’s health. Disadvantages in the regulations concerning joint property also gave rise to hardship for same-sex couples. A lack of formal recognition of their unions created difficulties in the area of work relations, whether they were employees or running their own businesses, whereas advantageous regulations existed for spouses.

94. The intervener further submitted that it was clear from the study that the lack of recognition had a profoundly negative impact on LGBT+ families in Poland and the professionals who worked with them. It paralysed and limited any social change towards a more inclusive society in which they could be treated as equal citizens.

*(vii) Ordo Iuris Institute for Legal Culture*

95. The third-party intervener submitted that, even though, according to the Court’s case-law, it could be seen that the legal recognition of same-sex unions constituted one of the elements of the right to respect for an

individual's private and family life, States had a certain margin of appreciation in this respect – one that depended on the social, cultural and moral context within the given State, ethical controversies relating to the issue at hand and the prevailing community interest. According to the Court, Contracting States had a legitimate interest in ensuring that their legislative prerogatives were respected and that the choices of democratically elected governments were therefore not circumvented.

96. The intervener further submitted that with regard to same-sex relationships, the case-law of the Constitutional Court, the Supreme Court and the Supreme Administrative Court showed a high degree of coherence in administrative and legal practice within the Polish legal system. The Polish courts, unlike the Italian courts, had not paved the way towards institutionalising same-sex unions (in contrast to the situation in *Oliari and Others*, cited above). At the same time, people living in informal relationships (whether in same-sex or opposite-sex relationships) could use many legal instruments which would allow them to take care of their private interests and avail themselves of the State's assistance.

## 2. The Court's assessment

### (a) General principles

97. The general principles concerning member States' positive obligations in cases similar to the present one were set out most recently in the Grand Chamber judgment in *Fedotova and Others* (cited above, §§ 152-65).

98. Having regard to its case-law as consolidated by a clear ongoing trend within the member States of the Council of Europe, the Court has confirmed that in accordance with their positive obligations under Article 8 of the Convention, the member States are required to provide a legal framework allowing same-sex couples to be granted adequate recognition and protection of their relationship (*ibid.*, § 178).

99. However, Articles 8, 12 and 14 of the Convention have to date not been interpreted as imposing a positive obligation on the States Parties to make marriage available to same-sex couples (*ibid.*, § 165; see also *Schalk and Kopf*, cited above, §§ 63 and 101; *Chapin and Charpentier*, cited above, §§ 38-39; and *Orlandi and Others*, cited above, § 192).

100. As regards the margin of appreciation available to the States Parties in implementing the above-mentioned positive obligation, the Court has considered that, given that particularly important facets of the personal and social identity of persons of the same sex are at stake and that, in addition, a clear ongoing trend towards legal recognition of same-sex couples has been observed within the Council of Europe member States, the States Parties' margin of appreciation is significantly reduced when it comes to affording

same-sex couples the possibility of legal recognition and protection (see *Fedotova and Others*, cited above, § 187).

101. Nevertheless, as is already apparent from the Court’s case-law, the 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, which does not necessarily have to take the form of marriage, the States having the “choice of the means” to be used in discharging their positive obligations inherent in Article 8 of the Convention. The discretion afforded to States in this respect relates both to the form of recognition and to the content of protection to be granted to same-sex couples (*ibid.*, § 188).

102. However, in that context it is also to be reiterated that since the Convention is intended to guarantee not rights that are theoretical or illusory but rights that are practical and effective, it is important that the protection afforded by States Parties to same-sex couples should be adequate. In this connection, the Court has already had occasion to refer in certain judgments to aspects, in particular 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 a legal framework available to same-sex couples (*ibid.* § 190, with further references).

**(b) Application of those principles to the present case**

103. The Court observes at the outset that the Government contested the existence of a positive obligation under Article 8 of the Convention to provide legal recognition to same-sex couples and invited the Court to afford them a wide margin of appreciation in the area given the alleged lack of social and legislative developments in Poland (see paragraphs 71 and 74 above).

As set out in the principles cited above, the Court reiterates that Article 8 of the Convention requires member States to ensure legal recognition and protection of same-sex couples by putting in place a “specific legal framework” (see paragraph 98 above; see also *Oliari and Others*, § 185, and *Orlandi and Others*, § 210, both cited above).

104. The Court will now ascertain whether the respondent State has satisfied this positive obligation to provide a legal framework allowing the applicants to be granted adequate recognition and protection of their relationships. To that end, it must examine whether, having regard to the margin of appreciation afforded to it, the respondent State struck a fair balance between the prevailing interests it relied on and the interests claimed by the applicants (see *Fedotova and Others*, cited above, § 191, and *Buhuceanu and Others v. Romania*, nos. 20081/19 and 20 others, § 75, 23 May 2023).

