



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

THIRD SECTION

**CASE OF BAYEV AND OTHERS v. RUSSIA**

*(Applications nos. 67667/09 and 2 others - see appended list)*

JUDGMENT

STRASBOURG

20 June 2017

**FINAL**

**13/11/2017**

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



**In the case of Bayev and Others v. Russia,**

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

Helena Jäderblom, *President*,

Luis López Guerra,

Helen Keller,

Dmitry Dedov,

Alena Poláčková,

Georgios A. Serghides,

Jolien Schukking, *judges*,

and Stephen Phillips, *Section Registrar*,

Having deliberated in private on 23 May 2017,

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

**PROCEDURE**

1. The case originated in three applications (nos. 67667/09, 44092/12 and 56717/12) against the Russian Federation lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by three Russian nationals, Mr Nikolay Viktorovich Bayev (“the first applicant”), Mr Aleksey Aleksandrovich Kiselev (“the second applicant”) and Mr Nikolay Aleksandrovich Alekseyev (“the third applicant”), on 9 November 2009 (the first application) and 2 July 2012 (the second and the third applications).

2. The applicants were represented by Mr D.G. Bartenev, a lawyer practising in St Petersburg. The Russian Government (“the Government”) were represented initially by Mr G. Matyushkin, the Representative of the Russian Federation to the European Court of Human Rights, and then by his successor in that office, Mr M. Galperin.

3. The applicants alleged that the legislative ban on “propaganda of non-traditional sexual relations aimed at minors” violated their right to freedom of expression and was discriminatory.

4. On 16 October 2013 the applications were communicated to the Government.

5. In addition to written observations by the Government and the applicants, third-party comments were received from the Family and Demography Foundation, jointly from Article 19: Global Campaign for Freedom of Expression (“Article 19”) and Interights, and jointly from the European Region of the International Lesbian, Gay, Bisexual, Trans and Intersex Association (ILGA-Europe), “Coming Out” and the Russian Lesbian, Gay, Bisexual and Transgender (LGBT) Network, whom the

President had authorised to intervene in the written procedure (Article 36 § 2 of the Convention and Rule 44 § 3 of the Rules of Court).

## THE FACTS

### I. THE CIRCUMSTANCES OF THE CASE

6. The applicants were born in 1974, 1984, and 1977 respectively. The first and the third applicants live in Moscow, and the second applicant lives in Gryazy, Lipetsk Region.

7. The applicants are gay rights activists. They were each found guilty of the administrative offence of “public activities aimed at the promotion of homosexuality among minors” (*публичные действия, направленные на пропаганду гомосексуализма среди несовершеннолетних*).

#### A. The applicants’ administrative offences

8. On 3 April 2006 the Ryazan Regional Duma adopted the Law on Protection of the Morality of Children in the Ryazan Oblast, which prohibited public activities aimed at the promotion of homosexuality among minors.

9. On 4 December 2008 the Ryazan Regional Duma adopted the Law on Administrative Offences, which introduced administrative liability for public activities aimed at the promotion of homosexuality among minors.

10. On 30 March 2009 the first applicant held a static demonstration (“picket”, *пикетирование*) in front of a secondary school in Ryazan, holding two banners which stated “Homosexuality is normal” and “I am proud of my homosexuality”. He was charged with an administrative offence for doing so.

11. On 6 April 2009 the Justice of the Peace of Circuit no. 18 of the Oktyabrskiy District of Ryazan found the first applicant guilty of a breach of section 3.10 of the Ryazan Law on Administrative Offences. He was ordered to pay a fine of 1,500 Russian roubles (RUB, equivalent to about 34 euros (EUR)). On 14 May 2009 the Oktyabrskiy District Court dismissed the first applicant’s appeal.

12. On 30 September 2011 the Arkhangelsk Regional Assembly of Deputies passed amendments to the Law on Separate Measures for the Protection of the Morality and Health of Children in the Arkhangelsk Oblast. The amended law prohibited public activities aimed at the promotion of homosexuality among minors.

13. On 21 November 2011 the Arkhangelsk Regional Assembly of Deputies passed amendments to the Regional Law on Administrative

Offences. The amendments introduced administrative liability for public activities aimed at the promotion of homosexuality among minors.

14. On 11 January 2012 the second and the third applicants held a static demonstration in front of the children's library in Arkhangelsk. The second applicant was holding a banner stating "Russia has the world's highest rate of teenage suicide. This number includes a large proportion of homosexuals. They take this step because of the lack of information about their nature. Deputies are child-killers. Homosexuality is good!" The third applicant was holding a banner stating "Children have the right to know. Great people are also sometimes gay; gay people also become great. Homosexuality is natural and normal"; it went on to list the names of famous people who had contributed to Russia's cultural heritage and were believed to be gay. Both applicants were arrested and escorted to the police station, where administrative offence reports were drawn up.

15. On 3 February 2012 the Justice of the Peace of Circuit no. 6 of the Oktyabrskiy District of Arkhangelsk found the second and the third applicants guilty of a breach of section 2.13 § 1 of the Arkhangelsk Law on Administrative Offences. The second applicant was ordered to pay a fine of RUB 1,800 (about EUR 45), and the third applicant was fined RUB 2,000 (about EUR 50). On 22 March 2012 the Oktyabrskiy District Court of Arkhangelsk dismissed both applicants' appeals.

16. On 7 March 2012 the St Petersburg Legislative Assembly passed amendments to the Law on Administrative Offences in St Petersburg. The amendments introduced administrative liability for public activities aimed at the promotion of homosexuality, bisexuality and/or transgenderism among minors; the same law introduced administrative liability for promotion of paedophilia.

17. On 12 April 2012 the third applicant held a demonstration in front of the St Petersburg City Administration, holding up a banner with a popular quote from a famous Soviet-era actress Faina Ranevskaya: "Homosexuality is not a perversion. Field hockey and ice ballet are." He was arrested by the police and escorted to the police station, where an administrative offence report was drawn up.

18. On 5 May 2012 the Justice of the Peace of Circuit no. 208 of St Petersburg found the third applicant guilty of a breach of section 7.1 of the Law on Administrative Offences in St Petersburg. He had to pay a fine of RUB 5,000 (about EUR 130). On 6 June 2012 the Smolninskiy District Court of St Petersburg dismissed the applicant's appeal.

