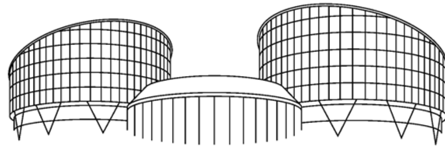

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FOURTH SECTION

CASE OF BUHUCEANU AND OTHERS v. ROMANIA

(Applications nos. 20081/19 and 20 others)

JUDGMENT

Art 8 • Positive obligations • Private and family life • Absence of any form of legal recognition and protection for same-sex couples • Application of principles established in *Fedotova and Others v. Russia* [GC] • Public-interest grounds put forward not prevailing over applicants' interests • Margin of appreciation overstepped in this case

STRASBOURG

23 May 2023

FINAL

25/09/2023

This judgment has become final under Article 44 § 2 of the Convention.
It may be subject to editorial revision.

COUNCIL OF EUROPE
CONSEIL DE L'EUROPE

In the case of Buhuceanu and Others v. Romania,

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

Gabriele Kucsko-Stadlmayer, *President*,
Tim Eicke,
Krzysztof Wojtyczek,
Faris Vehabović,
Branko Lubarda,
Armen Harutyunyan,
Ana Maria Guerra Martins, *judges*,
and Ilse Freiwirth, *Deputy Section Registrar,*

Having regard to:

the applications (nos. 20081/19 and 20 others – see appended table) against Romania lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by forty-two Romanian nationals, ("the applicants"), on the various dates indicated in the appended table;

the decision to give notice of the applications to the Romanian Government ("the Government");

the decision to grant anonymity to the applicants who requested it under Rule 47 § 4 of the Rules of Court;

the parties' observations;

the written observations submitted by the Commissioner for Human Rights of the Council of Europe under Article 36 § 3 of the Convention and the comments submitted by the third parties, who were granted leave to intervene by the President of the Section;

Having regard to the decision taken by the President of the Chamber to appoint Krysztof Wojtyczek, the judge elected in respect of Poland, to sit as an *ad hoc* judge in respect of Romania, in accordance with Rule 29 § 2 of the Rules of Court;

Having deliberated in private on 28 March 2023,

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

INTRODUCTION

1. The applications concern a lack of opportunity for the applicants (twenty-one same-sex couples) to have their relationships formally recognised, which amounted, in their opinion, to a breach of their right to respect for their private and family life and to discrimination against them on the grounds of their sexual orientation. The applicants relied on Article 8 of the Convention taken alone or in conjunction with Article 14.

THE FACTS

2. The details concerning the applicants may be found in the appended table. They were represented before the Court by Ms R. I. Ionescu, a lawyer practising in Bucharest.

3. The Government were represented by their Agent, Ms O.F. Ezer, of the Ministry of Foreign Affairs.

4. The facts of the case, as submitted by the parties, may be summarised as follows.

5. The applicants are in committed same-sex relationships and have been living together for periods of varying length. On various dates they gave notice of their intention to marry to their local registry offices (*Serviciul de Stare Civilă*), but the authorities rejected each couple's notice as their requests were considered contrary to Articles 271 and 277 § 1 of the Civil Code (see paragraph 9 below).

6. In 2018 the applicants in application no. 20081/19 lodged a complaint with the courts against several administrative decisions issued by the health insurance authorities denying their right to co-insured status under their respective partner's health insurance contracts. After several courts declined jurisdiction, the case was registered on the list of the Bucharest Court of Appeal. On 25 June 2019 the court decided to seek the Constitutional Court's interpretation of several provisions of Law no. 95/2006 regarding the reform of the health system and suspended the proceedings pending the delivery of a decision in that regard by the Constitutional Court. According to the information available to the Court, these proceedings are still pending.

RELEVANT LEGAL FRAMEWORK AND PRACTICE

I. RELEVANT DOMESTIC LAW AND PRACTICE

A. Constitution

7. The relevant Articles of the Romanian Constitution read as follows:

Article 16 - Equality of rights

"(1) Citizens are equal before the law and public authorities, without any privilege or discrimination.

(2) No one is above the law."

Article 26 – Intimate, family and private life

"(1) Public authorities shall respect and protect intimate, family and private life.

(2) Any person has the right to conduct himself/herself freely, unless this breaches the rights and freedoms of others, public order or public morals."

Article 48 - Family

"(1) The family is founded on freely consensual marriage between spouses, their full equality, and the right and duty of parents to ensure the upbringing, education and instruction of their children.

(2) The conditions for concluding a marriage, its dissolution and annulment shall be established by law. Religious [services of] marriage may be celebrated only after civil marriage.

(3) Children born out of wedlock are equal before the law with those born within wedlock."

B. Civil Code

8. Article 1 of the Civil Code ("the CC"), in force since 1 October 2011, provides the following sources of law in the Romanian legal system, in order of precedence: civil law, custom (*uzanțele*), and the general principles of law. The CC makes no mention as sources of law of court decisions or of judicial precedent.

9. Other relevant articles of the CC provide as follows:

Article 258 – Family

"(1) The family is based on freely consensual marriage between spouses, on their equality, and the right and duty of parents to ensure the upbringing and education of their children.

(2) Family shall be protected by society and by the State.

(3) The State is obliged to support, through economic and social measures, entry into marriage, as well as the development and consolidation of the family.

(4) For the purposes of the instant law [the CC], the spouses are the man and woman united by marriage."

Article 259 – Marriage

"(1) Marriage is the freely consensual union between a man and a woman, concluded in compliance with the law. ..."

Article 271 – Consent for marriage

"Marriage is concluded between a man and a woman, of their own free, personal consent."

Article 277 – Prohibition on equating other forms of cohabitation with marriage

"(1) Same-sex marriage is prohibited.

(2) Same-sex marriages concluded abroad between Romanian or foreign citizens are not recognised in Romania.

(3) Registered partnerships between opposite or same-sex persons contracted by Romanian or foreign citizens are not recognised in Romania.

(4) The legal provisions concerning the free movement of citizens of the European Union and the European Economic Area within the territory of Romania will remain valid."

Section 6 – Compensation for damage in case of civil responsibility
Article 1391 – Compensation for non-pecuniary damage

"(1) In case of injury to bodily integrity or health, compensation may also be granted in respect of limitations (*restrângerea posibilităților*) to family and social life.

(2) The court will also be able to grant compensation to ascendants, descendants, brothers, sisters and spouse, for the pain caused by the death of the victim, as well as to any other person who, in turn, could prove the existence of such damage. ..."

C. Anti-discrimination legislation

10. The relevant provisions of Government Ordinance no. 137/2000 on preventing and sanctioning all forms of discrimination are as follows:

Article 1

"...

(2) The principles [governing] equality among citizens and the exclusion of privileges and discrimination are guaranteed in particular with regard to the exercise of the following rights:

...

(iv) the right to marry and the right to choose a partner; ..."

Article 2

"(1) Under the provisions herein, discrimination refers to any differentiation, exclusion, restriction or preference – on the basis of race, nationality, ethnicity, language, religion, social origin, beliefs, sex, sexual orientation, age, disability, chronic non-contagious disease, HIV infection, disadvantaged status or any other reason – whose purpose or effect is to restrict and eliminate the recognition, use or exercise under conditions of equality, of human rights, fundamental freedoms or the rights recognised by law, in the political, economic, social and cultural sphere or in any other spheres of public life ..."

