EUROPEAN LAW

DEFINING THE FAMILY AND THE SCOPE OF PROTECTION AVAILABLE – TENSIONS BETWEEN NATIONAL GOVERNANCE AND INTERNATIONAL EXPECTATIONS

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Résumé

La Cour européenne des droits de l'homme est un forum actif en matière d'examen des plaintes individuelles contre les gouvernements dans le domaine des droits individuels et familiaux. Il reste qu'en dépit des progrès indéniables réalisés tant sur le plan du droit domestique que du droit européen, la déférence à la marge d'appréciation des États signataires a été prépondérante dans ce secteur particulièrement sensible du droit. Cela provoque des tensions continues entre les positions de juridictions locales et les inclinations souvent (mais pas toujours) plus libérales de la Cour européenne des Droits de l'Homme. Le présent texte analyse ces questions à travers les exemples du changement de sexe et des relations homosexuelles.

I INTRODUCTION

Family law is an especially organic and evolving area of law; reacting as it must to social change but nonetheless operating within the confines of the social and cultural norms of each jurisdiction. It is arguable that in the context of regulating the family, law is used less as a social tool utilised to direct individual choices and rather more typically as a regulatory framework to identify and protect the rights of a social unit or units, as individual and social choices evolve, making it reactive rather than proactive in approach. In terms of scope, the concept of the family and the protections afforded to the family by any state is typically limited by the parameters placed by individual states on its definition and composition. Traditionally many states deliberately limited the scope of the concept of family, mandating a particular structure and composition in order for it to come within the remit of the protections offered. Historically, differences have always existed between individual states as to the accepted norms in this sphere, but progressive shifts in respect of the changing

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shape and definition of families and the associated development of individual and family unit-based rights have been addressed to different degrees in most states. Against this backdrop the European Court of Human Rights has served as an active forum for the identification and consideration of individual grievances against governing regimes, in respect of the vindication of individual and/or family-based rights. However, despite the unquestionable progress that has been made at domestic and convention level, the over-riding deference to the margin of appreciation of signatory states in this especially sensitive area of governance can still result in remaining tensions between the jurisdiction-based regulatory approaches and the typically (but not always) more liberal inclinations of the European Court of Human Rights.

II DEFINING THE SCOPE OF ART 8 OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS

The European Court of Human Rights has demonstrated a growing acceptance of the multiple formulations of family to which the Art 8 Convention rights may apply, continuing the shift away from the more traditional construct of the family, historically expected to be premised upon a marital union, and typically with children. This broadening of the application of the Art 8 right to respect for one's private and family life has been evident in a number of recent cases, some related directly to the scope and definition of the familial relationship, and others more broadly linked to the notion of private life. However, as a collective it is reasonable to surmise that these decisions of the Court reflect a further and developing willingness to continue to extend the reach of Art 8 protection.

In *Fernandez Martinez v Spain*,[1] the complainant priest, an employee of the state, had been working as a religious education teacher for 7 years on the basis of renewable annual contracts. Privately, he lived as a married priest, with five children. The case arose from the decision of the Ministry of Education, under the direction of the diocese where he worked, to refuse to renew his contract; he claimed that this was in light of his personal circumstances becoming widely known through media exposure. Fernandez Martinez sought to rely upon the protections afforded by Art 8, claiming that the non-renewal of his employment contract had occurred as a direct result of the personal choices he had made in his private and family life. The European Court of Human Rights found in his favour, regarding 'private life ... [as] ... a broad term not susceptible to exhaustive definition',[2] and deeming Art 8 to be applicable to the case. It regarded the refusal to renew the contract as constituting interference with the exercise by the complainant of his right to respect for his private life.

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1 Application no 56030/07 Judgment of the Grand Chamber 12 June 2014.

2 Paragraph 109; relying upon *Schuth v Germany* no 1620/03 ECHR 2010, stating that it would be 'too restrictive to limit the notion of "private life" to an "inner circle" in which the individual may live his own personal life as he chooses and to exclude therefrom entirely the outside world not encompassed within that circle'.

> 'Restrictions on an individual's professional life may fall within Article 8 where they have repercussions on the manner in which he or she constructs his or her social identity by developing relationships with others. In addition, professional life is often intricably linked to private life, especially if factors relating to private life, in the strict sense of the term, are regarded as qualifying criteria for a given profession.'

The Grand Chamber took the view that 'as a consequence of the non-renewal of the applicant's contract, his chances of carrying on his specific professional activity were seriously affected on account of events mainly related to personal choices he had made in the context of his private and family life' and thus it followed that Art 8 was applicable. However, in adjudicating on the issue of arbitrary interference, the Court noted that 'regard must be had to the fair balance which has to be struck between the general interest and the interests of the individual', noting the fact of the state's margin of appreciation in both instances.[3] In applying these accepted principles to the facts of the case, the complainant's awareness of his heightened duty to the church as an employee of the state within the religious context was deemed to limit the scope of his right to respect for his own private choices. The court was of the view that:[4]

> 'by signing his successive employment contracts, the applicant knowingly and voluntarily accepted a heightened duty of loyalty towards the Catholic Church, which limited the scope of his right to respect for his private and family life to a certain degree.'

Thus, given that the applicant had knowingly placed himself in a situation that was incompatible with the teachings of the Church, the Court concluded that no violation had occurred in the circumstances.

Although unrelated to the definition or scope of the family per se, the decision of the Court in *Konovalova v Russia*[5] demonstrates a consideration of a previously untested aspect of the concept of private life – notably the extent of a patient's rights in the context of medical procedures, and in again stating that 'the concept of "private life" is a broad term not susceptible to exhaustive definition',[6] it serves to highlight the obligation on signatory states to protect individual rights of privacy; and in the instant case, the right of free and informed consent in the patient–hospital relationship. The applicant challenged the uninvited presence of medical students at the birth of her child, notwithstanding that she was attending a public hospital and was informed in advance, via information booklet, of the possibility of their presence. After the birth she claimed that their attendance without her express consent in advance had constituted a breach of her rights under Art 8. The Court found in her favour, declaring:[7]

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3 Paragraph 114.

