IN THE EUROPEAN COURT OF HUMAN RIGHTS

Coman and Others v Romania

(Application no. 2663/21)

WRITTEN COMMENTS

Submitted jointly by

AIRE Centre

ICJ

ILGA-Europe

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These observations are submitted on behalf of the AIRE Centre ("Advice on Individual Rights in Europe"), the European Region of the International Lesbian, Gay, Bisexual, Trans and Intersex Association ("ILGA-Europe") and the International Commission of Jurists (the "ICJ"). The submissions will address the following four points:

i. The nexus between European Union (EU) law, including case law of the Court of Justice of the European Union (CJEU), and the European Convention on Human Rights (ECHR), especially in light of Article 53 of the latter;
ii. The nexus between EU law and the national laws as complying with the principle of equivalence;
iii. The principle of equal rights for same-sex families in the EU with respect to the exercise of the right to freedom of movement, in light of the CJEU's ruling in *Coman and Others*; and
iv. The lack of any legal protection for same-sex families in selected Member States in light of this Court's jurisprudence on the legal protection of such families.

I. The nexus between EU law, including case law of the CJEU, and the ECHR, especially in light of Article 53 of the latter

1. In the absence of EU accession to the ECHR, it is incumbent on the CJEU and the European Court of Human Rights (ECtHR) to ensure that, so far as possible, the relationship between EU law, including the CJEU's case law, and the ECHR, including the ECtHR's jurisprudence, is one of harmony, promoting the collective understanding and enforcement of human rights.[1] Without such a concerted effort on the part of the two Courts, there is a risk of fragmentation of EU/ECHR law,[2] and of a lowering of standards with respect to human rights protection in Europe and beyond. The relationship between the two systems and the two Courts must be able to ensure a stable level of human rights protection, as well as legal certainty for applicants and, ideally, consistency in their respective case law over time, so long as such harmonization aims to enhance human rights protection, as opposed to lowering standards to a minimum common denominator.

2. Beyond merely informal dialogue between the two Courts, the current system provides two main responses to the challenge of ensuring that EU/ECHR law is not excessively fragmented or incoherent. Firstly, through Articles 53 ECHR and 52(3) of the Charter of Fundamental Rights of the EU ("CFR").[3] Secondly, through the ECtHR's critical role in scrutinising compliance with the Convention by EU Member States when applying EU law. In relation to the latter, in cases where the CJEU has made a preliminary ruling on a

[1] Callewaert, Johan. "Do we still need article 6 (2) TEU? Considerations on the absence of EU accession to the ECHR and its consequences." Common Market Law Review 55, no. 6 (2018). It must also be recalled that in Judgement of 30 June 2005, Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland, (Application no. 45036/98), 150, the Strasbourg Court recognised "the growing importance of international cooperation and of the consequent need to secure the proper functioning of international organisations".
[2] See e.g. See Christakis, "A fragmentation of EU/ECHR law on mass surveillance: Initial thoughts on the big brother watch judgment", European Law Blog, 20 Sept. 2018, available at www.europeanlawblog.eu/2018/09/20/a-fragmentation-of-eu-ECHR-law-on-mass-surveillance-initial-thoughts-on-the-big-brother-watch-judgment.
[3] Article 53 ECHR provides that, "Nothing in this Convention shall be construed as limiting or derogating from any of the human rights and fundamental freedoms which may be ensured under the laws of any High Contracting Party or under any other agreement to which it is a party." Article 52(3) CFR provides that, "In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection."

question that comes within the scope of the ECHR by virtue of engaging one or more Convention rights, and where an EU Member State has failed to properly give effect to that preliminary ruling once the case is returned to the referring Member State court, the ECtHR is, in effect, the "court of last resort" for the applicant seeking to exercise the relevant Convention right in the context of the EU Member State's purported application of relevant EU law.