D. Legislative activity on same-sex relationships in Romania

11. Until 1996, Article 200 of the 1968 Romanian Criminal Code punished "sexual relations between persons of the same sex" with between one and five years' imprisonment. This provision was repealed and replaced by a clause punishing with imprisonment homosexual relations if "carried out in public or if [such behaviour] caused public scandal"; this provision was repealed in 2001.

12. In 2018, on the basis of a popular initiative to support the "traditional family", a referendum was held on a proposal to amend Article 48 of the Constitution (see paragraph 7 above) to define the family as "being founded

on freely consensual marriage between a man and a woman" (this language would have replaced "between spouses"). The results of the referendum could not be validated because of a low turnout (only 21% of those entitled to vote participated in the referendum; a 30% turnout was required for it to have legal effect).

13. Following a fresh popular initiative, a proposal for a law to be adopted by Parliament and including again the same proposed modification of the Constitution was published in the Official Gazette on 13 August 2020.

14. Three legislative proposals on civil partnership submitted in 2016 and 2019 by five, thirty-seven and two members of parliament respectively, have been sent for opinions or reports to the standing committees of the Chamber of Deputies. According to the latest information available to the Court, none of these proposals have been tabled for debates yet. Four similar proposals by members of parliament, submitted to Parliament from 2010 to 2020 have been rejected to date.

E. Decisions of the Constitutional Court

15. In its decision no. 580 of 20 July 2016 on an initiative to revise Article 48 of the Constitution (see paragraph 7 above), the Constitutional Court noted the limiting and exclusive nature of the definition of the notion of "family" proposed – namely, a union founded on a freely consensual marriage between a man and a woman. In this regard, the court explained that Article 48 of the Constitution enshrined and protected the right to marriage and family relations resulting from marriage as distinct from the right to family life and to respect for and the protection of family life, which had a much broader legal content and was protected by Article 26 of the Constitution. The court found the initiative to be in compliance with the Constitution in so far as it did not restrict the broad notion of "family" provided by Article 26 or the right to marry provided by Article 48.

The relevant part of the decision reads as follows:

> "... further analysing the compliance of the proposed amendment with the provisions of paragraph 2 of Article 152 of the Constitution, regarding the prohibition of suppression of any fundamental right or freedom or their guarantees, the court finds, first, that the text proposed to be amended has the marginal name 'Family', and, in its content, establishes a number of principles and guarantees regarding marriage. Given the content of the regulation, the court notes that Article 48 of the Constitution enshrines and protects the right to marriage, and family relations resulting from marriage, distinct from the right to family life/respect and protection of family life, with a much broader legal content, enshrined and protected by Article 26 of the Constitution, according to which: "(1) Public authorities shall respect and protect intimate, family and private life. (2) Any person has the right to conduct himself/herself freely, unless this breaches the rights and freedoms of others, public order or public morals."

16. In its decision no. 534 of 18 July 2018, the Constitutional Court declared unconstitutional the provisions of Article 277 §§ 2 and 4 of the Civil

Code (see paragraph 9 above). The court considered that the above-mentioned provisions were constitutional only if they afforded the right (in accordance with EU law) of residence in Romania to citizens of EU member States or of other States that had contracted same-sex marriages in an EU member State. The court stated that a relationship between a same-sex couple fell within the scope of the notion of family life just as much as a heterosexual relationship did, and triggered the protection of the fundamental right to respect for private and family life, as guaranteed by Article 7 of the Charter of Fundamental Rights of the European Union, by Article 8 of the Convention and by Article 26 of the Constitution. In enjoying the right to private and family life, people of the same sex who formed stable couples had the right to express their personality within those relationships and to benefit, in time and through the means provided by law, from the legal and judicial recognition of the corresponding rights and duties.

F. Other domestic materials

17. According to market research commissioned by a non-governmental organisation, Association ACCEPT, in 2021 and conducted among the general population of Romania, 71% of respondents considered that legal recognition of civil marriage for same-sex couples would not have any impact on their lives and 43% were in favor of the legal recognition of same-sex couples; a higher percentage (56%) of those polled who were under the age of thirty-four, were in favour of the legal recognition of same-sex couples.[1]

II. EUROPEAN AND INTERNATIONAL LAW AND PRACTICE

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

19. The findings of the Court of Justice of the European Union (CJEU) in the *Coman and Others* case (judgment of 5 June 2018, C-673/16, ECLI:EU:C:2018:385) are summarised in *Fedotova and Others* (cited above, § 60).

20. In its fifth report on Romania, adopted on 3 April 2019 and published on 5 June 2019, the European Commission against Racism and Intolerance (ECRI) recommended that the Romanian authorities "provide a legal framework that affords same-sex couples, without discrimination of any kind, the possibility to have their relationship recognised and protected".

21. A 2020 Fundamental Rights Agency survey of LGBTI people found that 76% of Romanian respondents did not live openly and did not disclose their sexual orientation and gender identity. The survey also found that 48%

[1] See "Ce cred românii despre căsătoria cuplurilor de același sex?" – Asociația ACCEPT (acceptromania.ro)

of Romanian LGBTI respondents were in a stable and committed relationship, with 27% of respondents cohabitating with their partner.[2]

THE LAW

I. JOINDER OF THE APPLICATIONS

22. Having regard to the similar subject matter of the applications, the Court orders their joinder (Rule 42 § 1 of the Rules of Court) and will examine them in a single judgment.

II. PRELIMINARY OBSERVATION

23. In their observations of 28 January 2021, those of the applicants who had been granted anonymity under Rule 47 § 4 of the Rules of Court, informed the Court that the Government had revealed their identity by disclosing their full names, sexual orientation and family status to various authorities, including courts, prosecutor's offices, police and health authorities. This had "resulted directly or indirectly" from the documents submitted by the Government as an annex to their observations.

Rule 47 § 4 of the Rules of Court reads as follows:

Rule 47 – Contents of an individual application

> "4. Applicants who do not wish their identity to be disclosed to the public shall so indicate and shall submit a statement of the reasons justifying such a departure from the normal rule of public access to information in proceedings before the Court. The Court may authorise anonymity or grant it of its own motion."

24. In a letter of 10 March 2021, upon being invited to do so by the President of the Section, the Government submitted their observations in reply. They maintained that information concerning the applicants had been sent only to the courts of appeal, prosecutor's offices and the General Police Inspectorate for the purpose of gathering information necessary for the examination of the applications by the Court. Those institutions were bound by law to protect personal data, and their staff had a duty of confidentiality as regards any information that they received within the context of their work. In reply to an enquiry by the Government's Agent, the above-noted institutions gave assurances that no information relating to the applicants had been disclosed to third parties or to the public and that, within each of the institutions concerned, it had been disclosed only to those preparing the replies to the questions sent by the Government's Agent.

25. In view of the above, and after examining the documents in the file, the Court considers that the disclosure of the applicants' personal information

[2] See "A long way to go for LGBTI equality" – European Union Agency for Fundamental Rights (europa.eu)

was done for the purpose of obtaining information of relevance for the proceedings before the Court. It follows that it cannot be concluded that the Government disregarded the measures taken by the Court in respect of the conduct of the proceedings in the present case (see, *mutatis mutandis*, *X and Y v. Romania*, no. 2145/16, §§ 91-100, 19 January 2021).

III. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION

26. The applicants complained that they had no means of legally safeguarding their respective relationships, in that it was impossible for them to enter together into any type of legally recognised union in Romania. 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

27. The Government did not dispute the applicability of Article 8 to the facts of the case under both its "private life" and "family life" aspects.