105. The Court notes that it has not been disputed between the parties that Polish law provides for only one form of family union – an opposite-sex marriage – and does not provide for any form of legal recognition for same-sex couples. The Government agreed that in Poland there existed no legal

recognition of the applicants' same-sex relationship (see paragraph 68 above).

106. The applicants in the instant case, who form five same-sex couples, made declarations before the domestic civil status offices with a view to marrying their same-sex partners, but the authorities refused to accept those declarations as they were contrary to domestic law.

However, the applicants did not complain to the Court that it was impossible for them to get married in Poland. The Court is therefore not called upon to examine this issue (for legal principles relating to same-sex marriage see paragraph 99 above).

107. The present case concerns the absence in Polish law of any possibility of legal recognition and protection of the relationship of same-sex couples.

(i) *The applicants' individual interests*

108. The Court notes the applicants' submission that because their partnerships had not been formally acknowledged, same-sex couples lived in a legal limbo, were deprived of any legal protection and faced substantial difficulties in their daily lives (see paragraphs 59 and 61 above). They relied on the fact that same-sex partners could not inherit from each other unless expressly indicated in a will or be awarded maintenance in the event of separation or death. They were prevented from taking leave to care for their partner in the event that the partner fell ill and were excluded from receiving information about the partner's health or taking decisions concerning hospital treatment for the partner. The applicants were treated as unrelated in the field of taxation and could not benefit from an exemption from donation and inheritance taxes granted to next-of-kin or the right to submit a joint tax declaration. The applicants' submissions were also supported by information provided by the Council of Europe Commissioner for Human Rights (see paragraph 76 above) and other third-party interveners (see, in particular, paragraphs 85, 93 and 88 above).

109. The applicants and certain of the third-party interveners also emphasised that legal recognition concerned human rights and dignity and had value for same-sex partners beyond tax relief and facilitating everyday life (see paragraphs 60, 77 and 86 above). Indeed, the Court has accepted that such recognition forms part of the development of both personal and social identity of partners and has held that partnerships constituting an officially recognised alternative to marriage have an intrinsic value for same-sex couples irrespective of the legal effects, however narrow or extensive, that they produce (see paragraph 39 above; see also *Vallianatos and Others v. Greece* [GC], nos. 29381/09 and 32684/09, § 81, ECHR 2013 (extracts)). Accordingly, official recognition of same-sex couples confers an existence and a legitimacy on them *vis-à-vis* the outside world (see *Oliari and Others*, cited above, § 174).



110. Beyond the essential need for official recognition, same-sex couples, like different-sex couples, have “basic needs” for protection. The Court has held on a number of occasions that same-sex couples are in a relevantly similar situation to different-sex couples as regards their need for formal acknowledgment and protection of their relationship (see, in particular, *Schalk and Kopf*, § 99; *Vallianatos and Others*, cited above, §§ 78 and 81; *Oliari and Others*, cited above, § 165; and *Maymulakhin and Markiv v. Ukraine*, no. 75135/14, § 94, 1 September 2023).

111. The Government agreed that Polish law did not recognise the applicants’ same-sex relationships; however, they asserted that this had not constituted any disadvantage for the applicants, as they could enjoy all the rights under Article 8 of the Convention. In particular, the Government indicated that same-sex partners could grant each other power of attorney, indicate the partners as their heirs in their wills and authorise their access to medical files (see paragraph 73 above). The Government further argued that the domestic courts were bound by the constitutional protection afforded to marriage and had not signalled any need for an amendment to the law, contrary to the situation in Italy (compare and contrast *Oliari and Others*, cited above). Moreover, domestic law and case-law did not allow the extension to cohabiting partners of the regulations pertaining to marriage (see paragraphs 23 and 74 above).

112. The Court takes note of the domestic case-law confirming that the same rules were to be applied to the settlement of financial disputes between cohabiting couples regardless of their gender (see paragraphs 27 and 28 above). The domestic case-law also allowed same-sex partners to enter into tenancy agreements after the death of a partner by considering them to have cohabitated with the tenant and to obtain housing benefits (see paragraphs 20-22 above; compare with the earlier situation described in *Kozak v. Poland*, no. 13102/02, 2 March 2010). In the field of criminal law, the definition of the closest person to the accused, as interpreted by the Supreme Court on 25 February 2016, allowed same-sex partners to refuse to testify against each other (see paragraph 24 above).