## **B. Legislative developments and Constitutional Court judgments**

19. On an unspecified date the first and the third applicants brought proceedings before the Constitutional Court of the Russian Federation. They challenged the compatibility of section 4 of the Law on Protection of the

Morality and Health of Children in the Ryazan Oblast with the provisions of the Constitution, in particular with the principle of equal treatment and the freedom of expression enshrined in Articles 19 and 29 of the Constitution, and also the provisions of Article 55 § 3, setting out the conditions under which the constitutionally guaranteed rights and freedoms may be restricted.

20. On 19 January 2010 the Constitutional Court declared the complaint inadmissible, for the following reasons:

“Section 14 § 1 of the Federal Law clearly sets out the responsibility of the State bodies of the Russian Federation to take measures for the protection of children from information, propaganda and activism which is harmful to their health and moral and spiritual development.

...

The laws of the Ryazan Oblast “On protection of the morality of children in the Ryazan Oblast” and “On administrative offences” do not strengthen any measures which prohibit homosexuality or provide for its official censure; they do not contain signs of discrimination, and there is no indication in their intent of superfluous actions by the State bodies. It follows that the provisions being challenged by the appellants cannot be regarded as disproportionately restrictive of freedom of speech.”

21. On unspecified date the third applicant brought proceedings before the Constitutional Court of the Russian Federation. He challenged the compatibility of section 7 of the Law on Administrative Offences in St Petersburg with the Constitution.

22. On 24 October 2013 the Constitutional Court declared the complaint inadmissible, for the following reasons:

“... It follows that the given prohibition, determined by the fact that such promotion is capable of harming minors by virtue of the age-specific features of their intellectual and psychological development, cannot be considered as permitting a limitation on the rights and freedoms of citizens exclusively on the basis of sexual orientation.

...

However, this does not rule out a need to define – on the basis of a balancing exercise with regard to the competing constitutional values – the limits of the given individuals’ effective practice of their rights and freedoms, in order not to infringe the rights and freedoms of others.

...

Given that it is bound up with the investigation into the factual circumstances of the case, the assessment of whether the appellant’s actions with regard to the targeted and unchecked dissemination of generally accessible information were capable of causing harm to the health and moral and spiritual development of minors, including creating a distorted impression of the social equivalence of traditional and non-traditional marital relations, does not come within the competence of the Constitutional Court of the Russian Federation; nor does verification of the lawfulness and validity of the judicial decisions issued in the appellant’s case.”

23. On 29 June 2013 the Code of Administrative Offences of the Russian Federation was amended, introducing in Article 6.21 administrative liability for the promotion of non-traditional sexual relations among minors.

24. On an unspecified date the third applicant and two other persons brought proceedings before the Constitutional Court of the Russian Federation. They challenged the compatibility of Article 6.21 of the Code of Administrative Offences with the provisions of the Constitution.

25. On 23 September 2014 the Constitutional Court examined the complaint on the merits and dismissed it, for the following reasons:

“... Citizens’ enjoyment of the right to disseminate information concerning the question of an individual’s sexual self-determination ought not to infringe the rights and freedoms of others; in regulating of this right by means of legislation, it is necessary to ensure that a balance is struck between the values protected by the Constitution. Consequently, bearing in mind the sensitive nature of such questions, since they belong to the sphere of individual autonomy, and without encroaching on its very essence, the State is entitled to introduce, on the basis of the above-mentioned requirements of the Constitution of the Russian Federation, specific restrictions on activities linked with the dissemination of such information if it becomes aggressive [and] importuning in nature and is capable of causing harm to the rights and legal interests of others, primarily minors, and is offensive in form.

... In so far as one of the roles of the family is [to provide for] the birth and upbringing of children, an understanding of marriage as the union of a man and a woman underlies the legislative approach to resolving demographic and social issues in the area of family relations in the Russian Federation...

Regulation of freedom of speech and the freedom to disseminate information does not presuppose the creation of conditions which would facilitate the formation of other interpretations of the family as an institution, and the associated social and legal institutions, which would differ from the generally accepted interpretations nor society’s approval of them as being equivalent in value...

These aims also determine the need to protect the child from the influence of information that is capable of causing harm to his or her health or development, particularly information that is combined with an aggressive imposition of specific models of sexual conduct, giving rise to distorted representations of the socially accepted models of family relations corresponding to the moral values that are generally accepted in Russian society, as these are expressed in the Constitution and legislation.

...

In order to ensure the child’s healthy development, States are required, in particular, to protect the child from all forms of sexual exploitation and sexual perversion.

...

The aim pursued by the federal legislature in establishing the given norm was to protect children from the impact of information that could lead them into non-traditional sexual relations, a predilection for which would prevent them from building family relationships as these are traditionally understood in Russia and expressed in the Constitution of the Russian Federation. The Constitutional Court of the Russian Federation acknowledges that the possible impact on the child’s future

life of the information in question, even when delivered in a persistent manner, has not been proven beyond doubt. Nonetheless, in assessing the necessity of introducing one or another restriction, the federal legislature is entitled to use criteria that are based on the presumption that there exists a threat to the child's interests, especially as the restrictions introduced by it concern only the tendency of the information in question to target persons of a given age group, and cannot therefore be regarded as excluding the possibility of exercising one's constitutional right to freedom of information in this area. ...

The prohibition on public activities in relation to minors is intended to prevent their attention being increasingly focused on issues concerning sexual relations, which are capable, in unfavourable circumstances, of deforming significantly the child's understanding of such constitutional values as the family, motherhood, fatherhood and childhood, and adversely affecting not only his or her psychological state and development, but also his or her social adaptation. The fact that this ban does not extend to situations concerning the promotion of immoral conduct in the context of traditional sexual relationships, which may also require State regulation, including through [the existence of] administrative offences, is not grounds for finding that the given norm is incompatible with the Constitution of the Russian Federation from the perspective of infringing the principles of equality as applied to the protection of Constitutional values, which ensure the uninterrupted replacement of generations ...