28. The Court notes that the facts of the present case (see paragraph 5 above) fall within the scope of the applicants' "private life" and also "family life", within the meaning of Article 8 of the Convention (see *Fedotova and Others v. Russia*, [GC], nos. 40792/10 and 2 others, § 141-51, 17 January 2023). Consequently, Article 8 of the Convention is applicable under both its "private life" and "family life" aspects.

2. Exhaustion of domestic remedies

29. The Government submitted that the applicants had failed to exhaust the available domestic remedies. They noted that the applicants had failed to bring their particular issues to the attention of the relevant authorities and had failed to institute legal proceedings before the courts. This would have prompted additional attention on the part of the State with regard to their situation, thus potentially accelerating the process of amending national legislation in order to accommodate the situation of same-sex couples. As

regards the applicants in application no. 20081/19, the Government submitted that proceedings were pending before the national courts that could provide adequate solutions to the applicants' grievances (see paragraph 6 above).

30. The applicants argued that there was no effective domestic remedy available to people in their situation and that the Government had not proved, by means of examples, the existence of such a remedy. On the contrary, the fact that the proceedings detailed in application no. 20081/19 were still pending three years after their initiation proved the lack of efficiency of such avenue.

31. The Court notes that the general principles as regards the issue of the exhaustion of domestic remedies can be found in the case of *Oliari and Others v. Italy* (nos. 18766/11 and 36030/11, §§ 77-80, 21 July 2015).

32. The Court further notes that – both at the time when the applicants lodged their applications with the Court and at present – there were and are no provisions in Romanian law recognising same-sex marriage or some other form of partnership for same-sex couples. On the contrary, the Civil Code expressly does not recognise such partnerships (see paragraph 9 above). The Government have not shown how the Constitutional Court, lower-instance courts or any other authorities could have ignored the applicable law and delivered any decisions favourable to the applicants. On this point, the Court observes that, under the Romanian legal system, neither the courts nor the Constitutional Court can amend the law or create new rights that are not already provided by law (see paragraph 8 above).

33. As regards the proceedings initiated before the courts by the applicants in application no. 20081/19, it must be noted that they concern only one specific aspect of the applicants' list of grievances (see paragraph 38 below) and are in no way capable of addressing the main issue in the case, that is the lack of legal recognition of same-sex couples. Moreover, these proceedings are still pending and the date of their conclusion, and their outcome, are uncertain (see paragraph 6 above).

34. In view of the above, the Court considers that there is no evidence enabling it to hold that the remedies suggested by the Government would have had any prospects of success. It follows that, in the absence of remedies that are sufficiently certain not only in theory but also in practice, the applicants cannot be blamed for not having pursued an ineffective remedy either at all (all applications) or until the end of the judicial process (application no. 20081/19). Given those circumstances the Government's objection must be dismissed.

3. *Conclusion*

35. 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

36. The applicants considered that the lack of legal recognition and protection of their families deprived them of their dignity as spouses, stigmatised them and harmed them – validating and even inviting prejudice towards them.

37. They noted that Romanian society had made progress towards what they considered common European human-rights standards and was now ready for legislative changes towards the recognition of same-sex relationships. That progress had been reflected in the results of the 2018 referendum asking voters whether they approved of a proposed change to the definition of "family" (which would have prohibited same-sex marriage) provided by Article 48 of the Constitution. The results of the referendum had not been valid owing to a low turnout (see paragraph 12 above), and this had shown that the population was not against a more open approach towards marriage. Opinion polls also showed an increasing acceptance of same-sex couples by the general population (see paragraph 17 above). The Constitutional Court had also acknowledged that same-sex couples were protected by the right to private and family life just like opposite-sex couples and had called on the national legislature to ensure that same-sex families would have available to them a specific legal framework of legal recognition and protection (see paragraph 16 above).

38. The lack of recognition of same-sex unions – either in the form of marriage or civil partnerships – affected and disadvantaged the applicants in many specific ways. For example, in hospitals or other medical facilities there was no recognition of partners in such unions having any kind of kinship with each other (*aparţinători*); they could not make decisions on behalf of their partner and they could not claim the body of their deceased partner from the morgue; they could not have co-insured status under a partner's health insurance contract; they did not have the right to continue the lease on their home in the event that the other partner left the premises permanently or died, if the latter was the holder of the relevant lease contract; if one partner died through the fault of a third party, the remaining partner would have neither the right to be compensated (as would a surviving spouse) nor the right to a survivor's pension; they could not be granted three days' leave in the event of the death or severe illness of their partner; they could not be obliged to support financially the other partner in the event of his or her suffering incapacity owing to work; employers could not be obliged, as regards an employee's right to take leave, to take into account that two partners should be able to choose the same period of time in which to take a holiday, as was the case in respect of spouses; they could not set up a family-based company

(*întreprindere familială*); they were not expressly identified by law as beneficiaries of special protection (including criminal protection) in the event of domestic violence; and they were not eligible to take out a loan from a bank in order to purchase a house together (under the "First Home" programme for newlyweds). All the above rights were provided by law only for married couples.

39. As regards the Government's assertion that Romania should be allowed to adapt its legal system in its own time and at its own pace (see paragraph 48 below), the applicants argued that the State was only trying to waste time – time that the applicants did not have. Every day of delay was a day that brought tangible injury and real costs that the State refused to acknowledge. Some of the applicants had been in unrecognised and unprotected *de facto* relationships for over fifteen years.

40. Referring to recommendations by Council of Europe and other international human rights bodies (see paragraphs 18 and 20 above), the applicants submitted that the Government had never attempted to effectively address the situation of same-sex couples and had given no support to legislative initiatives in Parliament regarding the issue of civil partnership (see paragraph 62 below). The Government had also failed to fully enforce the CJEU judgment in the *Coman* case (see paragraph 19 above).

41. The Court had already concluded to the existence of a positive obligation under Article 8 of the Convention to ensure legal recognition and protection for same-sex couples and found a breach of that obligation in the cases of *Oliari and Others* and *Fedotova and Others* (both cited above). In application of the above case-law, it should find a breach of the same positive obligation on the part of Romania, too. This positive obligation should not depend on national circumstances. The obligation to ensure that the applicants had legal recognition and legal protection of their respective families is generally applicable under the Convention: the applicants – who constituted *de facto* same-sex families in Romania – had the same right to legal recognition and protection under Article 8 as had had the applicants in the above-mentioned cases.

42. With respect to the Government's argument concerning the possibility to obtain part of the rights available to married couples by means of private contracts (see paragraph 49 below) the applicants noted that the rights guaranteed to married couples originate in law and are opposable *erga omnes*. This level of protection cannot be achieved by private contracts.

43. The applicants furthermore argued that the Romanian legal framework specifically excluded same-sex couples from the right to legal protection (see paragraph 9 above), thus reinforcing prejudice against them. The applicants submitted that the Government had not put forward any substantive reason for excluding them from legal recognition and protection. The fact that there was public debate and even opposition could not serve as an excuse for the Court not to act or for the Convention standards not to apply.

It was precisely when there were disagreements, opposition, and strong passions that human rights could be most under attack, and when they – and those people who were vulnerable (particularly minorities) – most needed to be defended. It was essential that Governments defended human rights by not pretending to be neutral and quiet or by perpetuating stigma.

44. The applicants concluded that the breach of their right to private and family life had lasted for a long period and affected them in numerous aspects of their daily lives as families, determining their personal status in society (see also paragraph 38 above). The State's behaviour illustrated a systemic problem that needed to be addressed not only by the adoption of legislation recognising the right to marry and to enter into civil partnerships but also by tackling homophobia in Romanian society.