113. The Government submitted that the rights that the applicants allegedly could not enjoy because of the lack of legal recognition of their same-sex relationships could be effectively exercised through private contractual agreements. The Court has previously rejected such arguments, finding that such private agreements fail to provide for some basic needs which are fundamental to the regulation of a relationship between a couple in a stable and committed relationship, such as, *inter alia*, the mutual rights and obligations they have towards each other, including moral and material support, maintenance obligations and inheritance rights (see *Oliari and Others*, cited above, § 169). Those findings apply in the instant case, since in Poland the applicants can regulate important aspects of life, such as those concerning property, maintenance and inheritance, only as private

individuals entering into contracts under the ordinary law (see *Fedotova and Others*, cited above, § 203).

114. The Court therefore concludes that in the absence of official recognition, and in spite of some positive developments in the case-law in this field, same-sex partners are unable to regulate fundamental aspects of their life, such as those concerning property, maintenance, taxation, and inheritance, as an officially recognised couple (see, *Fedotova and Others*, cited above, § 190). In the majority of situations, they are not able to rely on the existence of their relationship in dealings with the judicial or administrative authorities. In accordance with the principle of subsidiarity underpinning the Convention, it is above all for the Contracting States to decide on the measures necessary to secure the Convention rights to everyone within their “jurisdiction”, and it is not for the Court itself to determine the legal regime to be accorded to same-sex couples (see, *Fedotova and Others*, cited above, § 189).

115. In the light of the foregoing, the Court concludes that the Polish legal framework, as applied to the applicants, cannot be said to provide for the core needs of recognition and protection of same-sex couples in a stable and committed relationship (see *Fedotova and Others*, cited above, § 204).

(ii) *Public-interest grounds put forward by the respondent State*

116. The Court will henceforth examine the reasons put forward by the respondent State to justify the lack of any legal recognition and protection for same-sex couples. It notes that they do not differ substantially from those relied on by the Russian Federation and examined by the Court in *Fedotova and Others* (cited above).

117. The Government argued, firstly, that the majority of Poles disapproved of same-sex unions but showed tolerance towards homosexual people (see paragraph 72 above). The applicants disagreed and relied on different statistics showing growing support among Poles for same-sex partnerships (see paragraph 62 above). The Polish Commissioner for Human Rights cited Ipsos and Kantar studies from 2019 which indicated support for same-sex unions at 56% and 57% respectively (see paragraph 84 above). The Court also takes 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 and other public persons. The applicants quoted statements made by a current judge of the Constitutional Court (see paragraph 46 above). A 2019 survey by the Fundamental Rights Agency showed that the Polish LGBTI community believed to the greatest extent among all European Union countries that prejudice and intolerance against them had increased over the past five years (see paragraph 36 above). The Polish Commissioner for Human Rights has intervened in several cases before the domestic courts,

challenging the resolutions “counteracting LGBT ideology” passed by some local government bodies in Poland (see paragraphs 33 and 84 above).

118. It is important to note that the Court has consistently declined to endorse policies and decisions which embodied a predisposed bias on the part of a heterosexual majority against a homosexual minority. It has also held, under Article 14 of the Convention, 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 (see *Fedotova and Others*, cited above, § 217, with further references). The Court has also held that the allegedly negative, or even hostile, attitude on the part of the heterosexual majority cannot be set against the applicants’ interest in having their respective relationships adequately recognised and protected by law (*ibid.*, § 219). It therefore rejects those arguments in the instant case.

119. In respect of the Government’s arguments that the traditional concept of marriage as a union of a man and a woman constituted Poland’s social and legal heritage, the Court notes that the present case does not concern same-sex marriage (see paragraphs 67, 74 and 106 above). The Government relied heavily on the argument that the constitutionally protected definition of family in its traditional sense was limited to opposite-sex marriage. They also alleged that, in contrast to the situation in *Oliari and Others* (cited above), the question of whether same-sex couples should benefit from legal recognition had, thus far, not been answered favourably by the judicial authorities in Poland (see paragraph 74 above).