The imposition on minors of a set of social values which differ from those that are generally accepted in Russian society, and which are not shared by and indeed frequently perceived as unacceptable by parents – who bear primary responsibility for their children's development and upbringing and are required to provide for their health and their physical, psychological, spiritual and moral development – ... may result in the child's social estrangement and prevent his or her development within the family, especially if one considers that equality of rights as set out in the Constitution, which also presupposes equality of rights irrespective of sexual orientation, does not yet guarantee that persons with a different sexual orientation are actually regarded in equal terms by public opinion; this situation may entail objective difficulties when trying to avoid negative attitudes from individual members of society towards those persons on a day-to-day level. This is also true for instances where the very information that is banned from dissemination to minors may be intended, from the disseminator's perspective, to overcome such negative attitudes towards persons with a different sexual orientation...

The prohibition on the promotion of non-traditional sexual relationships does not in itself exclude the information in question from being presented in a neutral (educational, artistic, historical) context. Such transmission of information, if it is devoid of indications of promotion, that is, if it is not aimed at creating preferences linked to the choice of non-traditional forms of sexual identity and ensures an individualised approach, taking into account the specific features of the psychological and physiological development of children in a given age group and the nature of the specific issue being clarified, may be conducted with the help of experts such as teachers, doctors or psychologists.

... does not signify a negative appraisal by the State of non-traditional sexual relationships as such, and is not intended to belittle the honour and dignity of citizens who are involved in such relationships...

... cannot be regarded as containing official censure for non-traditional sexual relationships, in particular homosexuality, far less their prohibition...



... the person [disseminating information] must understand that what appears to him or her as the straightforward provision of information may, in a specific situation, resemble activism (promotion), if it is shown that the aim was to disseminate (or especially to impose) information with the above-mentioned content. At the same time, only intentional commission by a person of the corresponding public activities, directly targeted at promoting non-traditional sexual relations among minors, or intentional commission of these actions by a person who was fully aware that there could be minors among those receiving the information, is punishable...”

## II. RELEVANT DOMESTIC LAW AND PRACTICE

26. The Russian Constitution guarantees equality of rights and freedoms to everyone, irrespective of, in particular, sex, social status or employment position (Article 19). It also guarantees the right to freedom of thought and expression, as well as freedom to freely seek, receive, transfer and spread information by any legal means (Article 29). It provides that rights and freedoms may be restricted by federal laws for the protection of constitutional principles, public morals, health and the rights and lawful interests of others, and to ensure the defence and security of the State (Article 55).

27. Law no. 172-22-OZ of the Archangelsk Oblast of 3 June 2003 “On Administrative Offences” provides:

### **Section 2.13 Public activities aimed at the promotion of homosexuality among minors**

“1. Public activities aimed at promoting homosexuality among minors – shall be punishable by an administrative fine for private citizens ranging from 1,500 to 2,000 roubles; for officials – from 2,000 to 5,000 roubles; for legal entities – from 10,000 to 20,000 roubles.

2. The activities referred to in point 1 of the present section, where repeated within one year, shall be punishable by the imposition of an administrative fine, ranging from 2,000 to 5,000 roubles for private individuals; from 5,000 to 10,000 roubles for officials; and from 20,000 to 25,000 roubles for legal entities.

(additional section included on the basis of Oblast Law no. 386-26-OZ of 21 November 2011).”

28. Law no. 41-OZ of the Ryazan Oblast of 3 April 2006 “On Protection of the Morality of Children in the Ryazan Oblast” provides:

### **Section 4. Prohibition of public activities aimed at the promotion of homosexuality among minors**

“Public activities aimed at promoting homosexuality (buggery and lesbianism) shall not be permitted.”

29. Law no. 182-OZ of the Ryazan Oblast of 4 December 2008 “On Administrative Offences” provides:

**Section 3.10 Public activities aimed at the promotion of homosexuality (buggery and lesbianism) among minors**

“Public activities aimed at the promoting homosexuality (buggery and lesbianism) among minors shall be punished by an administrative fine ranging from 1,500 to 2,000 roubles for private citizens; from 2,000 to 4,000 roubles for officials; and from 10,000 to 20,000 roubles for legal entities.”

30. Law no. 113-9-OZ of the Archangelsk Oblast of 15 December 2009 “On separate measures for the protection of the morality and health of children in the Archangelsk Oblast” provides:

**Section 10. Measures to preclude public activities aimed at the promotion of homosexuality among minors  
(introduced by Law no. 336-24-OZ of the Archangelsk Oblast of 30 September 2011)**

“Public activities that are aimed at promoting homosexuality among minors shall be inadmissible.”

31. Law no. 273-70 of St Petersburg of 31 May 2010 “On Administrative Offences in St Petersburg” provides:

**Section 7-1. Public activities aimed at the promotion of buggery, lesbianism, bisexuality and/or transgenderism among minors  
(section introduced from 30 March 2012 by Law no. 108-18 of St Petersburg of 7 March 2012)**

“Public activities aimed at promoting buggery, lesbianism, bisexuality and/or transgenderism among minors shall be punishable by an administrative fine of 5,000 roubles for private citizens; 15,000 roubles for officials; and from 250,000-500,000 roubles for legal entities.

Marginal note: For the purposes of the present section, public activities aimed at promoting buggery, lesbianism, bisexuality and/or transgenderism are to be understood as activities for the targeted and unchecked dissemination, in a generally accessible manner, of information capable of harming the health, morals and spiritual development of minors, and of creating in them a distorted image of the social equivalence of traditional and non-traditional marital relations.”

32. Federal Law no. 436-F3 of 29 December 2010 “On the Protection of Children from Information that is Harmful to their Health and Development”:

**Section 5. Forms of information harmful to children’s health and (or) development**

“...

2. Information prohibited for dissemination to children shall include information:

(1) inciting children to carry out actions which pose a threat to their lives and (or) their health, including harming their own health, suicide;

(2) capable of arousing in children a desire to use narcotic products, psychotropic and (or) intoxicating substances, tobacco products, alcohol and alcohol-based products, beer and beer-based beverages, to participate in gambling, to engage in prostitution, vagrancy or begging;

(3) justifying or defending the acceptability of violence and (or) cruelty or inciting to commit violent actions against people or animals, with the exception of the cases stipulated in this Federal Law;

(4) negating family values, promoting non-traditional sexual relationships and creating disrespect for parents and (or) other family members...