(b) The Government

45. The Government noted that the Court's case-law indicated an unequal approach towards how the margin of appreciation was to be construed and applied to the factual context of various cases. In cases where a particularly vulnerable group in society had suffered discrimination, the State's margin of appreciation had been found to be substantively narrower (see *E.B. v. France* [GC], no. 43546/02, § 94, 22 January 2008). However, the Court had also established, as a matter of principle, that where relations between individuals were concerned, the means chosen by a State to address the various issues arising therefrom fell within its margin of appreciation. They argued that the "margin of appreciation principle" was built on the notion of consensus. However, the Court had always taken a flexible approach towards this notion and this approach should be taken here too. Referring to the Court's case-law in respect of cases such as *Dubská and Krejzová v. the Czech Republic* ([GC], nos. 28859/11 and 28473/12, 15 November 2016) and *S.H. and Others v. Austria* ([GC], no. 57813/00, ECHR 2011), they contended that consensus was a significant factor in any evaluation made by the Court but that it was not necessarily decisive or determinative. Evolving trends at the national level could not in themselves justify a court's decision to promote consensus in areas where there was no discernible pan-European norm, on the basis of selected legislation of member States that offered a reflection of local compromises concerning current trends or developments.

46. Thus, when examining the merits of a case, the Court's perspective had to be based, first of all, on a substantive analysis of the nature and content of the rights inserted into the terms of the Convention; the Court could then move on to undertaking an objective analysis of the laws of Contracting States as an aid to interpreting the Convention. Moreover, such an analysis should not in itself constitute the main factor in respect of extending the meaning and scope of the Convention beyond that which had been previously and generally accepted or understood – including by means of the Court's case-law. In that regard, it was important to bear in mind that the democratic

process involved complex ethical and moral choices reflecting issues deeply rooted in the social fabric of society, which had to be duly taken into consideration before the perspective of "consensus" was applied as a catch-all concept that could be construed as negating the said complex choices.

47. The Government believed that it could not be accepted as sufficient by the Court to base its judgment in a case touching on such seminal issues solely on its own evaluation of the existence of a consensus among the member States of the Council of Europe or of an evolutionary trend and, moreover, to disregard the existence of pressing social needs that currently might appear to go against the tide of the perceived majority.

48. The Government also submitted that the authorities had shown their willingness to address the issue of same-sex marriage and attempts to regulate the situation of same-sex couples at the national level were following their due democratic path and should be allowed to come to fruition at their own pace. The several legislative initiatives that had been put forward in Parliament in this regard were indicative of the will of the national authorities to identify and implement proper and effective solutions for the issues facing LGBTI persons (see paragraph 14 above).

49. In the Government's opinion, part of the rights that the applicants allege they cannot enjoy because of the lack of legal recognition of their same-sex couples could be effectively exercised by entering into private civil law contracts.

50. The Government furthermore submitted that the factual context surrounding the instant case was fundamentally different from that surrounding the case of *Oliari* – especially with regard to the main aspects considered by the Court in its assessment of the Italian government's margin of appreciation, namely: the high profile given by the highest judicial authorities to the issue of legal recognition of same-sex couples; the existence of indications set out by the national community of the need to ensure protection for same sex-unions and to avoid discriminatory treatment; the sentiments of the majority of Italian population and the absence of any prevailing community interest. In the instant case, the question of whether same-sex couples should benefit from a specific form of legal protection under national legislation had not been, thus far, answered favourably at the highest instances of the national court system or by the Constitutional Court, and as such could not be construed as featuring prominently on the agenda of the judiciary. Secondly, while indeed from an overall perspective there had been positive developments in respect of public opinion in Romania regarding same-sex relationships, at the present time there were no objective reasons to support the conclusion that a social consensus on the legal recognition of same-sex couples had been reached. From a statistical point of view, the most recent available data from the European Commission's 2019

Eurobarometer on Discrimination[3] showed that, despite a slim margin of improvement between 2015 and 2019, in Romania a significant majority of people (63%) had an unfavourable perception of sexual relationships between two persons of the same sex, while a similar majority (54%, with 8% not expressing any views) disagreed with the idea that "gay, lesbian and bisexual people should have the same rights as heterosexual people". Thus, there was no argument to sustain the view that there was any widespread popular acceptance of same-sex relationships or any majority of any kind on the recognition of LGBTI couples in Romania at the present time. Therefore, the Government concluded that in the instant case, unlike in the case of *Oliari,* there was a discernible community interest which prevailed over the perceived urgency of providing a tailored legal framework for same-sex couples, and which amounted to a pressing social need; the existence of that social need should widen the margin of appreciation afforded by the Convention to the national authorities in this matter.

51. In contrast with the Court's findings in respect of Russia in the recent case of *Fedotova and Others* (cited above), the Government asserted that, as a matter of principle, they take into account the benefits attached to some form of civil partnerships for same-sex couples and they confirm their firm commitment to the protection and promotion of the fundamental rights and liberties of all persons, free from discrimination on any grounds, including on sexual orientation, as well as its strong opposition against any manifestation of homophobia.

52. In view of the above, the Government asked the Court to find that the Romanian State is within its margin of appreciation regarding the manner of implementation of the Convention, more specifically the adoption of legislative changes in the area of registered partnerships applicable to same-sex couples, in compliance with Article 8 of the Convention.

(c) Third-party interveners

(i) The Council of Europe Commissioner for Human Rights

53. The Commissioner noted that, after several decades of considerable progress towards achieving equal rights for LGBTI people in Europe – including the enactment of anti-discrimination and anti-hate crime legislation at national level, as well as increased recognition of same-sex unions – a worrying backlash could be observed, which had resulted in the increased stigmatisation of LGBTI people and renewed opposition to their being allowed to access and enjoy their human rights. There was a clear need and demand for legal recognition of same-sex partnerships in most of those Council of Europe member States that did not yet provide such recognition.

[3] See "Discrimination in the European Union" - September 2019 - Eurobarometer survey (europa.eu)

54. The Commissioner added that without the possibility to access legal recognition, same-sex couples were denied rights that seemed obvious to opposite-sex partners or spouses whose status was recognised by law and were left to face serious problems in their everyday lives. Country monitoring conducted in Romania by the Commissioner's Office showed that same-sex partners who could not demonstrate a family link to each other on the basis of legal recognition could be denied access to various rights such as the ones already mentioned by the applicants (see paragraph 38 above). In addition, they could not benefit from more favorable rules with respect to taxation. They would typically not enjoy the same rights and responsibilities in respect of children in their care, which could create hurdles in dealings with day-care and medical institutions, and with schools. Same-sex couples might not enjoy 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 same-sex partners toward each other or towards children in the event of separation. They might be restricted in their freedom of movement across and beyond Europe as they might not be able to obtain residency rights or family reunification for all family members in another country. For instance, during the COVID-19 pandemic, ILGA-Europe had documented four cases in Bulgaria and Romania where one non-national partner in a same-sex partnership had not been able to cross borders and rejoin his or her partner because of official non-recognition of their partnership.

55. The Commissioner also observed that the movement towards legal recognition of same-sex couples continued to develop in Europe. In the *Oliari* judgment, the Court had found that twenty-four of the forty-seven Council of Europe member States had enacted legislation permitting same-sex couples to have their relationship recognised as a civil marriage or as a form of civil union or registered partnership. That number had risen to thirty member States that now provided one form of legal recognition or another, with a significant increase in the number of States allowing same-sex marriage.