3. Meanwhile, with regard to the ECtHR's critical role in scrutinising EU Member States' compliance with the Convention when applying EU law, it is clear that EU law protection can be – and has on occasion been – raised above the Convention level.[4] Under the EU law, Article 52(3) CFR explicitly provides for this possibility, as does Article 53 ECHR within the Convention system. Moreover, under Article 53 ECHR, the ECtHR must ensure that High Contracting Parties to the Convention do not use the Convention to justify human rights violations or undermine greater standards of human rights protection guaranteed under their domestic laws or any other international law human rights law obligation by which the same States are bound.[5]

4. Article 53 ECHR may also expand the "interpretative latitude" of the Strasbourg Court *vis-a-vis* the Convention, fostering cross-fertilisation and synergy between parallel legal orders, by enabling and encouraging the ECtHR to view international law – and, therefore, where applicable, *also EU law* – in an open-minded way, ensuring compliance with higher human rights standards guaranteed under that body of law.[6] In this sense, Article 53 is not only a substantive right, but also an optimising provision that aims to maximise the protection of human rights beyond the confines of other provisions. This important role accorded to Article 53 is accepted by the Court both explicitly, when it references Article 53, but also, more often, implicitly, when the principles of Article 53 are applied without reference, for example, where the Court is informed by a jurisprudential precedent of CJEU where the CJEU has articulated a more expansive standard of protection in relation to specific overlapping rights.[7]

5. This, of course, is not to say that the scope of protection afforded by the Convention automatically, and without further interpretation, aligns with the highest available standard under international law binding the parties to the Convention. Moreover, as the Concurring Opinion of Judge Wojtyczek in *National Union of Rail, Maritime and Transport Workers v. the United Kingdom*[8] notes, the simple fact that there may be situations in which different instruments may provide a higher level of protection than the Convention is not, in and of itself, automatically indicative of a purported fragmentation or incoherence of international human rights law – or, in this case, of a purported incoherence between the ECHR and EU law. Furthermore, the Convention provides a floor guaranteeing, in

[4] For example, with respect to access to classified information in court files (see e.g. the CJEU judgment of 4 June 2013, C-300/11, ZZ, EU:C:2013:363 and the ECtHR judgment of 19 Sept. 2017, Regner v. the Czech Republic, Appl. No. 35289/11) or the scope of freedom of religion (see e.g. the CJEU judgment of 5 September 2012 in the joined Cases C-71 & 99/11, Y and Z, EU:C:2012:518 and the ECtHR judgement of 19 December 2017 in A. v. Switzerland, Appl. No. 60342/16) or the protection of personal data (see infra FN 1.).

[5] Judgement of 23 July, 2013, Suso Musa v. Malta, Application no. 42337/12, 97.

[6] Judgement of 20 October, 2016, Muršić v. Croatia, Application no. 7334/13, 22; and Judgement of 21 June 2016, L-Dulimi and Montana Management Inc. v. Switzerland, Application no. 5809/08, 71. Indeed, the ECtHR famously made use of such interpretative latitude, taking inspiration from the CJEU (in the CJEU judgement of 30 April 1996, C-13/94), in the ECtHR judgement of 11 July 2002, Christine Goodwin v. the United Kingdom, Application no. 28957/95.

[7] Ibid. (e.g.) judgment of 19 Sept. 2017, Regner v. the Czech Republic, Application no. 35289/11 or judgement of 11 July 2002, Christine Goodwin v. the United Kingdom, Application no. 28957/95.

[8] Judgement of 8 April 2014, National Union of Rail, Maritime and Transport Workers v. the United Kingdom, Application no. 31045/10, concurring opinion of Judge Wojtyczek, 3.

the words of Judge Wojtyczek, "a minimum standard for a limited catalogue of rights",[9] and not a "ceiling" of human rights protection.

6. Nevertheless, where a High Contracting Party (and EU Member State) is refusing to comply with explicit and unambiguous laws by which it is bound (under its own legal system through the application of EU law) guaranteeing certain human rights protections, it is clear from Article 53 ECHR that the Convention will not afford the relevant High Contracting Party with any justification for such non-compliance.[10] In cases where EU law protection has been raised above the Convention level, if the Strasbourg Court were to allow Member States to take advantage of lower standards of protection under the ECHR and its jurisprudence and, in so doing, subvert the appropriate enforcement of human rights guarantees under the EU legal order, it would undermine its long-established case law according to which the Convention is to be interpreted as a living instrument for the protection of human rights, including, as much as possible, in a manner consistent with other relevant international law obligations[11]. Ultimately, a question of fragmentation, incoherence and, indeed, lack of legal certainty would arise if the Strasbourg Court were to maintain a legal limbo on whether or not a Member State is complying with its Convention obligations in circumstances where that Member State is violating EU law rights that clearly and directly overlap with Convention rights.