(as worded in Federal Law no. 135-FZ of 29 June 2013)."

**Section 16. Additional requirements concerning the circulation of informational products that are forbidden to children**

"3. Informational products that are forbidden to children may not be distributed within educational institutions, establishments for children's health, health resorts, sports associations, children's cultural associations and recreational and health associations for children, or at a distance of less than 100m from the territory of such organisations."

33. Federal Law no. 124-FZ of 24 July 1998 "On the Main Guarantees of the Rights of the Child in the Russian Federation" provides:

**Section 14. Protection of the child from information, propaganda and activism that is harmful to his or her health, morals and spiritual development**

"1. The Governmental authorities of the Russian Federation shall take measures to protect the child from information, propaganda and activism that is detrimental to his or her health and moral and spiritual development, including from national, class-based or social intolerance; advertising for alcoholic and tobacco products; [material] promoting social, racial, national and religious inequality; information of a pornographic nature; information promoting non-traditional sexual relationships; and from the dissemination of printed, audio- and video-materials that promote violence and cruelty, addiction to narcotics or drugs, [or] anti-social behaviour..."

(in the wording of Federal Laws no. 252-FZ of 21 July 2013, no. 135-FZ of 29 June 2013)."

34. Code of Administrative Offences of the Russian Federation provides:

**Article 6.21 Promotion of non-traditional sexual relations among minors  
(introduced by Federal Law no. 135-FZ of 29 June 2013)**

"1. The promoting of non-traditional sexual relationships among minors, expressed in the dissemination of information aimed at creating in minors a non-traditional sexual orientation, promoting the attractiveness of non-traditional sexual relationships, creating a distorted image of the social equivalence of traditional and non-traditional sexual relationships, or imposing information about non-traditional sexual relationships, arousing interest in such relationships, if these activities do not contain acts punishable under criminal law,

- shall be subject to the imposition of an administrative fine, ranging from 4,000 to 5,000 roubles for citizens; from 40,000 to 50,000 roubles for officials; and, for legal entities, a fine ranging from 800,000 to 1,000,000 roubles or an administrative suspension of their activities for up to 90 days."

### III. RELEVANT COUNCIL OF EUROPE DOCUMENTS

#### A. The Parliamentary Assembly of the Council of Europe

35. Resolution 1948 (2013) of the Parliamentary Assembly of the Council of Europe (“PACE”), adopted on 27 June 2013 and entitled “Tackling discrimination on the grounds of sexual orientation and gender identity”, stated, *inter alia*, as follows:

“7. The Assembly particularly deplores the unanimous approval by the Russian Duma of the bill on so called propaganda for non-traditional sexual relationships among minors which, if approved also by the Council of the Federation, would be the first piece of legislation on the prohibition of homosexual propaganda to be introduced at national level in Europe.

8. In this context, the Assembly takes note of the Opinion of the European Commission for Democracy through Law (Venice Commission) on the issue of the prohibition of so-called homosexual propaganda in the light of recent legislation in some member States of the Council of Europe; it shares its analysis and endorses its findings, notably that “the measures in question appear to be incompatible with the underlying values of the [European Convention on Human Rights]”, in addition to their failure to meet the requirements for restrictions prescribed by Articles 10, 11 and 14 of the European Convention on Human Rights.”

#### B. The European Commission for Democracy through Law (the Venice Commission)

36. In its Opinion “On the Issue of the Prohibition of so-called “Propaganda of Homosexuality” in the Light of Recent Legislation in Some Member States of the Council of Europe, adopted at its 95th Plenary Session (Venice, 14-15 June 2013), the Venice Commission examined the statutory provisions containing prohibitions of “propaganda of homosexuality” which had been adopted or proposed to be adopted in the Republic of Moldova, the Russian Federation and Ukraine. The Opinion stated, *inter alia*, as follows:

“28. ... the scope of the terms such as “propaganda” and “promotion” which are fundamental to these laws does not only seem to be very wide, but also rather ambiguous and vague, taking into account the application of the provisions in the case-law ... Some of those provisions also use unclear terms such as “among minors”/ “aimed at minors” ...

...

31. Despite the attempts made by the [Russian Supreme Court and Constitutional Court] to give a precise definition to the notion of “propaganda of homosexuality”, the notion still remains vague as the Constitutional Court and the Supreme Court did not give further indication on what is to be considered as “*information which is able to cause damage to moral and spiritual development or to the health of minors*” or “*dictating homosexual lifestyle to minors*” in the implementation of the provisions in question.

...

34. It is thus not clear from the case law applying these provisions, whether the terms “prohibition of homosexual propaganda” have to be interpreted restrictively, or whether they cover any information or opinion in favour of homosexuality, any attempt to change the homophobic attitude of a part of the population towards gays and lesbians, any attempt to counterbalance the sometimes deeply rooted prejudices, by disseminating unbiased and factual information on sexual orientation.

35. ... Further, according to the United Nations Human Rights Committee, the Ryazan Law is ambiguous as to whether the term “‘homosexuality (sexual act between men or lesbianism)’ refers to one’s sexual identity or activity, or both.”

...

37. In the Venice Commission’s opinion, the provisions in question concerning the prohibition of “homosexual propaganda” ... are not formulated with sufficient precision as to satisfy the requirement “prescribed by law” contained in the paragraphs 2 of Articles 10 and 11 of the ECHR respectively and the domestic courts have failed to mitigate this through consistent interpretations.

...

41. At the outset, it should be noted that the prohibition of “propaganda of homosexuality” is obviously linked to the question of *sexual orientation*. First, the prohibition in question restricts speech propagating or promoting homosexual/lesbian sexual orientation. Secondly, it seems that the prohibition would more often, although not necessarily, affect persons of homosexual/lesbian sexual orientation, who have a personal interest in arguing for toleration of homosexual/lesbian sexual orientation and its acceptance by majority.

...

48. Therefore, measures which seek to remove from the public domain promotion of other sexual identities except heterosexual, affect the basic tenets of a democratic society, characterized by pluralism, tolerance and broadmindedness, as well as the fair and proper treatment of minorities. Thus, such measures would have to be justified by compelling reasons.

...

50. The first asserted justification of the prohibition of “propaganda of homosexuality” is the “protection of morals”...