56. The Commissioner added that Council of Europe institutions and human rights monitoring mechanisms and United Nations treaty-based committees had constantly called on States to provide some means of legal recognition to same-sex couples and to promote equality between same-sex and opposite-sex couples. Furthermore, since the *Oliari* judgment other regional human rights courts had delivered decisions of relevance. She referred in particular to the advisory opinion of the Inter-American Court of Human Rights of 24 November 2017.[4]

57. The Commissioner submitted that, to be truly effective, legal recognition of same-sex couples had to offer a clear and predictable

[4] See the references to this advisory opinion in *Fedotova and Others* (cited above, §§ 63 and 64).

framework that covered all aspects of life in a committed, stable relationship. Legal research conducted in a sample of twenty-one European countries had shown that existing registered partnerships mostly carried the same legal consequences as marriage, but that there were exceptions – usually in areas concerning parenting, migration laws, citizenship and/or surnames, income tax, inheritance, family medical leave and survivor's pensions. In previous cases dealing with particular aspects of the right to family life, the Court had consistently found no valid justification to deny a specific right to same-sex couples when it was available to opposite-sex couples in the same situation. The Commissioner concurred with this approach.

58. In the Commissioner's opinion, it was difficult to envision a situation in which a legitimate community interest could prevail to deny same-sex couples legal recognition of their relationships – even in countries where there was strong opposition to same-sex marriage or partnerships.

59. The Commissioner also mentioned recent studies that had found a clear link between the availability of legal recognition for same-sex couples (in the form of partnerships or marriage) and the social acceptance of LGBTI people. A broad 2018 sociological study based on European Social Survey data collected between 2002 and 2016 from 325,000 people in thirty-two European countries had found that the introduction of the legal recognition of same-sex partnerships in fifteen of those countries was associated with significantly improved attitudes toward LGBTI people.[5]

(ii) Dentons Europe – Zizzi-Caradja și Asociații SPARL

60. The intervener submitted that the Romanian State's failure to provide legal recognition of same-sex relationships had done nothing to resolve the emigration crisis in Romania, exacerbated difficulties in attracting and retaining talent, damaged the public brand of multinational companies operating in Romania by revealing a discrepancy in values, hindered economic progress and, lastly (but crucially) harmed employee well-being. Countries that legally recognised same-sex relationships generally had a higher per capita gross domestic product and ranked higher on the Human Development Index. Furthermore, the social inclusion of gays and lesbians was associated with higher foreign direct investment.

(iii) Civil Society Development Foundation (CSDF), supported by: PRIDE Romania; Rise OUT, Identity. Education; APADOR-CH; ActiveWatch; the Center for Partnership and Equality (CPE); FILIA Center; Déclic; and the Association Center for Public Innovation (CPI)

61. The CSDF, supported by other nine Romanian non-governmental organisations, submitted that the legislative changes concerning the

[5] See "Do Laws Shape Attitudes? Evidence from Same-Sex Relationship Recognition Policies in Europe" – IZA Institute of Labor Economics, August 2018 (iza.org).

decriminalisation of homosexuality and the prohibition of discrimination on the basis of sexual orientation (see paragraph 11 above) had had a positive impact on the evolution of the perception of same-sex couples in Romanian society. This finding was based on statistical data drawn from European and national authorities showing that Romanians – especially the younger generation – were now more open in accepting gay persons and their families.

62. They pointed out that legislative proposals regarding the issue of civil partnership submitted for debate in Parliament (see paragraph 14 above) had not been supported by the Government, who had submitted comments against the adoption of the proposals. Therefore, in the intervenors' opinion, the lack of legal recognition of same-sex unions in Romania was due to a lack of political will. In this regard, a favourable judgment from the Court would serve as starting point for more successful parliamentary debate.

(iv) Prof Dr Raluca Popescu of the Faculty of Sociology and Social Work, Bucharest University

63. The intervenor submitted that although the most common family model in Romania was that of a married couple with one child, it could be seen from the results of national censuses that the number of consensual unions was constantly increasing. The absence of legal recognition for such unions did not mean that they did not exist but that the people forming them (together with their children) were deprived of social protection. The intervenor submitted that in a democratic State that respected the right to respect for one's private life, people should be able to live as they wished, as long as they did not violate the rights of other individuals – even if that way of living was not that of the majority of the population.

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

64. Those intervening submitted that at the time when the Court had adopted its judgment in the case of *Oliari and Others* (cited above), a "thin majority" of twenty-four out of forty-seven (51%) of Council of Europe member States had afforded some form of legal recognition to same-sex couples. Since then, that number had increased by 25% – from twenty-four to thirty (that is to say from 51% to 63.8%). There was now a clear majority, in the Council of Europe States and in other democratic societies, that a government could not restrict particular rights or obligations to married couples and then tell same-sex couples that it was legally impossible for them to qualify for those rights or obligations, because they were not permitted to marry.

65. The intervenors furthermore submitted examples of case-law drawn from across the world showing that a growing number of national and international courts required at least an alternative to legal marriage, if not access to legal marriage for same-sex couples.

66. In view of the above, the intervenors considered that the dissenting views of the highest judicial authorities or of the majority of the population should not preclude the finding of a violation by the Court.

(vi) The Lithuanian Gay League joined by: the Association of LGBT and their friends MOZAİKA (Latvia); Iniciatíva Inakost' (Slovakia); "Love Does Not Exclude" (Poland); and Bilitis (Bulgaria)

67. Those intervening provided an overview of the numerous restrictions faced by same-sex couples in Lithuania, Latvia, Slovakia, Poland and Bulgaria – countries that did not afford any form of legal recognition to such couples.

68. They furthermore submitted that the present case should also be examined from the standpoint of Article 14 in conjunction with Articles 8 and 12, in application of the "Convention as a living instrument" principle.

(vii) The Alliance of Romania's Families and PRO VITA Bucharest

69. The interveners submitted that Article 8 did not oblige Romania to provide a legal framework for civil partnership. Member States had exclusive authority in the area of civil status, including in respect of any other form of union recognised legally between two people of either the same or opposite sex and in respect of the legal status of children or other members of a family. Such matters had to be regulated on the basis of the social-cultural reality of each State, as determined by public debate and consultation of public opinion.

(viii) Ordo Iuris Institute for Legal Culture

70. The intervener contended 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 related 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.

71. The intervenor furthermore referred to a comparative report dated 29 October 2018[6] issued by Pew Research Center Report (a

[6] "Eastern and Western Europeans Differ on Importance of Religion, Views of Minorities, and Key Social Issues" – Pew Research Center (pewresearch.org)

Washington-based "fact tank" that conducts public opinion polling and demographic research) which showed that people in Western Europe and the Americas were more accepting of homosexuality than those in Eastern Europe, Russia, the Middle East and sub-Saharan Africa. The report also indicated that those who were religiously unaffiliated tended to be more accepting of homosexuality; in Romania, 98% of the adult population identified as Christians, and 74% of Romanians opposed same-sex marriage.

2. *The Court's assessment*

(a) General principles

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

73. In the above-mentioned case, having regard to its case-law as consolidated by a clear ongoing trend within the member States of the Council of Europe, the Court 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).