7. **The interveners submit that the Strasbourg Court can optimally supervise a Contracting Party's compliance with Article 53 of the ECHR by adopting an approach that guarantees at least the protection required under the applicable EU law, and that such an approach is consistent with the Convention, its case law and the letter and the spirit of Article 53.**

II. The nexus between EU law and the national laws as complying with the principle of equivalence

8. For those Contracting Parties that are Member States of the EU, relevant EU law should be interpreted as constituting "national law" for the purposes of the Convention. The relationship between EU law and national law is mainly defined by two key principles: the principle of primacy of EU law and the principle of equivalence. By refusing to implement CJEU judgments, Member States breach both principles.

9. First, whenever there is a conflict between EU law and national law, EU law must prevail. This is the principle of supremacy or primacy of EU law, which the case of *Costa v. ENEL* established in 1964.[12] The principle requires that when such a conflict exists, the conflicting national provision should be disapplied in situations that fall within the scope of EU law, whereas the national provision may continue to be applied in purely internal situations where there is no conflict with EU law.

10. The principle of supremacy demonstrates that EU law requires EU Member States to disapply national provisions that violate, *inter alia*, the rights of "rainbow families" in

[9] Ibid.
[10] Supra note 5.
[11] Bayatyan v Armenia, no. 23459/03, 7 July 2011, para 102.
[12] Case 6/64, Costa v. ENEL, EU:C:1964:66.

situations that fall within the scope of EU law – including the exercise of free movement rights – but not in purely internal situations that do not engage EU law. With respect to this, the CJEU has made it clear that, under the principle of supremacy, EU law prevails over any type of national law, including over conflicting constitutional provisions.[13] In light of the above, it is clear that EU Member States cannot hide behind constitutional bans, for instance on same-sex marriage.

11. Consequently, by relying on the EU principle of supremacy, the Interveners submit that the CJEU judgment in *Coman and Others*[14] requires even those Member States that have a constitutional ban on same-sex marriage to recognise such marriages in situations that fall within the scope of EU law.

12. The second principle – that of equivalence – prohibits discrimination in relation to the procedural circumstances between claims based on national law and those based on EU law. It follows that procedural rules applied in actions for the enforcement of EU rights cannot be less favourable than those governing similar actions based on national law. More specifically, in the context of EU Law, the principle of equivalence requires Member States not to treat matters under EU law less favourably than purely domestic matters.[15] The principle is closely related to the general principle of equal treatment and the prohibition of discrimination from which it is derived. Importantly, there is no question of finding justification for a difference in procedural treatment of comparable domestic actions: if the relevant difference in treatment is shown, the less favourable procedure relating to rights derived from Community law is then unlawful. It is also a well-known international law principle which, together with the principle of mutual recognition, serves as a cooperation-promoting instrument. All domestic acts or omissions (legislative, executive, judicial) that contravene EU law will give rise to State liability if the conditions are met.[16]

13. The equivalence criterion is based on the idea – articulated in *Rewe v Landwirtschaftskammer*[17] – that procedures for actions aimed at guaranteeing the protection of rights of individuals provided for by EU norms cannot be less favourable than those used for similar actions in the domestic procedural system:

    "...in the absence of community rules on this subject, it is for the domestic legal system of each Member State to designate the courts having jurisdiction and to determine the procedural conditions governing actions at law intended to ensure the protection of the rights which citizens have from the direct effect of community law."[18]

14. Consequently, if the enforcement rules of two comparable substantive rights – whether based on EU law or not – are different and, considering all detailed aspects, less favourable, then the coherence of the legal system is in doubt.

15. A legal system that violates the principle of equivalence, is *per se* in breach of EU law.

[13] Case 11/70, Internationale Handelsgesellschaft, EU:C:1970:114.
[14] Case C-673/16, Coman and Others, EU:C:2018:385
[15] Article 19 TFEU.
[16] Joined cases C-46/93 and C-48/93, Brasserie du Pêcheur, EU:C:1995:407, paras. 50-51.
[17] Case C-33/76, Rewe v Landwirtschaftskammer für das Saarland, EU:C:1976:188.
[18] Ibid, para. 5.