...

53. The exercise of [the right to freedom of expression] by sexual minorities does not depend on the positive/negative attitudes of some of the members of the heterosexual majority. As put forward by the Human Rights Committee in its general comment on Article 19 of the ICCPR “the concept of morals derives from many social, philosophical and religious traditions”, any limitation imposed for the “purpose of protecting morals must be based on principles not deriving from a single tradition”

...

56. ... According to the Venice Commission, the negative attitude of even a large part of the public opinion towards homosexuality as such, can neither justify a restriction on the right to respect for the private life of gays and lesbians, nor on their freedom to come true for their sexual orientation in public, to advocate for positive ideas in relation to homosexuality and to promote tolerance towards homosexuals. In

this regard, the Venice Commission recalls that in its Recommendation CM/Rec(2010)5, the Committee of Ministers of the Council of Europe considered that neither cultural, traditional nor religious values, nor the rules of a “dominant culture” can be invoked to justify hate speech or any other form of discrimination, including on grounds of sexual orientation or gender identity.

...

58. As the provisions under consideration pertain to “homosexual propaganda” or “homosexual promotion” as such, without limiting the prohibition to obscene or pornographic display of homosexuality, or to the demonstration of nudity or sexually explicit or provocative behaviour or material, the provisions cannot be deemed to be justified as necessary in a democratic society to the protection of morals ...

59. The second asserted justification of the prohibition of “propaganda of homosexuality” is the protection of children. The provisions under consideration claim that the protection of minors against homosexual propaganda is justified, taking into account their lack of maturity, state of dependence and in some cases, mental disability.

60. Again it has to be emphasized that the incriminations in the provisions under consideration are not limited to obscenities, to provocative incitements to intimate relations between persons of the same sex, or to what the Russian Constitutional Court called to “dictating homosexual lifestyle”, but that they also seem to apply to the dissemination of mere information or ideas, advocating a more positive attitude towards homosexuality.

...

63. As to the explanatory memorandums that accompany the Russian Draft Federal Law and the Ukrainian draft law no. 8711 (no. 0945) respectively, the Venice Commission observes that they do not provide any evidence of harm that may result for minors.

64. In the same vein, the UN Human Rights Committee, in the case of *Fedotova* [cited in paragraph 40 below], duly distinguished “*actions aimed at involving minors in any particular sexual activity*” from “*giving expression to [one’s] sexual identity*” and “*seeking understanding for it*”. In this case, the Committee observed that the State party failed to demonstrate why it was necessary for the protection of minors, to restrict the author’s right to freedom of expression of her sexual identity even if she intended to engage children in the discussion of issues related to homosexuality.

65. Indeed, it cannot be deemed to be in the interest of minors that they be shielded from relevant and appropriate information on sexuality, including homosexuality.

66. The Venice Commission observes that international human rights practice supports the right to receive age appropriate information concerning sexuality.

67. ... In the Venice Commission’s opinion, the dissemination of information and ideas that advocate for positive ideas in relation to homosexuality and that promote tolerance towards homosexuals, does not preclude that traditional family values and the importance of traditional marital relations are propagated and strengthened.

68. ... Sweeping restrictions on the freedom of expression that target not only certain specific types of content (e.g. sexually explicit content such as in *Müller v. Switzerland*), but apply to all categories of expression, from political discussion and artistic expression to commercial speech, will certainly have serious impact on public debate on important social issues which is central to any democratic society. Thus, the

ban cannot be considered “necessary in a democratic society” for the protection of family in the traditional sense.

...

77. In conclusion, ... the Venice Commission considers that the prohibition of “propaganda of homosexuality” as opposed to “propaganda of heterosexuality” or sexuality generally – among minors, amounts to a discrimination, since the difference in treatment is based on the content of speech about sexual orientation and the authors of the provisions under consideration have not put forward any reasonable and objective criteria to justify the prohibition of “homosexual propaganda” as opposed to “heterosexual propaganda”.

...

80. Secondly, “public morality”, the values and traditions including religion of the majority, and “protection of minors” as justifications for prohibition on “homosexual propaganda” fail to pass the essential necessity and proportionality tests as required by the [Convention]. Again, the prohibitions under consideration are not limited to sexually explicit content or obscenities, but they are blanket restrictions aimed at legitimate expressions of sexual orientation. The Venice Commission reiterates that homosexuality as a variation of sexual orientation, is protected under the [Convention] and as such, cannot be deemed contrary to morals by public authorities, in the sense of Article 10 § 2 of the [Convention]. On the other hand, there is no evidence that expressions of sexual orientation would adversely affect minors, whose interest is to receive relevant, appropriate and objective information about sexuality, including sexual orientations.

81. Finally, the prohibition concerns solely the “propaganda of homosexuality” as opposed to “propaganda of heterosexuality”. Taking also into account the democratic requirement of a fair and proper treatment of minorities, the lack of any reasonable and objective criteria to justify the difference of treatment in the application of the right to freedom of expression and assembly amounts to discrimination on the basis of the content of speech about sexual orientation.

82. On the whole, it seems that the aim of these measures is not so much to advance and promote traditional values and attitudes towards family and sexuality but rather to curtail non-traditional ones by punishing their expression and promotion. As such, the measures in question appear to be incompatible with “the underlying values of the ECHR”, in addition to their failure to meet the requirements for restrictions prescribed by Articles 10, 11 and 14 of the Convention.

83. In the light of the above, the Venice Commission considers that the statutory provisions prohibiting “propaganda of homosexuality”, are incompatible with [Convention] and international human rights standards. The Venice Commission therefore recommends that these provisions be repealed ...”

### **C. The Committee of Ministers**

37. Recommendation CM/Rec(2010)5 of the Committee of Ministers to member States on measures to combat discrimination on grounds of sexual orientation or gender identity, adopted on 31 March 2010, covers a wide range of areas where lesbian, gay, bisexual or transgender persons may

encounter discrimination. In the chapter concerning “Freedom of expression and peaceful assembly”, it provides as follows:

“13. Member states should take appropriate measures to ensure, in accordance with Article 10 of the Convention, that the right to freedom of expression can be effectively enjoyed, without discrimination on grounds of sexual orientation or gender identity, including with respect to the freedom to receive and impart information on subjects dealing with sexual orientation or gender identity.