120. The Court has accepted that the protection of the family in the traditional sense is, in principle, a legitimate reason which might justify a difference in treatment on grounds of sexual orientation (see *Kozak*, cited above, § 98). However, that aim is rather abstract and a broad variety of concrete measures may be used to implement it. Moreover, the concept of family is necessarily evolutive, as is shown by the changes it has undergone since the Convention was adopted (see *Fedotova and Others*, cited above, §§ 207-08). The Court has already held that there is 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, the recognition of same-sex couples does not in any way prevent different-sex couples from marrying or founding a family corresponding to their conception of that term. More broadly, securing rights to same-sex couples does not in itself entail weakening the rights secured to other people or other couples (see *Fedotova and Others*, cited above, § 212, and *Maymulakhin and Markiv*, cited above, § 75). These arguments therefore cannot justify the absence of any form of legal recognition and protection for same-sex couples in the present case.

121. Lastly, as regards the Government's argument that a wide margin of appreciation was available to the State, the Court reiterates that the States' margin of appreciation is significantly reduced when it comes to affording same-sex couples the possibility of legal recognition and protection (see paragraph 100 above). In this context it notes that the instant case is not concerned with certain specific "supplementary" (as opposed to core) rights which may or may not arise from a same-sex union and which may be subject to fierce controversy in the light of their sensitive dimension (see *Oliari and Others*, cited above, § 177). Indeed, the instant case concerns solely the general need for legal recognition and the core protection of the applicants as same-sex couples.

The Court has also held that the States have a more extensive margin of appreciation in determining the exact nature of the legal regime to be made available to same-sex couples (see paragraph 101 above). However, as stated above, it is important that the protection afforded by member States to same-sex couples should be adequate (see paragraphs 101-102 above). It is in the latter context that Poland's social and cultural background may be taken into account.

122. Consequently, the Court finds that none of the public-interest grounds put forward by the Government prevail over the applicants' interest in having their respective relationships adequately recognised and protected by law.

*(iii) Conclusion*

123. In the light of the facts of the present case, 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* (cited above), the Court considers that the respondent State has overstepped its margin of appreciation and has failed to comply with its positive obligation to ensure that the applicants had a specific legal framework providing for the recognition and protection of their same-sex unions. That failure, as already noted above (see paragraph 114 above), resulted in the applicants' inability to regulate fundamental aspects of their lives. It amounted to a breach of the applicants' right to respect for their private and family life.

In view of the foregoing, the Government's preliminary objection regarding no significant disadvantage (see paragraph 56 above) must be dismissed.

124. There has accordingly been a violation of Article 8 of the Convention.

### III. ALLEGED VIOLATION OF ARTICLE 14 OF THE CONVENTION TAKEN IN CONJUNCTION WITH ARTICLE 8

125. The applicants alleged that the fact that they were unable to secure legal recognition of their relationships by means of an alternative to marriage amounted to discrimination on grounds of sexual orientation. They relied on Article 14 of the Convention taken in conjunction with Article 8.

126. Having regard to its finding under Article 8, the Court considers that it is not necessary to examine separately whether, in this case, there has also been a violation of Article 14 in conjunction with Article 8 (see *Fedotova and Others*, cited above, § 230).

### IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

127. Article 41 of the Convention provides:

“If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party.”

#### **A. Damage**

128. The first eight applicants claimed 10,000 euros (EUR) each in respect of non-pecuniary damage. The last two applicants (applications nos. 30128/18 and 30340/18) left the sum to the Court’s discretion, claiming at least EUR 3,000 each in respect of non-pecuniary damage.

129. The Government contested those claims.

130. Having regard to the circumstances of the case, the Court considers that the finding of a violation constitutes in itself sufficient just satisfaction for any non-pecuniary damage that may have been sustained by the applicants (see *Fedotova and Others*, cited above, § 235).

#### **B. Costs and expenses**

131. The first and second applicants (applications nos. 11454/17 and 11810/17) jointly claimed 92 Polish zlotys (PLN – approximately EUR 20) for the costs and expenses incurred before the domestic courts corresponding to costs of lodging their appeals against the Łódź District Court’s judgment.

132. The third and fourth applicants (applications nos. 15273/17 and 16898/17) jointly claimed EUR 443 in respect of costs incurred before the domestic courts and before the Court. They submitted copies of invoices indicating a payment of PLN 1,400 (equivalent to EUR 300) to the lawyer representing them in the proceedings before the Court and a further PLN 80 (approximately EUR 17) corresponding to fees for lodging their appeals.

133. The Government left the matter to the Court’s discretion.

134. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these were actually and necessarily incurred and are reasonable as to quantum. In the present case, regard being had to the documents in its possession and the above criteria, the Court considers it reasonable to award the applicants in cases nos. 11454/17 and 11810/17 jointly EUR 20 and the applicants in cases nos. 15273/17 and 16898/17 jointly the sum of EUR 317 for costs and expenses, plus any tax that may be chargeable to the applicants.