4 Paragraph 135.

5 Application no 37873/04; judgment delivered 9 October 2014; rectified 21 November 2014.

6 Paragraph 39. The court noted that Art 8 covers, amongst other things, information relating to one's personal identity, such as a person's name, photograph, or physical and moral integrity.

7 Paragraph 41.

> 'that given the sensitive nature of the medical procedures ... the fact that the medical students witnessed it and thus had access to her confidential medical information ... there is no doubt that such an arrangement amounted to "an interference" with the applicant's private life within the meaning of Article 8 of the Convention ...'

and thus there had been 'an interference' with her right to respect for her private life. The fact of an established legal basis for the interference, Art 54 of the Russian Health Care Act, did not legitimise the interference, as the Court regarded the statutory provision as having failed to 'contain any safeguards capable of providing protection to patients' private lives' as necessary.[8]

The interesting related judgment of the Court in *Dubska and Krejova v Czech Republic*[9] considered the scope of the contracting states' margin of appreciation in respect of the compliance of domestic legislation with Art 8 obligations. Acknowledging the sensitivities associated with the process of giving birth, as per the case of *Konovalova v Russia*, the Court noted in particular the important related issues of physical and psychological integrity, medical intervention, reproductive health and the protection of health-related information. Consequently, as a matter of definition, the Court was satisfied that decisions relating to the circumstances of giving birth do fall within the scope of the mother's private life for the purposes of Art 8. However, the issue before the court in *Dubska and Krejova v Czech Republic*, ie the prohibition under Czech law preventing health professionals from assisting with home births, was deemed to be a matter within the scope of the wide margin of appreciation afforded to signatory states and could not be regarded as placing an unlawful disproportionate or excessive burden upon the applicants. Certainly in allowing for this margin of appreciation, the Court relied upon what it considered to be the lack of European consensus on the issue of facilitating home births as a matter of policy.

More directly relevant to the concept and definition of family is the recent decision of the Grand Chamber in *Hamalainen v Finland*[10] where the issue of gender identity in the sphere of family life was considered. The applicant had undergone male-to-female gender reassignment surgery and issued the complaint because she was unable to record her new gender without either securing a divorce against her wife or alternatively transforming the marriage into a same-sex registered partnership. Neither was possible in the circumstances: the former because it would go against their religious conviction and the latter because her spouse would not consent to the transformation of their relationship status. The applicant claimed that, by forcing her to take one of these actions in order to record her new identity, her right to private and family life, as guaranteed under Art 8, was violated. The decision of the Grand Chamber not to find in her favour was not surprising in light of previous

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8 Paragraphs 43–44.

9 Applications nos 28859/11 and 28473/12.

10 [2014] ECHR 787. Application no 37359/09. Judgment of the Grand Chamber delivered 16 July 2014.

decisions in similar cases, bowing to the need for a margin of appreciation to be afforded to signatory states, given that the case 'raises sensitive moral or ethical issues',[11] as well as the absence of a European consensus on permitting same-sex marriages and the related lack of governing regulations of marriages where one party has undergone gender reassignment. From a comparative perspective and in an attempt to identify any level of consensus amongst the member states of the Council of Europe, the Court noted as follows:[12]

> 'From the information available to the Court, it would appear that ... twenty-four member States (Albania, Andorra, Azerbaijan, Bulgaria, Bosnia and Herzegovina, Croatia, Cyprus, Estonia, Georgia, Greece, Latvia, Liechtenstein, Lithuania, Luxembourg, the former Yugoslav Republic of Macedonia, Moldova, Monaco, Montenegro, Poland, Romania, Russia, Serbia, Slovenia and Slovakia) have no clear legal framework for legal gender recognition or no legal provisions which specifically deal with the status of married persons who have undergone gender reassignment. The absence of legal regulations in these member States leaves a number of questions unanswered, among which is the fate of a marriage concluded before gender reassignment surgery. In six member States (Hungary, Italy, Ireland, Malta, Turkey and Ukraine) relevant legislation on gender recognition exists. In these States the legislation specifically requires that a person be single or divorced, or there are general provisions in the civil codes or family-law provisions stating that after a change of sex any existing marriage is declared null and void or dissolved. Exceptions allowing a married person to gain legal recognition of his or her acquired gender without having to end a pre-existing marriage exist in only three member States (Austria, Germany and Switzerland).
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> ... It would thus appear that, where same-sex marriage is not permitted, only three member States permit an exception which would allow a married person to gain legal recognition of his or her acquired gender without having to end his or her existing marriage. In twenty-four member States the position is rather unclear, given the lack of specific legal regulations in place.'

As regards the extent of the signatory states' duty to give effect to their positive obligations under Art 8, given the sensitivities surrounding the issue for consideration, and the need to strike a balance between competing private and public interest of Convention Rights, the Court accepted the need for a wide margin of appreciation in the particular circumstances.[13]

> 'In the absence of a European consensus and taking into account that the case at stake undoubtedly raises sensitive moral or ethical issues, the Court considers that the margin of appreciation to be afforded to the respondent State must still be a wide one ... This margin must in principle extend both to the State's decision whether or not to enact legislation concerning legal recognition of the new gender of post-operative transsexuals and, having intervened, to the rules it lays down in order to achieve a balance between the competing public and private interests.'[14]

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[11] Paragraph 67.

[12] Paragraphs 32–33.

[13] Paragraph 67, citing *Fretté v France* and others Application no 36515/97.

[14] Paragraph 75. The court in this paragraph relied upon the previous ruling in *X, Y and Z v United Kingdom* Application no 21830/93 (1997).

An additional factor hindering the strength of the applicant's claim that her rights under Art 8 had been breached related to the fact of her remaining options, in particular the capacity for her to convert her marriage into a registered partnership, a status that already operated to protect same-sex couples in a manner very similar to marriage. On this point, the differences between marriage and registered partnership were not deemed sufficient to amount to a failure on the part of the Finnish legal system to act:[15]

> 'In the Court's view, it is not disproportionate to require, as a precondition to legal recognition of an acquired gender, that the applicant's marriage be converted into a registered partnership as that is a genuine option which provides legal protection for same-sex couples that is almost identical to that of marriage (see *Parry v The United Kingdom* (dec)). The minor differences between these two legal concepts are not capable of rendering the current Finnish system deficient from the point of view of the State's positive obligation.'