...

16. Member states should take appropriate measures to prevent restrictions on the effective enjoyment of the rights to freedom of expression and peaceful assembly resulting from the abuse of legal or administrative provisions, for example on grounds of public health, public morality and public order.

17. Public authorities at all levels should be encouraged to publicly condemn, notably in the media, any unlawful interferences with the right of individuals and groups of individuals to exercise their freedom of expression and peaceful assembly, notably when related to the human rights of lesbian, gay, bisexual and transgender persons.”

38. The same Recommendation also states, in the chapter concerning “Education”, as follows:

“31. Taking into due account the over-riding interests of the child, member states should take appropriate legislative and other measures, addressed to educational staff and pupils, to ensure that the right to education can be effectively enjoyed without discrimination on grounds of sexual orientation or gender identity; this includes, in particular, safeguarding the right of children and youth to education in a safe environment, free from violence, bullying, social exclusion or other forms of discriminatory and degrading treatment related to sexual orientation or gender identity.

32. Taking into due account the over-riding interests of the child, appropriate measures should be taken to this effect at all levels to promote mutual tolerance and respect in schools, regardless of sexual orientation or gender identity. This should include providing objective information with respect to sexual orientation and gender identity, for instance in school curricula and educational materials, and providing pupils and students with the necessary information, protection and support to enable them to live in accordance with their sexual orientation and gender identity. Furthermore, member states may design and implement school equality and safety policies and action plans and may ensure access to adequate anti-discrimination training or support and teaching aids. Such measures should take into account the rights of parents regarding education of their children.”

39. At the date of adoption of the present judgment, the Council of Europe’s Committee of Ministers is continuing its supervision of the pending execution of the judgment in *Alekseyev v. Russia*, nos. 4916/07 and 2 others, 21 October 2010), which it classified as suitable for the enhanced supervision procedure. Most recently, at the 1273rd meeting of the Committee of Ministers (December 2016, DH) a decision was adopted (CM/Del/Dec(2016)1273/H46-23) whereby the Ministers’ Deputies expressed serious concern that, notwithstanding the measures presented by



the Russian authorities, the situation did not attest to any improvement, as the number of LGBT public events allowed continues to be very limited. The Committee urged the authorities to adopt all further necessary measures to ensure that the practice of local authorities and the courts develops so as to ensure the respect of the rights to freedom of assembly and to be protected against discrimination, including by ensuring that the law on “propaganda of non-traditional sexual relations” among minors does not pose any undue obstacle to the effective exercise of these rights. The Committee of Ministers invited the Russian authorities to continue action to address effectively the outstanding questions with a view to achieving concrete results, including taking further measures to address continued widespread negative attitudes towards LGBT persons.

#### IV. RELEVANT INTERNATIONAL MATERIAL

40. The United Nations Human Rights Committee examined a complaint about an administrative penalty imposed under Law no. 41-OZ of the Ryazan Oblast (see *Fedotova v. Russian Federation*, Merits, Communication No 1932/2010, UN Doc CCPR/C/106/D/1932/2010, IHRL 2053 (UNHRC 2012), 31 October 2012, United Nations Human Rights Committee [UNHRC]) and found as follows:

“2.2 On 30 March 2009, the author displayed posters that declared “Homosexuality is normal” and “I am proud of my homosexuality” near a secondary school building in Ryazan. According to her, the purpose of this action was to promote tolerance towards gay and lesbian individuals in the Russian Federation.

2.3 The author’s action was interrupted by police and, on 6 April 2009, she was convicted by the justice of the peace of an administrative offence [and was] punished with [an] administrative fine ...

...

10.8 The Committee notes the State party’s arguments that the author had a deliberate intent to engage children in the discussion of the issues raised by her actions; that the public became aware of the author’s views exclusively on the initiative of the latter; that her actions from the very beginning had an “element of provocation” and her private life was not of interest either to the public or to minors, and that the public authorities did not interfere with her private life ... While the Committee recognizes the role of the State party’s authorities in protecting the welfare of minors, it observes that the State party failed to demonstrate why on the facts of the present communication it was necessary, for one of the legitimate aims ... to restrict the author’s right to freedom of expression ..., for expressing her sexual identity and seeking understanding for it, even if indeed, as argued by the State party, she intended to engage children in the discussion of issues related to homosexuality. Accordingly, the Committee concludes that the author’s conviction of an administrative offence for “propaganda of homosexuality among minors” on the basis of the ambiguous and discriminatory section 3.10 of the Ryazan Region Law, amounted to a violation of her rights under article 19, paragraph 2 [right to freedom of expression], read in

conjunction with article 26 [protection against discrimination] of the [International Covenant on Civil and Political Rights].”

## THE LAW

### I. JOINDER OF THE APPLICATIONS

41. Given their similar factual and legal background, the Court decides that the three applications should be joined pursuant to Rule 42 § 1 of the Rules of Court.

### II. ALLEGED VIOLATION OF ARTICLE 10 OF THE CONVENTION

42. The applicants complained about the ban on public statements concerning the identity, rights and social status of sexual minorities. They relied on Article 10 of the Convention, which reads as follows:

“1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.”

#### A. Admissibility

43. The Court notes that the Government stated that the applicants had not applied for supervisory review of the decisions concerning their administrative offences in accordance with Article 30.12 of the Code of Administrative Offences. However, in the absence of any submissions clarifying the potential benefit of using this procedure in relation to the complaints at issue, it is not ready to treat the Government’s remark as a plea of non-exhaustion of effective domestic remedies that would require its assessment (see *R. v. Russia*, no. 11916/15, § 50, 26 January 2016).

44. The Court notes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

## **B. Merits**

### *1. The parties' submissions*

#### **(a) The Government**

45. The Government accepted that the administrative liability imposed on the applicants for holding demonstrations constituted an interference with their right to freedom of expression. However, they considered that the restrictions on the promotion of homosexuality in general and the enforcement of these restrictions against the applicants in particular had been in accordance with law and had been necessary in a democratic society for the protection of health and morals and the rights of others. In the present case, the Government claimed to have enjoyed the wide margin of appreciation generally available to the Contracting States when regulating freedom of expression in relation to matters liable to offend intimate personal convictions within the sphere of morals or, especially, religion.