III. The principle of equal rights for same-sex families in the European Union with respect to the exercise of the right to freedom of movement, in light of the CJEU's ruling in *Relu Adrian Coman and Others v Inspectoratul General pentru Imigrări and Ministerul Afacerilor Interne*

16. With the ruling in *Coman and Others*,[19] the CJEU made an unequivocal interpretation that the term 'spouse' within the meaning of Directive 2004/38 was gender neutral. It could therefore cover the same-sex spouse of the Union citizens concerned.[20] It followed that a Member State cannot rely on its national law as justification for refusing to recognise in its territory a marriage concluded by that national with a Union citizen of the same sex in another Member State, in accordance with the law of that State, for the sole purpose of granting a derived right of residence to a third-country national.[21]

17. Implicitly, the CJEU explained that obstacles to free movement rights that emerge from a refusal to grant family reunification rights to same-sex spouses can *under no circumstances* be justified.[22] EU law requires that the exercise of the primary and fundamental right to move and reside freely in another Member State can under no circumstances lead to the loss by a Union citizen of the marital status (s)he has acquired in the Member State from which (s)he moves, *at least* for the purposes of granting EU family reunification rights.[23]

18. Consequently, the Interveners also submit that, to allow Member States to grant or refuse entry into and residence in their territory to a third-country national whose marriage to a Union citizen was concluded in a Member State in accordance with the law of that State, whether or not national law allows same-sex marriage, would result in variations of the freedom of movement of Union citizens. This equally applies to those EU citizens who have already made use of that freedom from one Member State to another. Such a situation would be at odds with EU law.

19. When a Union citizen has exercised their freedom of movement by taking up residence in a Member State, other than that of which (s)he is a national, Article 21(1) of the Treaty on the functioning of the European Union ("TFEU") must be interpreted as precluding the competent authorities of the Member State, of which the Union citizen is a national, from refusing to grant their third-country national spouse a right of residence in the territory of that Member State on the ground that the law of that Member State does not recognise same-sex marriage for the purposes of residence in that Member State.

20. The CJEU did not impose on all the Member States an obligation to introduce either same-sex marriage or partnership.[24] It did, however, demand single-purpose recognition of the status attached to same-sex marriage in the Member States where this institution exists, and in Member States where it is legally unknown, to ensure that free movement can be enjoyed without discrimination on the basis of sexual orientation across the territory of the

[19] Supra note 14.
[20] Ibid, para. 35.
[21] Ibidem.
[22] Ibid, paras. 44-46.
[23] Ibid, paras. 39-40.
[24] Ibid, para. 37.

Union.[25] Particularly important in this regard is the outright dismissal of the esoteric defence of moral choices to discriminate without any critical scrutiny, clothed by the terminology of "constitutional identity",[26] which has played a questionable role in the line of case law regarding the right to a name.[27] The incongruity of the 'protection of the traditional family' argument, which lies at the core of 'identity' considerations, was outlined by AG Wathelet, as well as by AG Jääskinen in his Opinion in *Römer*,[28] and, given its obvious clarity, failure to take it into account would put the ECtHR in contrast with clear EU law.

21. **Consequently, the Interveners submit that *Coman and Others* transcends the narrow paradigm of discrimination within employment schemes of Directive 2004/38 and extends it to a unified approach, clearly establishing basic protections of free movement of persons in the internal market for same-sex couples.**

IV. The lack of any legal protection for same-sex families in selected Member States in light of this Court's jurisprudence on the legal protection of such families

22. This Court has established that, "*in defining the meaning of terms and notions in the text of the Convention, [it] can and must take into account elements of international law other than the Convention, the interpretation of such elements by competent organs, and t**he practice of European States reflecting their common values. The consensus emerging from specialised international instruments and from the practice of Contracting States** [emphasis added] may constitute a relevant consideration for the Court when it interprets the provisions of the Convention in specific cases.*"[29]

23. The rights under the Convention are not applied in a vacuum,[30] but fall to be interpreted in light of, and in harmony with, other international law standards and obligations,[31] including under treaty and customary international law.[32]

24. In relation to protection of same-sex families and recognition of same-sex couples, the 27 EU Member States can be divided into three groups:

    (1) six with neither marriage nor registered partnership for same-sex couples: Bulgaria, Latvia, Lithuania, Poland, Romania and Slovakia.