Another recent decision of the European Court of Human Rights in respect of Art 8 arises from the related cases of *Mennesson v France*[16] and *Labassée v France*[17] which concerned a claim of interference first in relation to respect for the collective family life of surrogate parents and their twin daughters; and secondly relating to the twins' right to respect for their private lives. The cases centred on the refusal by the French authorities to recognise the parentage of the applicant twin girls, born as the result of a surrogacy arrangement entered into in California. The applicants sought to register their familial parent–child status in France, having already secured US birth certificates identifying the French couple as the parents of the two girls, following a judgment of the Californian Supreme Court. The parents were unable to register the birth of the girls in the French Civil Register because surrogacy is prohibited under French law. The Court of Cassation in France rejected the applicants' case on the basis that surrogacy is unlawful and is contrary to French law and public policy.

The European Court of Human Rights commenced its judgment by declaring it to be satisfied that the complainants Mr and Mrs Mennesson had cared for the children since birth and they had lived together as a family in France for 10 years, being 'brought up there by genetic and intended parents in a de facto family unit in which [they were receiving] affection, care, education and the material welfare necessary to their development'.[18]

On the first issue, by way of preliminary point, the Court noted that it was not in dispute between the parties that the refusal by the French authorities to legally recognise the family tie between the four applicants amounted to an interference in their right to respect for their family life, and thus it was simply

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[15] Paragraph 87. Thus the court concluded that no violation could be declared. Of note of course is the subsequent change in governing Finnish regulation, with same-sex marriage to become lawful in Finland in 2017.

[16] Application no 65192/11.

[17] Application no 65941/11.

[18] Paragraph 26, quoting from the observations of the Advocate-General, although his opinion was not followed by the Court of Cassation (First Civil Division) 6 April 2011.

for the Court to determine the lawfulness of that interference. Such interference would be regarded as a breach of the rights guaranteed by Art 8 of the Convention 'unless it is justified under paragraph 2 of that Article as "being in accordance with the law", pursuing one or more of the legitimate aims listed therein, and being "necessary in a democratic society" in order to achieve the aim or aims concerned'.[19]

On the first issue requiring that the interference must be 'in accordance with the law' the Court explained that not only does this mandate that the measure in question must have a basis in law, but also that it must be accessible to the person affected and be foreseeable as to its effects in order to permit the person to regulate his or her behaviour as necessary.[20] The court was satisfied that the interference was in fact in accordance with law, on the basis of the evidence adduced and the applicants' associated failure to support their assertion that a more liberal practice had previously existed in France regarding the recognition of a surrogacy arrangement. As regards the legitimacy of the refusal to recognise the existence of a valid legal familial relationship, the Court noted the lack of a consensus in Europe on the lawfulness of surrogacy arrangements and on the legal recognition of the relationship between the intended parents and the child or children conceived abroad:[21]

> 'A comparative-law survey conducted by the Court shows that surrogacy is expressly prohibited in fourteen of the thirty-five member States of the Council of Europe – other than France – studied. In ten of these it is either prohibited under general provisions or not tolerated, or the question of its lawfulness is uncertain. However, it is expressly authorised in seven member States and appears to be tolerated in four others. In thirteen of these thirty-five States it is possible to obtain legal recognition of the parent-child relationship between the intended parents and the children conceived through a surrogacy agreement legally performed abroad. This also appears to be possible in eleven other States (including one in which the possibility may only be available in respect of the father-child relationship where the intended father is the biological father), but excluded in the eleven remaining States (except perhaps the possibility in one of them of obtaining recognition of the father-child relationship where the intended father is the biological father) ...'

The lack of a consensus was not a surprise to the court, given the 'sensitive ethical questions' raised in this context and thus led the court to recognise the need for a wide margin of appreciation in principle, both in relation to authorising surrogacy arrangements and also recognising such arrangements carried out in other jurisdictions. However, given the impact of the French Government's refusal upon what the court regarded as 'an essential aspect of

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[19] Paragraph 50. The Court further noted that '[t]he notion of "necessity" implies that the interference corresponds to a pressing social need and, in particular that it is proportionate to the legitimate aim pursued . . .' citing reliance upon *Wegner and JMWL v Luxembourg* Application no 76240/01 and *Negrepontis-Giannisis v Greece* Application no 56759/08.

[20] Paragraph 57; citing relevant case law from the Court in support: *Rotaru v Romania* Application no 28341/95 ECHR 2000-V and *Sabanchiyeva and others v Russia* Application no 38450/05 ECHR 2013.

[21] Paragraph 78.

the identity of individuals',[22] it determined that in the present case the margin of appreciation must be reduced. In respect of the claim by the four applicants that the French laws failed to vindicate their right to respect for their family life, the Court concluded that the applicants had not claimed that it had been impossible for them to overcome the practical difficulties arising from the lack of recognition of the legal parent–child relationship and were thus deemed to have failed to demonstrate that they had been prevented from enjoying in France their right to respect for their family life.[23] Thus the court agreed with the findings of the Court of Cassation on this point, concluding that the situation arising from the lack of French legal recognition of the parent–child relationship 'strikes a fair balance between the interests of the applicants and those of the State in so far as their right to respect for family life is concerned'.[24] The separate claim of a failure to respect the private lives of the third and fourth applicants was however successful. The Court commenced this part of its ruling by noting that 'respect for private life requires that everyone should be able to establish details of their identity as individual human beings, which includes the legal parent-child relationship ...; an essential aspect of the identity of individuals is at stake where the legal parent-child relationship is concerned'.[25] The legal uncertainty for the third and fourth applicants arising by virtue of the failure by France to recognise their legal relationship with their parents was regarded as serving to undermine their identity in French society, with the capacity to have 'negative repercussions on the definition of their personal identity' as well as consequences for their inheritance rights.[26] In the circumstances the Court unanimously ruled that[27]

> 'having regard to the consequences of this serious restriction on the identity and right to respect for private life of the third and fourth applicants, that by thus preventing both the recognition and establishment under domestic law of their legal relationship with their biological father, the respondent State overstepped the permissible limits of its margin of appreciation ... having regard also to the importance to be given to the child's interests when weighing up the competing interests at stake, the Court concludes that the right of the third and fourth applicants to respect for their private life was infringed.'