74. As regards the margin of appreciation available to the States Parties in implementing the above-mentioned positive obligation, the Court considered that, given that particularly important facets of the personal and social identity of persons of the same sex were 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 was significantly reduced when it came to affording same-sex couples the possibility of legal recognition and protection (ibid., § 187). In this context, the Court considered that where the States Parties have a more extensive margin of appreciation, was 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).

(b) Application of these principles to the present case

75. In the light of the foregoing, the Court will now ascertain whether the respondent State has satisfied its positive obligation to secure recognition and protection for the applicants' relationships (see paragraph 73 above). 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 (ibid., § 191).

76. The Court observes that Romanian law provides for only one form of family union – an opposite-sex marriage and does not provide for legal recognition for same-sex couples (see paragraph 9 above).

77. The Court further notes that the respondent State did not inform it of any intention to amend its domestic law in order to allow same-sex couples to enjoy official recognition and a legal regime offering protection. On the contrary, several attempts to pass legislation in this field (coming from a few members of the Parliament) have not received the support of the Parliament or the Government (see paragraph 14 above). Moreover, the Government submitted that the fact that it was impossible for same-sex couples to be granted legal recognition and protection was compatible with Article 8 of the Convention and was justified in order to safeguard what they claimed to be prevailing interests (see paragraphs 50 and 52 above). Therefore, the situation in the respondent State differs markedly from the situation in a substantial number of States Parties which have sought to amend their domestic law with a view to ensuring effective protection of the private and family life of same-sex partners (ibid., § 195). In this context, the Court takes note of the adoption by Romania of more inclusive legal provisions of a general nature such as Article 1391 of the Civil Code (see paragraph 9 above) and the legislation sanctioning all forms of discrimination (see paragraph 10 above) and of the broader interpretation given by the Constitutional Court to the notion of family life set forth by Article 26 of the Constitution (see paragraphs 15 and 16 above). Nevertheless, the Court considers that the Government's statement that they take into account the benefits attached to some form of civil partnerships for same-sex couples (see paragraph 51 above) is not being supported by evidence of actual steps taken towards any form of legal recognition for such couples.

78. The Court further notes the applicants' submission that, because their partnerships are not formally acknowledged, same-sex couples are prevented from accessing numerous social and civil rights that are provided by law for married couples (see paragraph 38 above). The applicants' submissions are also supported by information provided by the Council of Europe's Commissioner for Human Rights (see paragraph 54 above). On this point, the Court takes note of the Government's assertion that part of the rights that the applicants alleged they could not enjoy because of the lack of legal recognition of their same-sex couples could be effectively exercised through private contractual agreements (see paragraph 49 above); however, no relevant details have been provided in support of this statement and similar arguments have already been rejected by the Court (see *Oliari and Others*, § 169, and *Fedotova and Others*, § 203, both cited above). Therefore, the Court can conclude in the present case, that in the absence of official recognition, same-sex couples are nothing more than *de facto* unions under

Romanian law, the partners being unable to regulate fundamental aspects of their life as a couple such as those concerning property, maintenance and inheritance as an officially recognised couple. Nor are they able to rely on the existence of their relationship in dealings with the judicial or administrative authorities (compare *Fedotova and Others*, cited above, § 203). In sum, the applicants have a particular interest in obtaining the possibility of entering into a form of civil union or registered partnership in order to have their relationships legally recognised and protected – in the form of core rights relevant to any couple in a stable and committed relationship – without unnecessary hindrance. In the light of the foregoing, the Court concludes that the Romanian 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 (ibid., § 204).

79. The Court will further examine the reasons put forward by the respondent State to justify the lack of any legal recognition and protection for same-sex couples.

80. The Government argued that the majority of Romanians disapprove of same-sex unions (see paragraph 50 above). The Court had already rejected such arguments concluding 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).

81. The Government also alleged that, contrary to the case of *Oliari and Others* (cited above), the question of whether same-sex couples should benefit from legal recognition had not been, thus far, answered favourably by the highest judicial authorities in Romania (see paragraph 50 above). The applicants disagreed considering that, in its decision of 18 July 2018, the Constitutional Court had called on the legislature to ensure that same-sex families would have available to them a specific legal framework of legal recognition and protection (see paragraph 37 above). The Court notes the Constitutional Court's finding that people of the same sex who formed stable couples had the right to express their personality within those relationships and to benefit, in time and through the means provided by law, from the legal and judicial recognition of the corresponding rights and duties (see paragraph 16 above). The Court takes also note of the proposals to amend the provisions governing the notion of family in the Constitution so as to restrict it to opposite-sex couples; however, these proposals have, so far, not been followed (see paragraphs 12 and 13 above). In this context, the Constitutional Court had clarified that the notion of family, as protected by Article 26 of the Constitution, had a much broader legal content that included the relationship between a same-sex couple (see paragraphs 15 and 16 above). Moreover, on this point, the Court reiterates that it cannot discern any risks for the institution of marriage – as stipulated by the domestic legal framework – that the affording of legal recognition and protection to same-sex unions might

involve, since it does not prevent opposite-sex couples from entering marriage, or from enjoying the benefits that marriage gives (see *Fedotova and Others*, cited above, § 212). Therefore, these arguments cannot justify the absence of any form of legal recognition and protection for same-sex couples in the present case.

82. As regards the Government's arguments concerning the breadth of the margin of appreciation (see paragraphs 45-47 above), the Court reiterates that it had already held that 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 paragraph 74 above). Nevertheless, they have a more extensive margin of appreciation in determining the exact nature of the legal regime to be made available to same-sex couples (ibid.). It is in that latter context that Romania's social and cultural background may be taken into account.

83. In the light of the above 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. The Court concludes that the respondent State has overstepped its margin of appreciation and has failed to comply with its positive obligation to secure the applicants' right to respect for their private and family life.

84. There has therefore been a violation of Article 8 of the Convention.

IV. VIOLATION OF ARTICLE 14 OF THE CONVENTION TAKEN IN CONJUNCTION WITH ARTICLE 8

85. 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.

86. 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).

V. APPLICATION OF ARTICLE 41 OF THE CONVENTION

87. 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

88. The applicants claimed a total amount of 606,22 euros (EUR) in respect of pecuniary damage consisting of the costs incurred in order to secure the issuance of their medical certificates (which they had submitted to the local authorities together with their declarations of marriage). Copies of invoices were submitted in support of this claim. They furthermore noted that they had suffered non-pecuniary damage due to the mental suffering that they had experienced and continued to experience owing to the lack of legal recognition and protection of their relationships. In this respect they claimed EUR 25,000 for each applicant.

89. The Government submitted that there was no direct link between the material damage cited and the subject matter of the case. As regards the non-pecuniary damage cited, they considered the just satisfaction claimed in respect thereof to be excessive and asked the Court, in case it were to find a violation, to rule that such a finding constituted sufficient just satisfaction.

90. The Court does not discern any causal link between the violation found and the pecuniary damage alleged; it therefore rejects this claim.

91. As regards the non-pecuniary damage, 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

92. The applicants claimed EUR 4,665.08 for the costs and expenses incurred within the context of their attempts to lodge their declarations of their intention to marry with their local registry offices and their exchanges of correspondence with the domestic authorities. In support of this claim, they submitted copies of invoices showing the payment by Association ACCEPT of the expenses incurred.

93. They furthermore claimed EUR 10,782.93 for the expenses incurred before the Court, of which EUR 10,500 represented lawyer fees and EUR 282.93 represented postal expenses. In support of these claims, the applicants submitted copies of invoices showing various amounts paid by ACCEPT to their representative between 2019 and 2021 on the basis of specific contracts and copies of invoices attesting to the payment of postal costs by their representative. The applicants failed to submit copies of the above-mentioned contracts within the time-limit provided by the Court for this purpose. They requested that any award under this head be made directly payable to ACCEPT who had paid all these expenses.