    (2) eight with registered partnership but not marriage for same-sex couples: Croatia, Cyprus, Czechia, Estonia, Greece, Hungary, Italy and Slovenia; and

[25] Ibid, para. 38.
[26] Article 4(2) TEU.
[27] Case C-208/09, Ilonka Sayn-Wittgenstein v Landeshauptmann von Wien, EU:C:2010:806; Case C-391/09, Malgožata Runevič-Vardyn and Łukasz Paweł Wardyn v Vilniaus miesto savivaldybės administracija and Others, EU:C:2011:291.
[28] Opinion of AG Jääskinen in Case C-147/08, Römer v. Freie und Hansestadt Hamburg, EU:C:2010:425, para. 175.
[29] ECtHR, Demir and Baykara v. Turkey, 12 November 2008, Application No. 34503/97, para. 85.
[30] *Öcalan v. Turkey* [GC], no. 46221/99, judgment, 12 May 2005, para. 163.
[31] *Demir and Baykara v. Turkey* [GC], no. 34503/97, judgment, 12 November 2008, § 67; *Al-Adsani v. the UK* [GC], no. 35763/97, judgment, 21 November 2001, para. 55.
[32] *Al-Adsani*; *Waite and Kennedy v. Germany* [GC], no. 26083/94, judgment, 18 February 1999; *Taskin v Turkey*, no. 46117/99, 10 November 2004.

(3) thirteen with marriage for same-sex couples: Austria, Belgium, Denmark, Finland, France, Germany, Ireland, Luxembourg, Malta, Netherlands, Portugal, Spain and Sweden.

25. Although the constitution of Romania, unlike the constitutional texts of Bulgaria, Hungary, Latvia, Lithuania, Poland and Slovakia, contains a gender-neutral phrasing surrounding 'family', the Romanian Civil Code (Codul Civil) not only defines marriage as the union of a man and a woman,[33] but also stipulates – in a rather atypical manner for continental civil codes – that "*marriage between persons of the same sex shall be prohibited*" and, even more specifically, "*marriages between persons of the same sex entered into or contracted abroad by Romanian citizens or by foreigners shall not be recognised in Romania*".[34]

26. Given that EU law is supreme over national law, all 27 Member States must be expected to comply with *Coman and Others* in practice, sooner or later. The issuance of a residence (and work) permit to the same-sex spouse of an EU citizen (or a returning national) removes the greatest legal obstacle to the exercise of the right to freedom of movement within the EU in this context.

27. Member States (of the Council of Europe and/or the European Union) have jurisdiction over civil rights granted to their citizens. Nevertheless, their legislation cannot condone illegal discrimination. On this point, much legislation has been brought before this Court by same-sex couples, mainly based on Article 8 (right to a family life) combined with Article 14 (non-discrimination) of the ECHR.[35]

28. Quite early on, the ECtHR stated that "*a difference in treatment is discriminatory under Article 14 if it has no objective and reasonable justification*", in other words if it does not pursue a "*legitimate aim*" or if there is no "*reasonable relationship of proportionality between the means employed and the aim to be realised*".[36]

29. On this ground, the Court stated in *Mata Estevez v. Spain*[37] that it was proportionate for Spain to exclude homosexual partners from social-security allowances for the surviving spouse, as the underlying reason for such exclusion was the protection of the bond of marriage. However, such an argument is less and less valid given that sexual orientation is a protected ground under the Convention and international human rights law, alongside broader acceptance of LGBTI persons throughout Europe.

30. Only two years after the *Mata Estevez* case, the Court ruled in *Karner v. Austria*[38] that the Government's position, which was based on the argument that the legislation in question aimed to protect the bond of marriage, was not valid in itself[39]. On this point, *Karner* was a big step forward as it granted same-sex couples the right to succeed to a tenancy after the death of a companion when such a right exists for different-sex couples. As it is a patrimonial right, the Court considered there is no justification to discriminate on the basis

[33] (Art. 259(1) and (2) of the Civil Code of Romania)
[34] (Art. 227(1), (2) and (4) of the Civil Code of Romania)
[35] For example, ECtHR, Oliari and others v. Italy, nos. 18766/11 and 36030/11; ECtHR, Norris v. Ireland (6/1987/129/180); ECtHR, Schalk and Kopf v. Austria, No. 30141/04; ECtHR, Karner v. Austria, no. 40016/98; ECtHR, P.B. And J.S. V Austria, no. 18984/02.
[36] ECtHR, Mata Estevez v. Spain, no. 56501/00, 10 May 2001.
[37] Ibid.
[38] ECtHR, Karner v. Austria, no. 40016/98, 24 July 2003, para 41.
[39] Ibid, para 42.

of sexual orientation. It should be noted that Austrian legislation allowed unmarried different-sex partners to succeed.