The gradual expansion of the scope of the rights and the circumstances to which they will apply arising under Art 8 and the associated willingness of the European Court of Human Rights to narrow the margin of appreciation afforded to signatory states was perhaps better evident in the 2014 judgment in *Jeunesse v the Netherlands*.[28] This case concerned a complaint by Jeunesse, a Surinamese national who was illegally present in the Netherlands, having been refused a residence permit although she lived there with her Dutch husband and their three children and provided welcome clarification in respect of the scope

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[22] Paragraph 80.
[23] Paragraph 92.
[24] Paragraph 94.
[25] Paragraph 96.
[26] Paragraphs 96–97.
[27] Paragraphs 101–102.
[28] Application no 12738/10; judgment delivered on 3 October 2014.

of a signatory state's positive obligations to ensure respect for family and private life under Art 8, arising in the context of immigration. Crucially the court addressed the state's margin of appreciation given the fact of family life being established, albeit during an illegal overstay, and the associated obligations on the state vis-à-vis the children and the protection of their best interests.

The applicant had outstayed a tourist visa and subsequently married a Dutch national with whom she had three children. Despite numerous attempts the applicant failed to secure a residence permit, primarily given her lack of a provisional residence permit upon which to ground a successful application. Before the Grand Chamber she sought to rely upon, inter alia, her rights arising by virtue of Art 8; that the refusal by the Dutch authorities to issue her a residence permit amounted to an infringement of her right to respect for her family life. As a matter of process, the domestic practice, as evidenced in this case, of requiring requests to be made from outside the receiving state, was regarded by the Grand Chamber as entirely reasonable. In cases such as the one at issue, where the applicant is part of an established family living with nationals of that state, the Court stated that only in the most exceptional circumstances would the removal of such an applicant be deemed incompatible with Art 8. However such exceptional circumstances were deemed to exist in the case presented by the applicant, the Court was satisfied that, upon examining her circumstances cumulatively, the Dutch authorities had failed to strike a fair balance between the competing interests of the complainant, her husband and their children and their need to maintain their family life together in the Netherlands and the competing interest of the state's public-order efforts to control immigration. Ultimately the Court found in favour of the applicant, concluding that:[29]

> 'national decision-making bodies should, in principle, advert to and assess evidence in respect of the practicality, feasibility and proportionality of any removal of a non-national parent in order to give effective protection and sufficient weight to the best interest of the children directly affected by it.'

Thus whilst there remains significant domestic capacity to refuse applications for residence notwithstanding evidence of family life, and Art 8 cannot serve as a means to override domestic policies that greatly restrict the success of such applications, where exceptional circumstances are presented, the European Court of Human Rights can invoke Art 8 to protect the right to private and family life.

Reliance upon Art 8 protections has more recently been accepted in respect of the *potential* for family life developing at a future stage. The applicants in *D and Others v Belgium*[30] challenged the time taken by the Belgian authorities to provide them with the necessary travel documentation to allow a child born in the Ukraine as the result of a surrogacy arrangement to return to Belgium with

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[29] Paragraph 120.

[30] Application no 29176/13. Judgment delivered 8 July 2014.

the applicants following his birth. The capacity to rely upon Art 8 was not negatively affected by the fact that the parents and child had very limited contact at the time of the hearing, and struggled to prove the fact of 'family life'. The Court was satisfied that, in light of the extensive efforts of the parents from the moment of birth to establish strong familial ties, an effective family life had in fact existed and they were deemed entitled to invoke the protections available under Art 8. In the circumstances however, the court was not satisfied that the applicants had proven unreasonable delay and the complaint was rejected as manifestly ill-founded.[31]

Finally, as regards the scope and impact of Art 8, the European Court of Human Rights also recently considered the scope of protection that can be afforded to protect the relationship between grandparents and grandchildren. In *Kruskic v Croatia*[32] the first and second named applicants, the grandparents, sought to challenge the decision of the domestic court to award custody of their grandchildren to the children's father. Whilst the court accepted that Art 8 might be invoked successfully by grandparents, it stated that the relationship between grandparents and grandchildren attracts a lesser degree of protection and is different in nature from a parental/child relationship. Additionally, although Art 8 can be successfully relied upon by grandparents in certain circumstances, it cannot in its own right be regarded as conferring custodial rights on grandparents. The complaint before the court in this case was rejected as manifestly ill-founded, especially as the father had not renounced nor been divested of his rights and responsibilities of parental care; and indeed the domestic proceedings were ongoing. However, the capacity for Art 8 to apply to protect the grandparent–grandchild relationship reflects an expanding view of the scope of Art 8 protections and its capacity to protect parties in a non-traditional family formation.

III EXPANDING THE BOUNDARIES OF MARRIAGE – MOVING TOWARDS THE ACCEPTANCE OF SAME-SEX-MARRIAGE AS A RIGHT?

The capacity for parties to a same-sex partnership to secure protection under the European Convention on Human Rights Art 8 guarantee of respect for private and family life has been considered in a number of recent cases by both the First Section Chamber and the Grand Chamber of the European Court of Human Rights. In these cases, the Court has also considered the extent, if at all, to which the guarantees under Art 12 (right to marry) and Art 14 (right to non-discrimination) can be relied upon by parties in same-sex relationships where they seek to vindicate their rights to equal treatment. Specifically the cases before the courts have arisen in the context of the consideration of the

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[31] The child was born on 26 June 2013 and was not authorised to arrive in Belgium accompanied by the applicants until 6 August 2013, following approval by the Brussels Court of Appeal for the issuing of a travel document in the child's name.

