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 By Arthur S. Leonard

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Russia has violated the European Convention of Human Rights for refusing to recognize unions between same-sex couples, the European Court of Human Rights ruled.

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A seven-judge international panel of the European Court of Human Rights (ECHR) ruled on July 13 that Russia has violated the European Convention of Human Rights by failing to provide any formal acknowledgment of family status for same-sex couples. The court ruled on cases brought by three Russian same-sex couples who had applied to be married at local government offices and suffered rejection of their applications. Local courts rejected their appeals, pointing out that Russia's Constitution, as recently amended at the suggestion of President Vladimir Putin, authorizes the government to protect "marriage in the form of union between a man and a woman."

The Russian government's reaction to the ruling was negative, both from a Kremlin spokesperson and from a Russian parliamentarian. EuroNews.com reported on July 14 that a Kremlin spokesperson had "reaffirmed" that same-sex marriages are "not allowed" under the Russian Constitution, and a member of the Russian Parliament, Vasily Piskarev, who chairs a commission on "foreign interference," "rejected" the ruling, mischaracterizing it as trying to "make Russia register same-sex marriages," which, he insisted, "contradicts the foundations of Russian rule of law and morality" and "is clear systemic meddling in Russia's internal affairs."

The Family Code of Russia provides that "the mutual and voluntary consent of a man and a woman who have attained the age of marriage is required for the registration of a marriage," and "the regulation of family relationships is based on the principles of a voluntary marital union between a man and a woman, on the equality of spouses' rights in the family."

The couples retained a Swiss law firm to present their claims to the European Human Rights Court, and the court (which included one Russian judge) unanimously agreed with the substance of the opinion, differing only over the question of whether an attorney fee award should be made to the plaintiffs.

The plaintiffs invoked two Articles of the Convention. Article 8 provides that "everyone has the right to respect for his private and family life," and has been interpreted by the Court in numerous cases to require that government provide some legal framework of recognition for same-sex couples in committed relationships. However, the European Court's interpretation are based on a consensus of the member states, and the court has shied from decreeing that member states must allow same-sex couples to marry. Article 14 provides that the "rights and freedoms set forth in the Convention shall be secured without discrimination on any ground such as sex or other status."

The court's opinion reports that as of June 2021, "sixteen Contracting States to the Convention legally recognize and perform same-sex marriages: Austria, Belgium, Denmark, Finland, France, Germany, Iceland, Ireland, Luxemburg, Malta, Netherlands, Norway, Portugal, Spain, Sweden and the United Kingdom." In addition, "fourteen Contracting States legally recognize some form of civil union for same-sex couples: Andorra, Croatia, Cyprus, the Czech Republic, Estonia, Greece, Hungary, Italy, Lichtenstein, Monaco, Montenegro, San Marino, Slovenia, and Switzerland." There are 47 Contracting States, including Russia. In light of the current breakdown, the court has declared that there is no consensus that Article 8 requires states to recognize or perform same-sex marriages. On the other hand, adding the marriage and civil union jurisdictions produces a clear majority of Contracting States that provide some legal recognition and protection for same-sex couples.

As a result, the court easily reached the same conclusion it has reached in earlier litigation that Article 8 requires providing such recognition, if not all the formalities of marriage. The ECHR's ruling on this point have proved a sticking point in considering applications from additional countries to join the European Union, even though technically the ECHR's rulings bind only the Contracting States to the Convention, a different group. The European Union has, however, made clear through its own Court of Justice that member states have to recognize legalized same-sex relationships from other member states, in cases involving diplomats and people who take advantage of the Union's freedom of movement principles to relocate and work within the Union.

"As regards same-sex couples," wrote the court, "the Court has already held that they are just as capable as different-sex couples of entering into committed relationships. They are in a relevantly similar situation to a different-sex couple as regards their need for formal acknowledgement and protection of their relationship," citing litigation involving Austria, Greece, and Italy.

The court observed that Article 8 “does not explicitly impose on the Contracting States an obligation to formally acknowledge same-sex unions. However, it implies the need for striking a fair balance between the competing interests of same-sex couples and of the community as a whole.”

“The Court notes the applicants’ submission that without formal acknowledgement same-sex couples are prevented from accessing housing or financing programmes and from visiting their partners in hospital, that they are deprived of guarantees in criminal proceedings (the right not to witness against the partner), and rights to inherit the property of the deceased partner. That situation creates a conflict between the social reality of the applicants who live in committed relationships based on mutual affection, and the law, which fails to protect the most regular of ‘needs’ arising in the context of a same-sex couple. That conflict can result in serious daily obstacles for same-sex couples.”

The Russian government argued that public opinion polls showed majority disapproval of same-sex unions by Russians, but the court did not deem this to be dispositive. “It would be incompatible with the underlying values of the Convention, as an instrument of the European public order, if the exercise of Convention rights by a minority group were made conditional on its being accepted by the majority,” commented the court. And, “the interest in protecting minors from display of homosexuality to which the Government referred is based on the domestic legal provision criticized by the Court in the case of Bayev. That argument is not relevant to the present case and therefore it cannot be accepted by the Court.”

The court rejected the Russian government’s argument that the refusal to provide any acknowledgment for same-sex couples was necessary to protect “traditional marriage.” “The Court cannot discern any risks for traditional marriage which the form acknowledgment of same-

sex unions may involve,” it commented, “since it does not prevent different-sex couples from entering marriage, or enjoying the benefits which the marriage gives,” so the court could not “identify any prevailing community interest against which to balance the applicants’ interests,” and the Russian government had “failed to justify the lack of any opportunity for the applicants to have their relationship formally acknowledged.”

The court pointed out that the government could satisfy its Convention obligations by devising some form of civil partnership, civil union, or civil solidarity act (all terms that have been used by one or more Convention contracting states) that is different from marriage.

“Giving the applicants access to formal acknowledgement of their couples’ status in a form other than marriage will not be in conflict with the ‘traditional understanding of marriage’ prevailing in Russia,” insisted the court, “or with the views of the majority to which the Government referred, as those views oppose only same-sex marriages, but they are not against other forms of legal acknowledgment which may exist (see the experience of other Contracting States summarized above).”

Since the court resolved the question in favor of the same-sex couples under Article 8 of the Convention, it was not necessary to analyze whether there was a violation of Article 14 as well. The court concluded that the applicants’ demand for 50,000 euros in compensation as “non-pecuniary damages” had not been adequately documented, as the only evidence presented was some invoices from the law firms, and the Russian government had criticized the damage claim as “excessive.” As a result, the court held that “the finding of a violation constitutes in itself sufficient just satisfaction for the non-pecuniary damage sustained by the applicants. Two judges partially dissented from the decision on this point.

What comes next? As a Contracting Party, Russia has an obligation under international law to implement the court’s ruling, although first it can seek appeal to a larger chamber of the court, which is unlikely to change the outcome. But the court has no power other than moral suasion regarding its decisions, as it would be up to the contracting parties as a body whether to attempt some kind of pressure on Russia to comply. Russia has, in the past, shrugged off judgments of the court. Other countries with more concern for their reputations have taken steps to implement rulings in favor of LGBTQ litigants.