94. The Government submitted that the costs and expenses incurred before the domestic authorities were unnecessary and unsubstantiated. The

costs and expenses incurred before the Court were excessive and not entirely substantiated, since the applicants had submitted only copies of invoices – not copies of the legal representation contracts on which they were based.

95. 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 (see, among many other authorities, *Merabishvili v. Georgia* [GC], no. 72508/13, § 370, 28 November 2017). In the present case, the applicants did not submit documents showing that they had paid or were under a legal obligation to pay the expenses incurred before the domestic authorities (see paragraph 92 above) or the legal fees and postal expenses charged by their representative for the proceedings before the Court (see paragraph 93 above; and ibid., § 372). In the absence of such documents, the Court is not in a position to assess the points mentioned above (compare *Budinova and Chaprazov v. Bulgaria*, no. 12567/13, § 107, 16 February 2021). It therefore finds no basis on which to accept that the costs and expenses claimed by the applicants have actually been incurred by them.

96. It follows that these claims must be rejected.

FOR THESE REASONS, THE COURT

1. *Decides*, unanimously, to join the applications;

2. *Declares*, by a majority, the applications admissible;

3. *Holds*, by five votes to two, that there has been a violation of Article 8 of the Convention;

4. *Holds,* by six votes to one, that there is no need to examine the complaints under Article 14 of the Convention taken in conjunction with Article 8;

5. *Holds*, unanimously, that the finding of a violation of the Convention constitutes in itself sufficient just satisfaction for any non-pecuniary damage sustained by the applicants;

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

Done in English, and notified in writing on 23 May 2023, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Ilse Freiwirth	Gabriele Kucsko-Stadlmayer
Deputy Registrar	President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the following separate opinions are annexed to this judgment:

(a) partly dissenting opinion of Judge Guerra Martins;
(b) joint dissenting opinion of Judges Wojtyczek and Harutyunyan.

G.K.S.
I.F.

PARTLY DISSENTING OPINION OF JUDGE GUERRA MARTINS

1. I fully agree that there has been a violation of Article 8 of the Convention in the present case.

2. However, for the reasons set out below I cannot join the majority in concluding, with extremely succinct reasoning, that there is no need to examine the complaint under Article 14 of the Convention taken in conjunction with Article 8, based on § 230 of the judgment in *Fedotova and Others* ([GC], nos. 40792/10 and 2 others, 17 January 2023).

3. First and foremost, I firmly believe that discrimination on the ground of sexual orientation is a fundamental aspect of this case and that it should therefore have been addressed.

4. Secondly, I am fully aware that *Fedotova and Others* is a judgment of the Grand Chamber, which gives it a certain supremacy over the judgments of the Chambers. In fact, although neither the Convention nor the Rules of Court contain an express provision granting priority to those judgments (indeed, the system of *stare decisis* is not applicable to the Convention), one can accept that there is a broad consensus in so far as the Convention and the Rules of Court implicitly presuppose that the judgments of the Grand Chamber are to be followed by the Chambers until they are reversed by the Grand Chamber.

5. Thirdly, that said, it is worth noting that I have already had the opportunity to respectfully disagree with what I consider to be the Court's restrictive interpretation of Article 14 of the Convention (see, recently, the partly dissenting opinion of Judges Yudkivska, Lubarda, Guerra Martins and Zünd joined by Judge Kūris, in the case of *Macatė v. Lithuania* (no. 61435/19, 23 January 2023). It is true that the factual situation in the two cases is different, but the rationale behind the finding of no violation of Article 14 in conjunction with Article 10 in *Macatė* reflects the same restrictive approach to Article 14 as in the present case.

6. In that opinion we argued precisely that anti-discrimination law has evolved in the past few decades, especially in Europe, and that as a result the Court must adapt its reasoning to the new trends.

7. Finally, the finding of no need to examine the complaint under Article 14 in *Fedotova and Others* was not unanimous. Judge Pavli, joined by Judge Motoc, added a partly dissenting opinion whose reasoning, in my humble view, is more accurate than the reasoning of the majority. Therefore, without further explanation, I would say that had I been part of the composition of the Court in *Fedotova and Others* I would have joined the partly dissenting opinion of my colleagues. Consequently, I cannot accept the finding of no need to examine the complaint under Article 14 in the current case based on *Fedotova and Others* without expressing my opinion.

8. Although this does not change anything in the current case, it might pave the way for the future evolution of the Court's case-law regarding Article 14 of the Convention.

JOINT DISSENTING OPINION OF JUDGES WOJTYCZEK AND HARUTYUNYAN

1. We respectfully disagree with the view that the instant applications are admissible and that Article 8 has been violated.

2. The Court has consistently held that Article 34 does not allow complaints *in abstracto* alleging a violation of the Convention. The applicants have to show that they are personally affected by the contested legislation (see, for instance, *Centre for Legal Resources on behalf of Valentin Câmpeanu v. Romania* [GC], no. 47848/08, § 101, ECHR 2014).

In the instant case, the applicants pointed to a certain number of shortcomings of the national legislation in several domains. However, in our view, they did not provide sufficient evidence that those shortcomings had affected them personally and, in any event, they did not bring their complaints to the attention of the relevant authorities (with the exception of the proceedings mentioned in paragraph 6). The grievances as formulated by the applicants are reflected in the very concise factual findings. The majority decided to follow the approach of the applicants and to review the applicable legislation *in abstracto* without looking at the practical difficulties the applicants had actually encountered.

3. The majority rely on the judgment in the case of *Fedotova and Others v. Russia* ([GC], nos. 40792/10 and 2 others, 17 January 2023), and refer to it throughout the reasoning. That judgment was rendered in very specific factual circumstances which are characterised by the following three features, as set out in that judgment:

> (i) "The present case concerns the absence in Russian law of **any possibility of legal recognition** for same-sex couples, regardless of the form such recognition may take" (§ 155, emphasis added).
>
> (ii) "Nor is it disputed that Russian law **has not changed at all** since the present applications were lodged ..." (§ 193, emphasis added).
>
> (iii) "The Court notes that the respondent State did not inform it of **any intention** to amend its domestic law in order to allow same-sex couples to enjoy official recognition and a legal regime offering protection" (§ 194, emphasis added).

4. The instant case differs from the case of *Fedotova and Others v. Russia* on all these three counts.

(i) As explained by the Government, Romanian law provides for some forms of recognition of same-sex couples and protection for them. The majority note in particular the following developments in this regard:

> "In this context, the Court takes note of the adoption by Romania of more inclusive legal provisions of a general nature such as Article 1391 of the Civil Code (see paragraph 9 above) and the legislation sanctioning all forms of discrimination (see paragraph 10 above) and of the broader interpretation given by the Constitutional Court to the notion of family life set forth by Article 26 of the Constitution (see paragraphs 15 and 16 above)" (paragraph 77).

We note in this context that the Constitution, as interpreted by the Constitutional Court, protects same-sex couples. Some specific legislative provisions set forth this protection. In particular, Article 1391 of the Civil Code is interpreted as a form of recognition of same-sex couples for specific purposes. Furthermore, European Union law recognises same-sex couples and grants them a series of rights. European Union law is a part of Romanian domestic law and is directly applicable in Romania. In any event, it would have been necessary to carry out a thorough analysis of the domestic law, domain by domain, in order to determine with sufficient precision the legal status of same-sex couples. We also note *en passant* that in Romania the number of unmarried different-sex couples is growing, which shows that the legal regime provided to unmarried couples does not appear unattractive.