[32] Application no 10140/13. Judgment delivered on 25 November 2014.

right to marry and the right to adopt and the recent rulings have demonstrated that the international momentum is moving increasingly towards the recognition of the equal rights of all couples, as regards both status and substantive rights.

Whilst the European Court of Human Rights has not as yet recognised the right to same-sex marriage nor has it identified any positive obligation on members of the Council of Europe to afford and facilitate this right, recent case law centring on the application and scope of the right to respect for private and family life in this and related contexts continues with a progressive, less rigid view of the notion of family, suggesting a gradual movement in that direction. Recent applications to the court have relied as a starting point upon the important decision of *Schalk and Kopf v Austria*[33] where it was accepted by the Court that same-sex partnerships may come within the 'protection of family life' element of Art 8, an extension of the previously limited application of the right to protection of the parties' 'private life' under Art 8. However, these applications have sought to further extend that 2010 decision, and to limit or indeed eliminate the generous margin of appreciation afforded to the Austrian Government in that case.[34] The applicants in *Schalk and Kopf v Austria* sought a progressive, contemporary interpretation of the Art 12 right to marry, challenging the (then) Austrian statutory provisions which they claimed to be in breach of their right to marry and additionally in breach of the Art 14 right to non-discriminatory treatment in circumstances where the discrimination could no longer be regarded as objectively justifiable in the circumstances. In calling for a more liberal interpretation of the Art 12 right to marry, they sought to rely upon what they identified as the existing international acceptance of the right of same-sex couples to have their relationships recognised by law. However, the Court pointed to the lack of a consensus amongst signatory states, noting that at that time, no more than six of the 47 Convention states permitted same-sex marriage.[35] Showing absolute deference to the individual signatory states' right to govern in this sensitive area, the Court relied expressly upon Art 9 of the Charter of Fundamental Rights of the European Union and the right to determination of the scope of the right by individual national states which provides that 'The right to marry and the right to found a family shall be guaranteed in accordance with the national laws governing the exercise of these rights'.[36] This formed the basis for the Court's refusal to impose its own judgment upon national authorities, who retain the right to regulate in such matters in light of domestic norms and policies.

However, of note since this 2010 judgment are both the changing regulatory frameworks in numerous signatory states as well as the related decision (both

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[33] *Schalk and Kopf v Austria* [2010] ECHR 995.

[34] However, the potential scope and impact of this judgment was greatly lessened by the court's ultimate reluctance to identify the fact of such a right, in light of the Court's acceptance of a significant 'margin of appreciation' for individual signatory states in respect of the equal right to marry, thereby limiting the impact of the extension of the application of Art 8.

[35] Paragraph 57.

[36] See www.europarl.europa.eu/charter/pdf/text_en.pdf.

delivered and pending) of the European Court of Human Rights. It is interesting to track the slow but definite escalation in the number of states now permitting same-sex marriage – not quite attaining consensus status yet, but certainly moving in that direction. In addition to the ongoing attempts by citizens, individually and collectively, to convince their domestic courts and ultimately in some instances, the Grand Chamber of the European Court of Human Rights, to progress the rights of same sex couples, the legislatures of various jurisdictions, and in the case of Ireland, the citizens,[37] are in fact making the most significant progress on this issue. Currently, 13 European countries recognise same-sex marriage as lawful, namely Belgium, Denmark, Finland, France, Iceland, Ireland, Luxembourg, the Netherlands, Norway, Portugal, Spain, Sweden and the United Kingdom (except Northern Ireland).[38] Finland and Ireland are the most recent additions to this list; Finland will give effect to same-sex marriage in 2017.[39] Ireland has uniquely progressed its laws by way of popular vote; with 60 per cent of those voting in a referendum on 22 May 2015 voting in favour of the re-definition of the right to marry to exclude any distinction based on the gender of those entering the civil union. Upon the passing of the Thirty-fourth Amendment of the Constitution (Marriage Equality) Bill 2015 the Irish Constitution will be amended to state as follows: 'Marriage may be contracted in accordance with law by two persons without distinction as to their sex.' Further, the matter is far from stagnant in the remaining jurisdictions; an additional 12 countries have a form of civil union or unregistered cohabitation. A number of the jurisdictions that have sought to maintain a distinction in respect of the status and rights of a different-sex relationship and that of a same-sex relationship have been challenged before both national courts and the ECtHR to varying levels of success, as set out below. A related question still unanswered, but pending before the Court (and set out below), is the lawfulness of excluding heterosexual couples from the right to access civil partnerships.

As regards this contemporaneously developing case law of the European Court of Human Rights, a number of recent decisions demonstrate a willingness on the part of the Court to support this international liberalisation of laws. An example is the recent decision in *Vallianatos and others v Greece*,[40] where, notwithstanding an acceptance of the lack of consensus amongst countries within the Council of Europe, the Court recognised the increasing recognition

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[37] The majority of the Irish electorate voted in favour of amending the Irish Constitution on 22 May 2015 to a right to marriage equality, irrespective of the gender of the parties.

[38] The Netherlands was the first European country to legally recognise same-sex marriage in 2001, followed by Belgium (2003), Spain (2005), Norway (2009), Sweden (2009), Iceland (2010), Portugal (2010), Denmark (2012), France (2013), England/Wales (2013), Scotland (2014) and Luxembourg (2015). An additional 14 have a legally recognised form of civil union or unregistered cohabitation.

[39] In February 2015 the President of Finland has signed a law introducing equal marriage rights following a narrow acceptance by the Finnish Parliament in November 2014. The law will have effect from 1 March 2017.

[40] Applications no 29381/09 and 32684/09; judgment delivered 7 November 2013.

and regulation of same-sex relationships, in varying formats, including the right to same-sex marriage in nine signatory states:[41]

> 'a trend is currently emerging with regard to the introduction of forms of legal recognition of same sex marriage. In addition, seventeen member states authorise some form of civil partnership for same-sex couples. As to the specific issue raised in the present case, the Court considers that the trend emerging in the legal systems of the Council of Europe member states is clear: of the nineteen States which authorise some form of registered partnership other than marriage, Lithuania and Greece are the only ones to reserve it exclusively to different-sex couples. In other words, with two exceptions, Council of Europe member States, when they opt to enact legislation introducing a new system of registered partnership as an alternative to marriage for unmarried couples, includes same-sex couples in its scope ...'