31. Another important development in the Court's jurisprudence was in the *P.B. and J.S. case,*[40] in which the ECtHR reaffirmed the principle that the notion of "family life" (Article 8 ECHR) applies to same-sex couples.[41] In this case, the applicant sought an extension of his health and accident insurance to cover his companion, something considered by the Austrian Supreme Court as possible under a statutory insurance scheme for cohabiting partners, on the condition that they were different-sex couples. The ECtHR considered this to be a violation of Article 8 combined with Article 14. The *P.B. and J.S.* case thus recognised that same-sex partners had the right to benefit from a companion's health insurance.

32. The ECtHR has since developed a vast case law on same-sex couples' access to a specific legal institution (e.g., same-sex civil unions or civil partnerships) that guarantees them the same level of legal protection that opposite-sex marriage affords to heterosexual couples.

33. The Court first indirectly recognised the right of same-sex couples to enter into a civil union by basing such recognition on the protection of the right not to be discriminated against. In *Valliatanos and others v. Greece*[42], concerning civil unions available only to different-sex couples, the Court found that the applicants' same-sex relationships fell within the scope of "private life" and "family life", just as the relationships of different-sex couples in the same situation would.[43] It therefore considered that the applicants were in a comparable situation to different-sex couples regarding their need for legal recognition and protection of their relationships.[44] Consequently, the Court was of the view that, by tacitly excluding same-sex couples from its scope, the law in question introduced a difference in treatment based on the sexual orientation of the persons concerned.[45]

34. Later, in *Oliari and others v. Italy*,[46] the Court finally recognised the right to enter into a civil union as such.[47] In this case, the Court considered applications of three same-sex couples complaining that there was no alternative to marriage provided for in Italian law for same-sex couples. They appealed to the Court for recognition of the violation of Articles 8 and 14 of the Convention. The Court once again acknowledged that same-sex couples are in need of legal recognition and protection of their relationships. It noted that the applicants in the case, who were unable to marry, had been unable to gain access to, and enjoy the protection of, a specific legal framework (such as that for civil unions) capable of providing them recognition of their status and guaranteeing them certain rights relevant to a couple in a stable and committed relationship. Consequently, it held that the Italian State had failed to guarantee certain basic needs that are fundamental to the

[40] ECtHR, P.B. And J.S. V Austria, no. 18984/02, 22 July 2010.
[41] The Court notes that since 2001, when the decision in Mata Estevez was given, a rapid evolution of social attitudes towards same-sex couples has taken place in many Member States (para. 29) and "in view of this evolution the Court considers it artificial to maintain the view that, in contrast to different-sex couple, a same-sex couple cannot enjoy "family life" for the purposes of Article 8. Consequently, the relationship of the applicants, a cohabiting same-sex couple living in a stable de facto partnership, falls within the notion of "family life", just as the relationship of a different-sex couple in the same situation would." (para 30) Ibid.
[42] ECtHR, Vallianatos and Others v. Greece, Nos. 29381/09 and 32684/09, 7 November 2013.
[43] Ibid, para. 73.
[44] Ibid, para. 81.
[45] Ibid, para. 77.
[46] ECtHR, Oliari and others v. Italy, Nos. 18766/11 and 36030/11, 21 July 2015.
[47] Ibid, para 159.

regulation of a relationship between a couple in a stable and committed relationship, such as, *inter alia*, the mutual rights and obligations they have towards each other, including moral and material support, maintenance obligations and inheritance rights. Thus, in *Oliari and others v. Italy* the Court established a positive obligation upon the States to implement a general legal framework regulating same-sex relationships, regardless whether civil unions already exist for different-sex couples[48].

35. Ultimately, in the recent judgment of *Fedotova v. Russia*,[49] the Court held that the Russian State had violated Article 8 ECHR by failing to provide same-sex couples with the opportunity to have their relationships formally acknowledged in the form of a marriage, or any other form. Three same-sex couples wished to get married in Russia. Their requests were inevitably rejected on the ground that the Russian Family Code (also endorsed by the Russian Constitutional Court) stated that marriage is a "voluntary union between a man and a woman". They then brought the claim that it was impossible for them to enter marriage and thus obtain legal protection for their relationships. The Court clearly held that a State, failing to provide the opportunity for same-sex couples to have their same-sex relationships legally acknowledged, violates Article 8.