FOR THESE REASONS, THE COURT,

1. *Decides*, unanimously, to join the applications;
2. *Decides*, by a majority, to join to the merits the preliminary objection of lack of significant disadvantage and dismisses it;
3. *Declares*, by a majority, the applications admissible;
4. *Holds*, by six votes to one, that there has been a violation of Article 8 of the Convention;
5. *Holds*, unanimously, that there is no need to examine the complaints under Article 14 of the Convention taken in conjunction with Article 8;
6. *Holds*, unanimously, that the finding of a violation constitutes in itself sufficient just satisfaction for any non-pecuniary damage sustained by the applicants;
7. *Holds*, unanimously,
  - (a) that the respondent State is to pay jointly the applicants Ms C. Przybyszewska and Ms B. Starska (applications nos. 11454/17 and 11810/17), within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 20 (twenty euros), plus any tax that may be chargeable to the applicants, in respect of costs and expenses;
  - (b) that the respondent State is to pay jointly the applicants Mr M. Napielski and Mr W. Piątkowski (applications nos. 15273/17 and 16898/17), within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, EUR 317 (three hundred and seventeen euros), plus any tax that may be chargeable to the applicants, in respect of costs and expenses;
  - (c) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a

rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

8. *Dismisses*, unanimously, the remainder of the applicants' claim for just satisfaction.

Done in English, and notified in writing on 12 December 2023, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Renata Degener  
Registrar

Alena Poláčková  
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the separate opinion of Judge Wojtyczek is annexed to this judgment.

A.P.L.  
R.D.

## DISSENTING OPINION OF JUDGE WOJTYCZEK

1. I respectfully disagree with the majority's view that the application is admissible and that Article 8 has been violated in the instant case.

2. I refer in this respect to the views I expressed in my dissenting opinion appended to the judgment in *Fedotova v. Russia* ([GC], nos. 40792/10 and 2 others, 17 January 2023), which were further developed in my joint dissenting opinion with Judge Harutyunyan in *Buhuceanu v. Romania* (nos. 20081/19 and 20 others, 23 May 2023).

3. I note that the Court's case-law has never required a system providing for the registration of same-sex couples. Recognition of same-sex couples may be ensured by granting them specific rights *ex lege*. I further note that the Polish legal system grants a series of rights to same-sex couples and the dynamic domestic case-law is constantly expanding this list. In any event, the list of rights granted to same-sex couples is much more extensive than under the Romanian legal system (see *Buhuceanu*, cited above). In these circumstances, in my view, the minimum requirements set forth in the *Fedotova* judgment have been met.



## APPENDIX

List of cases:

No.	Application no.	Case name	Lodged on	Applicant Year of birth Place of residence Nationality	Represented by
1.	11454/17	Przybyszewska v. Poland	01/02/2017	<b>Cecylia PRZYBYSZEWSKA</b> 1987 Łódź Polish	Paweł KNUT
2.	11810/17	Starska v. Poland		<b>Barbara Gabriela STARSKA</b> 1987 Łódź Polish	
3.	15273/17	Niepielski v. Poland	20/02/2017	<b>Michał Szymon NIEPIELSKI</b> 1963 Cracow Polish	Mikołaj Wacław PIETRZAK
4.	16898/17	Piątkowski v. Poland		<b>Wojciech Kazimierz PIĄTKOWSKI</b> 1972 Cracow Polish	
5.	24231/17	Borowska v. Poland	19/03/2017	<b>Karolina Monika BOROWSKA</b> 1991 Warsaw Polish	Krystian LEGIERSKI
6.	24351/17	Keller v. Poland		<b>Agata KELLER</b> 1989 Warsaw Polish	
7.	25891/17	Łoś v. Poland	28/03/2017	<b>Krzysztof Mariusz ALCER (name changed)</b> 1980	Marcin Piotr WOJCIECHOWSKI

PRZYBYSZEWSKA AND OTHERS v. POLAND JUDGMENT

No.	Application no.	Case name	Lodged on	Applicant Year of birth Place of residence Nationality	Represented by
				Warsaw Polish	
8.	25904/17	Lepianka v. Poland		<b>Grzegorz Adam LEPIANKA</b> 1981 Warsaw Polish	
9.	30128/18	Sobczyńska v. Poland	12/06/2018	<b>Malgorzata SOBCZYŃSKA</b> 1981 Łódź Polish	Marcin GÓRSKI
10.	30340/18	Hanuszkiewicz v. Poland		<b>Beata HANUSZKIEWICZ</b> 1976 Łódź Polish	