The case heard before the Grand Chamber was brought by three same-sex couples and a not-for-profit organisation which provides psychological and moral support to gays and lesbians, who collectively claimed that Greek Law No 3719/2008,[42] enacted in November 2008 creating the concept of 'civil unions', a partnership between two adults of different gender, was a violation of Art 8, taken together with Art 14 of the European Convention of Human Rights. The judgment of the Grand Chamber provides a very useful contemporary statement of not only the court's understanding of the evolving application of Arts 8 and 14, but also a broad analysis of the comparative European and international law approach to non-marital partnerships within the legal systems of the Council of Europe. In addition to tracking the updated position of those states,[43] the judgment makes reference to the relatively progressive views of the Parliamentary assembly of the Council of Europe. Specifically Resolution 1728 (2010) adopted on 29 April 2010, entitled 'Discrimination on the basis of sexual orientation and gender identity', calls on member states to 'ensure legal recognition of same-sex partnerships when national legislation envisages such recognition, as already recommended by the Assembly in 2000', by providing, inter alia, for 'the same pecuniary rights and obligations as those pertaining to different-sex couples; and measures to ensure

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41 At para 91.

42 Law no 3719/2008 entitled 'Reforms concerning the family, children and society'.

43 The judgment at part B, paras 25–26 sets what it refers to as the 'Comparative Law material' in this context as follows: '25 The comparative law material available to the Court on the introduction of official forms of non-marital partnership within the legal systems of Council of Europe member States shows that nine countries (Belgium, Denmark, France, Iceland, the Netherlands, Norway, Portugal, Spain and Sweden) recognise same-sex marriage. In addition, seventeen member States (Andorra, Austria, Belgium, the Czech Republic, Finland, France, Germany, Hungary, Iceland, Ireland, Liechtenstein, Luxembourg, the Netherlands, Slovenia Spain, Switzerland and the United Kingdom) authorise some form of civil partnership for same-sex couples. Denmark, Norway and Sweden recognise the right to same-sex marriage without at the same time providing for the possibility of entering into a civil partnership. 26. Lastly, Lithuania and Greece are the only Council of Europe countries which provide for a form of registered partnership designed solely for different-sex couples, as an alternative to marriage (which is available only to different-sex couples).'

that, where one partner in a same-sex relationship is foreign, this partner is accorded the same residence rights as would apply if she or he were in a heterosexual relationship'.[44]

In considering the alleged discriminatory treatment of the applicants, the Grand Chamber refers to Recommendation CM/Rec (2010)5 of the Council of Europe which sets out required measures to combat discrimination on grounds of sexual orientation or gender identity, and notes the recommendation by the Committee of Ministers that Member States:[45]

> '1. examine existing legislative and other measures, keep them under review, and collect and analyse relevant data, in order to monitor and redress any direct or indirect discrimination on grounds of sexual orientation or gender identity;
>
> 2. ensure that legislative and other measures are adopted and effectively implemented to combat discrimination on grounds of sexual orientation or gender identity, to ensure respect for the human rights of lesbian, gay, bisexual and transgender persons and to promote tolerance towards them ....'

The Grand Chamber further noted that Recommendation CM/Rec (2010)5 also requires that[46]

> '23. Where national legislation confers rights and obligations on unmarried couples, member states should ensure that it applies in a non-discriminatory way to both same-sex and different-sex couples, including with respect to survivor's pension benefits and tenancy rights.
>
> 24. Where national legislation recognises registered same-sex partnerships, member states should seek to ensure that their legal status and their rights and obligations are equivalent to those of heterosexual couples in a comparable situation.
>
> 25. Where national legislation does not recognise nor confer rights or obligations on registered same-sex partnerships and unmarried couples, member states are invited to consider the possibility of providing, without discrimination of any kind, including against different sex couples, same-sex couples with legal or other means to address the practical problems related to the social reality in which they live.'

The position under European Union law was also considered by the Court and in particular, the commentary of the Charter of Fundamental Rights of the European Union in respect of Arts 7, 9 and 21 of the Charter, relating to discrimination. Article 7 asserts the right to respect for private and family life;[47]

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[44] Paragraphs 16.9.1 and 169.3 of Resolution 1728 (2010) cited in para 28 of the judgment.

[45] Paragraphs 1 and 2 of Recommendation CM/Rec (2010) 5 on measures to combat discrimination on grounds of sexual orientation or gender identity, set out in para 29 of the judgment.

[46] Paragraphs 23–25; cited at para 30 of the judgment.

[47] 'Everyone has the right to respect for his or her private and family life, home and communications.'

Art 9 provides a clear statement on the right to marry;[48] whilst Art 21 prohibits discrimination on a lengthy list of grounds.[49] All three articles are cited in full by the Court in considering the current and potential obligations of EU member states and, in assessing their impact, the Court was instructed by the Commentary of the Charter of Fundamental Rights of the European Union, prepared in 2006 by the EU Network of Independent Experts on Fundamental Rights, stating as follows in relation to Art 9:[50]

> 'Modern trends and developments in the domestic laws in a number of countries toward greater openness and acceptance of same-sex couples notwithstanding, a few states still have public policies and/or regulations that explicitly forbid the notion that same-sex couples have the right to marry. At present there is very limited legal recognition of same-sex relationships in the sense that marriage is not available to same-sex couples. The domestic laws of the majority of states presuppose, in other words, that the intending spouses are of different sexes. Nevertheless, in a few countries, e.g., in the Netherlands and in Belgium, marriage between people of the same sex is legally recognized. Others, like the Nordic countries, have endorsed a registered partnership legislation, which implies, among other things, that most provisions concerning marriage, i.e. its legal consequences such as property distribution, rights of inheritance, etc., are also applicable to these unions. At the same time it is important to point out that the name "registered partnership" has intentionally been chosen not to confuse it with marriage and it has been established as an alternative method of recognizing personal relationships. This new institution is, consequently, as a rule only accessible to couples who cannot marry, and the same-sex partnership does not have the same status and the same benefits as marriage ...
>
> In order to take into account the diversity of domestic regulations on marriage, Article 9 of the Charter refers to domestic legislation. As it appears from its formulation, the provision is broader in its scope than the corresponding articles in other international instruments. Since there is no explicit reference to "men and women" as the case is in other human rights instruments, it may be argued that there is no obstacle to recognize same-sex relationships in the context of marriage. There is, however, no explicit requirement that domestic laws should facilitate such marriages. International courts and committees have so far hesitated to extend the application of the right to marry to same-sex couples.'