46. They specified that the “promotion”, or “propaganda”, was to be understood as active dissemination of information aimed at inducing others to subscribe to particular sets of values, or patterns of behaviour, or both, or prompting others to commit, or to abstain from, certain actions. The legal provisions governing liability for such acts had been accessible and foreseeable in their application. The Government considered that the applicants were not simply pursuing the aim of expressing their views, or of informing others in a neutral manner. Their statements were thus not a harmless “mention” of homosexuality or a contribution to a public debate on sexual minorities’ social status. The applicants specifically targeted an underage audience – hence the choice of venues – so as to impose a homosexual lifestyle, to plant an attractive and even superior image of same-sex relations in the minds of minors and to corrupt their vision on traditional family values. They had thus encroached on the moral and spiritual development of children. According to the Government, statements such as “homosexuality is natural”, “homosexuality is normal” or “homosexuality is good” placed psychological pressure on children, influenced their self-identification and intruded into their private lives.

47. The Government further pointed out that the applicants could have disseminated their information and ideas among adults. When it came to addressing children, it was necessary to have regard to the right of parents to decide on the appropriate forms of education and means of ensuring the moral and intellectual development of their children. The Government therefore considered that the restrictions on sharing certain categories of information and ideas with minors were justified. The applicants, in exercising their right to freedom of expression, had disregarded these considerations and intruded into the sphere of parental responsibilities. According to the Government, their actions were not driven by a genuine

need to express themselves, otherwise they would have protested against the law in another, more appropriate place; by targeting minors they had abused their right to freedom of expression, intentionally harmed others and knowingly and deliberately subjected themselves to administrative sanctions.

48. Commenting on the laws imposing limits on the dissemination of information concerning homosexuality, the Government stated that similar restrictions also concerned information about heterosexual relations; any materials with sex-related content were subject to classification and labelling for age-appropriate use. On the other hand, they submitted that information on homosexuality promoted the denial of traditional family values, which in itself justified the restrictions. They specified that the term “non-traditional sexual relations” used in the legislation was generally understood by the legal community as meaning “homosexual”, the latter term being deliberately avoided. They also contended that compared to the traditional family, same-sex relations were associated with greater health risks, in particular that of contracting HIV, and that they impeded population growth.

49. The Government reiterated the findings of the Constitutional Court and concluded that the penalties imposed on the applicants had been proportionate to the legitimate aims pursued, in accordance with Article 10 § 2 of the Convention.

50. Finally, the Government made a number of references to the Court’s case-law which they considered to have supported their allegations. In particular, they quoted *Dudgeon v. the United Kingdom* (22 October 1981, §§ 49, 52 and 62, Series A no. 45) and claimed that the Court had “acknowledged the legitimate necessity in a democratic society for some degree of control over homosexual conduct, notably in order to provide safeguards against the exploitation and corruption of those who are especially vulnerable by reason, for example, of their youth” before it had found a violation of Article 8 of the Convention on account of a higher age of consent being fixed for homosexual conduct than for sexual relations between persons of the opposite sex. They also relied on *Mouvement raëlien suisse v. Switzerland* [GC] (no. 16354/06, §§ 17, 61-62 and 73-75, ECHR 2012 (extracts)) referring to the legitimacy of protection of minors against paedophile practices and incest. Further references were made to *Vejdeland and Others v. Sweden* (no. 1813/07, § 55, 9 February 2012) in which the Court noted that the homophobic leaflets in question had been distributed to “young people who were at an impressionable and sensitive age and who had no possibility to decline to accept them”; the Government implied that this was equally relevant to the present case. They also relied on *K.U. v. Finland* (no. 2872/02, § 43, ECHR 2008), a case concerning a minor who had been refused disclosure of the name of a person who had published an advertisement of a sexual nature in the applicant’s name; in this case the

Court found that the State's positive obligations may involve the adoption of measures designed to secure respect for private life, even in the sphere of the relations of individuals between themselves. The Government considered that in the present case the authorities were precisely fulfilling their positive obligations under the Convention to protect the private lives of minors, and that they did so in a balanced manner.

**(b) The applicants**

51. The applicants specified that their applications concerned two issues. First, they challenged the use of the legislation banning the promotion of homosexuality among minors in order to suppress an open expression of protest against the same legislation. They alleged that regardless of whether there had been any legitimate considerations for introducing the ban on "propaganda" of homosexuality, there was no justification for a restriction on the right to protest against the laws in question. Secondly, they alleged that the prohibition of "homosexual propaganda" introduced by the recent legislation constituted a blanket ban on the mere mention of homosexuality in the presence of minors, irrespective of the content of the message. They challenged the Government's claim that dissemination of information about homosexuality should be limited to an adult audience. In contrast to the Government, the applicants considered that the margin of appreciation was a narrow one, given that the subject matter of the expression at stake was an innate personal characteristic, and also because campaigning for LGBT rights constituted political speech or debate on matters of public interest, for which there is little scope for restrictions under Article 10 § 2 of the Convention.

52. The applicants acknowledged that the choice of the "picket" venues and the content of the banners had been intentional. However, they defended these decisions as a form of protest against the legislative acts in question and pointed out that placing a restriction on the very possibility of protesting against the adoption of a law would affect the very essence of the right to freedom of expression. They also considered that public places frequented by minors were appropriate for the intended message of their demonstrations. The banners describing homosexuality as "normal" had been intended to confront the perception, held by many in Russia, of homosexuality as a "perversion" and to promote tolerance, not to proclaim its superiority. In addition, the second applicant's banner raised the issue of the high suicide rate among teenagers because of the lack of understanding of their homosexuality. It thus called on the public to address the special needs of young people who were at risk because of bullying, intolerance and misunderstanding, which was a matter of public importance, to minors above all.

53. The applicants alleged that the "propaganda" legislation did not meet the quality-of-law requirement contained in Article 10 § 2 of the

Convention. They also contested the Government's presumption that the ban on the promotion of non-traditional sexual relations served the legitimate aim of protecting minors from obscene or age-inappropriate information about homosexuality. They pointed out that homosexuality was an individual's innate personal characteristic – and not a lifestyle of one's choice as the Government seemed to believe, and embraced not only sexual life but the whole spectrum of a human relationship between two individuals, emotional affection forming an integral part of it. According to the applicants, information about sexual orientation as such should not be subject to the same restrictions as information on sexual relations; otherwise this would be equivalent to denial of an individual's right to express his or her identity. In all three cases, however, the applicants had been found liable for the breach of the ban merely because their banners had mentioned homosexuality or because the applicants openly identified themselves as homosexuals.