36. More specifically, concerning the issuance of residence permits to same-sex partners for family reunification purposes, the Court has handed down judgments in *Pajić v. Croatia*[50] and *Taddeucci and McCall v. Italy*.[51]

37. In *Pajic*, the applicant, a national of Bosnia and Herzegovina who was in a stable same-sex relationship with a woman living in Croatia, complained of having been discriminated against on the grounds of her sexual orientation when applying for a residence permit in Croatia. The Court ruled that the relevant domestic law operated to exclude same-sex couples from its scope, thereby introducing a difference in treatment based on the sexual orientation of the persons concerned. As the government had not shown that the difference in treatment was necessary to achieve a legitimate aim, or that it was justified by any other convincing reason,[52] the ECtHR found that this exclusion violated Article 8 in conjunction with Article 14. The ECtHR held that a same-sex partnership implies a possibility of family reunification.[53] In other words, if a Contracting Party complies with ECHR law, no recourse to EU law would be necessary at all.

38. In *Taddeucci and McCall*, the Court ruled on the Italian authorities' refusal to issue a residence permit based on Italy's domestic legislation's failure to recognise unmarried same-sex partners as capable of being entitled to a residence permit on family grounds. The Court found that the circumstances of the applicants, an unmarried same-sex couple, could not be considered comparable to that of an unmarried heterosexual couple since the applicants could neither marry nor, at the time of their complaint, obtain any other form of legal recognition of their situation in Italy. The Court, therefore, concluded that, in deciding to treat homosexual couples in the same way as heterosexual couples without any spousal status, Italy had breached the applicants' right not to be subjected to

[48] Ibid, para 185, in comparison with Vallianatos and others v. Greece.
[49] ECtHR, Fedotova v. Russia, Nos. 40792/10, 13 July 2021.
[50] ECtHR, Pajić v. Croatia, App no. 68453/13, 23 February 2016.
[51] ECtHR, Taddeucci and McCall v. Italy, App no. 51362, 30 June 2016.
[52] Ibid, para 83.
[53] Ibid, paras. 74-77, 85.

discrimination based on sexual orientation in the enjoyment of their rights under Article 8 of the Convention together with Article 14[54].

39. **In essence, *Taddeucci and McCall* strengthens rights of same-sex couples in committed relationships who do not have access to marriage or civil union. *Coman* ensures partial portability of the civil status of a couple who had already married. Consequently, the Interveners submit that the complementarity of these two rulings establish undeniable guarantees for same-sex couples moving across Europe.**

40. These cases and the Court's findings, echoed later in the Parliamentary Assembly of the Council of Europe (PACE) Resolution 2239 (2018) 'Private and family life: achieving equality regardless of sexual orientation',[55] calling Member States to: "align their constitutional, legislative and regulatory provisions and policies with respect to same-sex partners with the case law of the European Court of Human Rights in this field".[56] More specifically Member States should "ensure that same-sex partners have available to them a specific legal framework providing for the recognition and protection of their unions"[57] and "when dealing with applications for residence permits for the purposes of family reunification, ensure that, if same-sex couples are not able to marry, there is some other way for a foreign same-sex partner to qualify for a residence permit".[58]

Conclusion

41. In *Coman*, the CJEU clarified that the gender-neutral framing of 'spouse' in Article 2(2)(a) of the Citizenship Directive 2004/38 implies that married, same-sex couples enjoy free movement rights equally to married, heterosexual couples throughout the whole territory of the Union. It applies irrespective of how each particular Member State frames 'family' in its own legislation.

42. This consequently includes situations where a same-sex union remains unrecognised, in violation of ECHR law, as Article 8 ECHR contains a positive obligation to this effect[59] that is of a sufficiently general nature,[60] while also prohibiting differences based solely on sexual orientation.[61]

[54] Supra note 51, paras 93-93.
[55] Parliamentary Assembly of the Council of Europe (PACE), of Resolution 2239 (2018) 'Private and family life: achieving equality regardless of sexual orientation', adopted by PACE on 10 October 2018.
[56] Ibid, para 4.3
[57] Ibid.
[58] Ibid, para 4.3.4.
[59] See Oliari and others v Italy, supra note 46 and Pajic.v Croatia, supra note 50.
[60] Orlandi and others v. Italy, nos. 26431/12; 26742/12; 44057/12 and 60088/12, 14 December 2017, para 210.
[61] See supra note 42, paras 77 and 92.