Thus at this point of its judgment the Court noted and reiterated the capacity for signatory states to lawful recognise same-sex marriages through domestic regimes, but again reiterated the position outlined in *Schalk v Kopf* and rejected any suggestion that such marriages must be positively facilitated by domestic marital laws.

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[48] 'The right to marry and to found a family shall be guaranteed in accordance with the national laws governing the exercise of these rights.'

[49] '1. Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited. 2. Within the scope of application of the Treaty establishing the European Community and of the Treaty on European Union, and without prejudice to the special provisions of those Treaties, any discrimination on grounds of nationality shall be prohibited.'

[50] Paragraph 32.

In considering the merits of the case, the Court outlined the reliance by the Greek Government on the legitimate aims of Law no 3719/2008, which 'should be viewed as a set of provisions allowing parents to raise their biological children in such a way that the father had an equitable share of parental responsibility without the couple being obliged to marry'.[51] Thus, in limiting the availability of the union to heterosexual couples, the Greek Government sought to find other means of stabilising the relationship between heterosexual parents, in order to better secure both parental and child rights. Intriguingly the Court demonstrated that 'the Greek legislature had shown itself to be both traditional and modern in its thinking'; in recognising the societal shift away from the traditional marital union, and creating an alternative legal framework, whilst continuing to limit the scope of that statutory-based status and associated rights solely to heterosexual couples. This motivation, when applied to the personal situation of the applicant couples, was justified in the submissions of the Greek Government on the basis 'that the biological difference between different-sex and same-sex couples, in so far as the latter could not have biological children together, justified limiting civil unions to different-sex couples'.[52] It was argued by the Greek Government that, by no longer necessitating marriage in order to allow a father to establish paternity and be involved in his child's life, the limited availability of the civil union created by the impugned law could not thus be perceived as a violation of Arts 14 and 8 of the Convention. In their defence it was asserted that same-sex couples could simply not be regarded as being in a 'similar or comparable situation to different-sex couples, since they could not in any circumstances have biological children together'.[53] In light of the fact of legislation on civil unions in other Council of Europe member states, the Greek Government added that Law no 3719/2008 differed from similar legislation in those states and was thus capable of being distinguished legitimately:[54]

> 'While those laws produced effects with regard to the financial relations between the parties, only the Greek legislation established a presumption of paternity in respect of children born in the context of a civil union. The Government concluded from this that Law no. 3719/2008 focused on the personal ties between the partners rather than the property-related aspects of their relationship.'

On the first issue, the Court recognised the absence of a dispute regarding whether the applicants' relationship fell within the notion of 'private life' within the meaning of Art 8 of the Convention, and noting that, in light of the decision in *Schalk and Kopf v Austria*, and 'in view of the rapid evolution in a considerable number of member States regarding the granting of legal recognition to same-sex couples, it [would be] artificial to maintain the view that, in contrast to a different-sex couple, a same-sex couple [could not] enjoy "family life" for the purposes of Article 8'.[55] Consequently the Court was of the

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[51] Paragraph 82.
[52] Paragraph 67.
[53] Ibid.
[54] Paragraph 68.
[55] Paragraph 73, quoting directly from *Schalk and Kopf* at 94.

view 'that the applicants' relationships in the present case fall within the notion of "private life" and that of "family life", just as would the relationships of different-sex couples in the same situation'.[56] However, in its judgment the Court also accepted that the protection of the 'traditional' family 'might justify a difference in treatment' and accepted that it can be legitimate to 'enact legislation to regulate the situation of children born outside marriage and also indirectly strengthen the institution of marriage within Greek society'. Equally such a distinction in treatment mandates respect for the principle of proportionality in the circumstances. In assessing this, the Court reaffirmed, with reference to the decisions in *Tyrer v the United Kingdom*[57] and *Goodwin v United Kingdom*,[58] that the Convention is a living and evolving document, subject to progressive interpretations in light of contemporary conditions and thus the state:[59]

> 'in its choice of means designed to protect the family and secure respect for family life as required by Article 8, must necessarily take into account developments in society and changes in the perception of social and civil-status issues and relationships, including the fact that there is not just one way or one choice when it comes to leading one's family or private life.'

Thus the Court emphasised the need for a state to lawfully apply its margin of appreciation in a manner which reflects the narrow margin afforded to states in cases arising 'where there is a difference in treatment based on sex or sexual orientation'. In such cases, relying upon the previous rulings in *Karner v Austria*[60] and *Kozak v Poland*,[61] it was stated that 'the principle of proportionality does not merely require the measure chosen to be suitable in principle for achievement of the aim sought. It must also be shown that it was necessary, in order to achieve that aim, to exclude certain categories of people – in this instance persons living in a homosexual relationship – from the scope of application of the provisions at issue'.[62] Consequently the burden of proof was placed firmly on the Greek Government to justify the limited availability of civil union to the residual couples, as reasonably securing the legitimate aims which they claim to pursue, i e 'to bar same-sex couples from entering into the civil unions provided for by Law no. 3719/2008'.[63]

Ultimately the Court was not convinced by the defence presented by the Greek Government and found in favour of the applicants on both key issues. First the Court concluded that the Greek Government had failed to justify the 'difference in treatment arising out of the legislation in question between same-sex and