(ii) The domestic law is changing. The above-mentioned elements have been adopted recently and we note that the case-law, in particular, is expanding the scope of protection provided to non-married couples, whether they are of the same or different sex.

(iii) The Government have expressed their willingness to amend the legislation.

5. In the case of *Fedotova and Others* (cited above), the Court explained the scope of States' obligations in respect of same-sex couples in the following terms (emphasis added):

> "188. Nevertheless, as is already apparent from the Court's case-law (see *Schalk and Kopf*, § 108; *Gas and Dubois,* § 66; *Oliari and Others*, § 177; and *Chapin and Charpentier*, § 48, all cited above), 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 (see paragraph 165 above). **Indeed, States have the 'choice of the means'** to be used in discharging their positive obligations inherent in Article 8 of the Convention (see *Marckx*, cited above, § 53). **The discretion afforded to States in this respect relates both to the form of recognition and to the content of the protection to be granted to same-sex couples.**
>
> 189. The Court observes in this connection that while a clear ongoing trend is emerging towards legal recognition and protection for same-sex couples, no similar consensus can be found as to the form of such recognition and the content of such protection. Thus, 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 *Christine Goodwin*, § 85, and *Marckx*, § 58, both cited above)."

6. We note that in the judgment in the case of *Fedotova and Others* (cited above), the Court, unlike for different-sex couples, leaves a very broad freedom to the States in defining the legal regime for same-sex couples. The underlying idea was to allow the States to adapt their legislation step-by-step and domain by domain rather than in a single revolutionary move which might trigger strong opposition and ultimately prove counter-productive. We observe that the Council of Europe expressed the view that while "a

considerable number of member states have made substantial progress regarding the legal and social recognition of LGBT persons, albeit often in a challenging context", "a climate of opposition to LGBT human rights has simultaneously gained ground in certain European countries" (see the CDDH Report on the implementation of Recommendation CM/Rec(2010)5 of the Committee of Ministers to member States on measures to combat discrimination on grounds of sexual orientation or gender identity, adopted by the CDDH at its 92nd meeting (26-29 November 2019), paragraphs 11-12).

7. It is important to note that the judgment in the case of *Fedotova and Others* (cited above) does not equate legal recognition with registration. States may choose among several possible means of granting legal recognition to same-sex couples. They may either create the possibility for same-sex couples to register their union (recognition by registration) or grant recognition *ex lege* in different branches of the law, so that such couples acquire *ex lege* certain specific rights and obtain their protection (recognition *ex lege*). What is important – under the approach adopted in *Fedotova and Others* (cited above) – is that rights and protection are granted *ex lege,* without the necessity to apply to the domestic courts for protection, so that the couples can rely upon the mere existence of their relationship in dealings with the judicial or administrative authorities (see *Fedotova and Others*, cited above § 203). The advantage of this second method is that rights are automatically granted to all cohabiting couples and are not restricted to those who choose to register. At the same time, it should be noted that registration does not confer *per se* broader or stronger rights.

8. The majority make the following assessment in paragraph 76 of the judgment:

> "The Court observes that Romanian law provides for only one form of family union – an opposite-sex marriage and does not provide for legal recognition for same-sex couples (see paragraph 9 above)."

In our view, for the reasons explained above, not only does Romanian law provide for some forms of recognition for same-sex couples, but the scope of this recognition is also expanding.

9. To sum up, as rightly stated in *Fedotova and Others* (cited above, § 189):

> "...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 ..."

For all these reasons, we consider that the respondent State has not violated its obligations under the Convention.

APPENDIX

No.	Application no.	Lodged on	Applicant Year of birth Place of residence Nationality
1.	20081/19	10/04/2019	**Florin BUHUCEANU** 1971 Bucharest Romanian **Victor CIOBOTARU** 1987 Bucharest Romanian
2.	20108/19	10/04/2019	**A.A.N.** 1972 Bucharest Romanian **M.M.I.** 1980 Bucharest Romanian
3.	20115/19	10/04/2019	**M. P.** 1989 Brașov Romanian **G.I.Ț.** 1984 Bucharest Romanian
4.	20122/19	10/04/2019	**Voicu-Dan DRAGOMIR** 1983 Cernica Romanian **Oliver ULERICH** 1997 Petroșani Romanian

No.	Application no.	Lodged on	Applicant Year of birth Place of residence Nationality
5.	20129/19	10/04/2019	**G.C.C.** 1974 Bucharest Romanian **G.R.B.** 1974 Bucharest Romanian
6.	20134/19	10/04/2019	**A.T.S.** 1979 Bucharest Romanian **I.P.** 1994 Târgu Mureș Romanian
7.	20140/19	10/04/2019	**A.F.S.** 1990 Bucharest Romanian **G.S.M.** 1990 Bucharest Romanian
8.	55037/19	18/10/2019	**B.C.** 1989 Bucharest Romanian **I.I.C.** 1987 Bucharest Romanian

No.	Application no.	Lodged on	Applicant Year of birth Place of residence Nationality
9.	55041/19	18/10/2019	**A.M.** 1986 Brașov Romanian **C.E.F.** 1978 Brașov Romanian
10.	55045/19	18/10/2019	**M.C.R.** 1967 Brașov Romanian **R.V.F.** 1999 Daișoara Romanian
11.	55047/19	18/10/2019	**V.A.B.** 1994 Bucharest Romanian **M.A.D.** 1988 Bucharest Romanian
12.	55049/19	18/10/2019	**R.M.M.** 1990 Urlați Romanian **I.A.P.** 1996 Dioști Romanian

No.	Application no.	Lodged on	Applicant Year of birth Place of residence Nationality
13.	55051/19	18/10/2019	**G.C.P.** 1982 Otopeni Romanian **F.S.** 1979 Bucharest Romanian
14.	5926/20	23/01/2020	**S.K.K.** 1991 Timișoara Romanian **A.C.G.** 1981 Timișoara Romanian
15.	5948/20	23/01/2020	**A.L.M.** 1988 Timișoara Romanian **A.M.** 1993 Timișoara Romanian
16.	5965/20	23/01/2020	**Andrada POPA** 1989 Cluj-Napoca Romanian **Oana MÂNDRUȚESCU** 1996 Suceava Romanian

No.	Application no.	Lodged on	Applicant Year of birth Place of residence Nationality
17.	5985/20	23/01/2020	**A.V.I.** 1967 Bucharest Romanian **S.M.A.** 1973 Bistriţa Romanian
18.	6013/20	23/01/2020	**Diana-Loredana MANOLE** 1987 Giurgiu Romanian **Claudia-Valentina TASE** 1988 Buzău Romanian
19.	6034/20	23/01/2020	**Diana-Georgiana GRIGORE** 1981 Bragadiru Romanian **Maria-Olimpia ROMAN** 1977 Sighişoara Romanian
20.	6046/20	23/01/2020	**Oltea-Ilinca CĂLUGĂREANU** 1981 Cluj-Napoca Romanian **Alina MORAR** 1988 Cluj-Napoca Romanian

No.	Application no.	Lodged on	Applicant Year of birth Place of residence Nationality
21.	6058/20	23/01/2020	**M.S.Ş.** 1991 Timişoara Romanian **A.M.P.** 1992 Timişoara Romanian