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[56] Paragraph 73.
[57] 25 April 1978 Series A no 26.
[58] Application no 28957/95 ECHR 2002-VI.
[59] Paragraph 84, further citing *X and Others v Austria* [GC] Application no 19010/07 19 February 2013 in support.
[60] Application no 40016/98 ECHR 2003-IX.
[61] Application no 13102/02 2 March 2010.
[62] Paragraph 85.
[63] Paragraph 85.

different-sex couples who are not parents'.[64] Secondly, the Court declared itself 'not convinced by the Government's argument that the attainment through Law no. 3719/2008 of the goals to which they refer presupposes excluding same-sex couples from its scope'.[65] By way of additional comment and notwithstanding the lack of general consensus among the legal systems of the Council of Europe Member states on the issue of same-sex marriage, the court expressly acknowledged that:

> 'a trend is currently emerging with regard to the introduction of forms of legal recognition of same-sex relationships. Nine member States provide for same-sex marriage. In addition, seventeen member States authorise some form of civil partnership for same-sex couples ... the Court considers that the trend emerging in the legal systems of the Council of Europe member States is clear: of the nineteen States which authorise some form of registered partnership other than marriage, Lithuania and Greece are the only ones to reserve it exclusively to different-sex couples ....'

Thus, save for two exceptions, the Court noted that, when choosing to amend their laws or enact new laws in respect of registered partnership as an alternative to marriage, the law-makers in the Council of Europe states have chosen to include same-sex couples in its scope. In the context of what the Court referred to as a 'gradual evolution', the European Court of Human Rights concluded that the Greek Government had failed to offer 'convincing and weighty reasons capable of justifying the exclusion of same-sex couples from the scope of Law no. 3719/2008'.[66]

Currently awaiting decision before the European Court of Human Rights are the cases of *Chapin and Charpentier v France*,[67] *Ferguson and others v United Kingdom*[68] and *Orlandi and others v Italy*.[69] The case of *Chapin and Charpentier v France* centres on the marriage of two men, arising from a civil ceremony rebelliously conducted by the Mayor of Bègles, in the French department of Gironde. The union was subsequently declared null and void by the French Cour de Cassation, where, in line with common law views, it declared a valid marriage to be the union of one man and one woman. In 2009 the European Court of Human Rights gave notice of the application to the French Government and declared its intention to put questions to the parties under Art 14 (prohibition of discrimination) in conjunction with Art 12 (right to marriage) and in conjunction with Art 8 (right to respect for private and family life) of the Convention. However, given that the French law has changed significantly in the interim and legalised same-sex marriage in 2013, it has been

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[64] Paragraph 89.
[65] Paragraph 89.
[66] Paragraph 92.
[67] Application no 40183/07.
[68] Application no 8254/11.
[69] Applications no 26431/12, 26742/12, 44057/12 and 60088/12.

suggested that 'the ECtHR could easily evade the broader issue of the right of same-sex partners to marry and instead rule on the specific facts of each case'.[70]

Somewhat similarly in *Ferguson v United Kingdom*, pending before the European Court of Human Rights, the first to eighth applicants seek to challenge the lawfulness of the (then) non-extension of the right to marry to same-sex couples, whilst the ninth to sixteenth applicants seek to challenge the ongoing non-availability to heterosexual couples of the right to register a civil partnership. They claim on both issues the United Kingdom is in breach of the parties' right to respect for family life under Art 8 of the Convention. As above it has been suggested that the fact of the more recent availability of marriage to same-sex couples in the United Kingdom might permit the Court to evade the broader issue of the right to marry: 'the ECtHR will at a minimum need to address whether barring heterosexuals from accessing civil partnerships is discriminatory.'[71]

In *Orlandi and Others v Italy* notice of the multiple applications received against Italy was communicated to the Italian Government in 2013, and the Court similarly put questions to the parties under Art 8 and under Art 14, read in conjunction with Art 8 and/or Art 12 of the Convention. These cases arose in the first instance following the refusal by the Italian authorities to register homosexual marriages which had been lawfully contracted in other jurisdictions. The 12 applicants, six couples, had entered into marriages in jurisdictions where such unions were lawfully permitted. Their subsequent attempts to register the marriages in Italy were refused on the basis that such unions were contrary to the norms of Italian public order. Specifically in the matter of *Antonio Garullo and Mario Ottocento*, one of the six couples presenting before the European Court of Human Rights, the Rome Court of Appeal noted that such registration could not take place given that their marriage lacked one of the essential requisites to amount to the institution of marriage in the domestic order, namely the different sex of the spouses.[72] In presenting these cases the applicants have raised the related absence under the Italian legal system of any other domestic framework for the legal recognition of a same-sex relationship. In light of the ruling in *Vallianatos and others v Greece*, this latter issue in particular may prove difficult for the Italian Government to refute.

Marriage equality is an issue of significant social and legal importance, yet quite differing approaches remain evident in Convention signatory states. Although there is a distinct absence of international consensus on the issue, these are very much changing times and the legal recognition of what might be regarded as a non-traditional union is slowly evolving towards the long-standing norms for opposite-sex unions. A number of the jurisdictions that

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[70] E Bribosia, I Rorive and L Van den Eynde 'Same-Sex Marriage: Building an Argument Before the European Court of Human Rights in Light of the US Experience' (2014) 32 Berkeley J Int'l Law 1 at 6.

[71] Ibid.

[72] Rome Court of Appeal decision of 13 July 2006.

have sought to maintain a distinction in respect of the status and rights of a different-sex relationship and that of a same-sex relationship have been challenged before both national courts and the European Court of Human Rights to varying levels of success. A related question still unanswered is the lawfulness of excluding heterosexual couples from the right to access civil partnerships. This issue continues to develop nationally and at the European Court of Human Rights with welcome evidence of an increasing acceptance of the right to equal treatment for all committed couples; thereby respecting and facilitating their choices in private and family life. The recently developed right to some form of legal recognition and status continues to move slowly towards a growing momentum towards a right to marriage for all. The broader case law centring on the definition and scope of the family under Art 8 equally demonstrates a capacity and willingness to expand the concept, with a view to reducing the scope for the exercise of a margin of appreciation and ultimately influencing all signatory states to favourably develop their governing laws.