54. They further affirmed that the “propaganda” law was inherently discriminatory, in that it specifically concerned minors' exposure to information about sexual minorities, which reinforced stigma and prejudice against the latter groups. They pointed out that the impugned provisions went beyond what was necessary for the protection of minors from indecency, given the general prohibition in the Criminal Code of lecherous actions in respect of minors and of dissemination of pornography to minors. The ban on the “promotion of homosexuality” was intended to restrict not only information relating to the intimate sphere, but also the other dimensions of a same-sex relationship, such as emotional or loving affection, family ties, etc., thus depicting them as immoral. No such restrictions existed as regards “traditional” relationships. The applicants considered that everyone ought to have the right to express his or her homosexuality on an equal basis with the heterosexual majority.

55. Commenting on the Government's reliance on the wide margin of appreciation, the applicants referred to the Court's case-law to the effect that a wider margin of appreciation is generally available to the contracting States when regulating freedom of expression in relation to matters liable to offend intimate personal convictions within the sphere of morals or, especially, religion (they cited *Mouvement raëlien suisse*, cited above, § 61). They relied on the Court's case-law to affirm that neither homosexuality nor homosexual behaviour contradicts the notion of public morals even in their broadest understanding (among other cases, they referred to *Smith and Grady v. the United Kingdom*, nos. 33985/96 and 33986/96, § 97, ECHR 1999-VI; *S.L. v. Austria*, no. 45330/99, § 44, ECHR 2003-I (extracts); and *Alekseyev*, cited above, § 84). They pointed out that the Court had criticised “predisposed bias on the part of a heterosexual majority against a homosexual minority” and held that “these negative attitudes [could not] of themselves be ... sufficient justification for the differential

treatment any more than similar negative attitudes towards those of a different race, origin or colour” (citing *Smith and Grady*, cited above, § 97).

56. The applicants disagreed that learning about the existence of homosexuality or adopting a tolerant attitude to sexual minorities could offend children’s intimate convictions. An opposite approach would force homosexual individuals to hide their sexual orientation, resulting in social exclusion which the Convention was designed to eliminate. They contested the Government’s allegation that an open public discussion of homosexuality would undermine the protection of minors or would adversely affect their harmonious development. Quite the contrary, it was the only way to eradicate the stigmatization of LGBT children, adults and families.

57. As to the right of parents to choose appropriate forms of education for their children, they submitted that their actions did not interfere with the educational process or curricula; they did not seek to engage minors in classes or meetings. Nevertheless, they claimed that parents’ right to choose an educational environment did not imply their ultimate power to protect their children from any public speech which children might encounter in schools, on the streets or elsewhere, a principle which they derived from *Kjeldsen, Busk Madsen and Pedersen v. Denmark* (7 December 1976, § 54, Series A no. 23). They requested that the Court expressly acknowledge that the right to disseminate information about homosexuality among children should not be conditional on parents’ authorisation. They contested the Government’s comparison of the present case with *Vejdeland and Others*, cited above, and alleged that it could in fact only be contrasted with the latter case, in that *Vejdeland and Others*, cited above, concerned homophobic expression and the sanctions imposed fell within the permitted restrictions on hate speech.

**(c) Third parties**

58. The submissions of the Family and Demography Foundation focused on the risks associated, in their view, with a homosexual lifestyle. They argued that homosexual men ran a higher risk of contracting HIV than heterosexual men, and that they were more likely to suffer from suicidal tendencies, depression, anxiety, substance abuse and similar disorders. They also submitted that homosexual lifestyles and behaviour were regarded as immoral by all major religions, and that the majority of non-believers shared this view. Finally, they expressed support for traditional family values and argued that the family, as a union between a man and a woman, was afforded special protection by international law in recognition of its virtues deriving from the procreative function; they further alleged that this protection would be incomplete without a ban on “homosexual propaganda” among children.

59. “Article 19” and Interights in their joint submissions drew attention to the rise of the concept of “homosexual propaganda” in a number of Eastern European countries, reflected in legislative proposals placing severe restrictions on the freedom of expression and rights of sexual minorities. They pointed out that these initiatives were invariably based on the declared need to protect the morals and health of children, but were themselves detrimental to the protection of health, the interests of children and the social cohesion. They submitted that the right to education included children’s access to sexual and reproductive health information. They quoted the United Nations Special Rapporteur on the right to health, who had stated that laws censoring discussion of homosexuality in classroom “fuel stigma and discrimination of vulnerable minorities” and “perpetuate false and negative stereotypes concerning sexuality, alienate students of different sexual orientations and prevent young people from making fully informed decisions regarding their sexual and reproductive health”. They also referred to Recommendation of the Committee of Ministers (CM/Rec(2010)5, cited in paragraph 37 above) stating that “the over-riding interests of the child” required that the right to education is “effectively enjoyed without discrimination on grounds of sexual orientation or sexual identity”, including “safeguarding ... a safe environment, free from violence, bullying, social exclusion ... related to sexual orientation or gender identity”. They argued that laws on “homosexual propaganda” made it impossible for schools, educational authorities and charities to provide students with objective information on sexual orientation and gender identity, to implement measures against bullying and harassment and to provide adequate protection to LGBT students, staff and teachers.

60. In their joint submissions ILGA-Europe, “Coming Out” and the Russian LGBT Network expressed concern about discrimination and violence against LGBT people in Russia, hate crimes, bullying and harassment of LGBT children, and pressure on same-sex couples and the children they are raising and on LGBT advocacy organisations. They referred to international instruments urging States to combat homophobia, to implement educational policies against harassment and bullying of sexual minorities at school, and to ensure that accurate information concerning sexual orientation and gender identity, expressed without prejudice, was included in the curriculum.

## *2. The Court’s assessment*

### **(a) Whether there was interference with the exercise of the applicants’ freedom of expression**

61. The Court observes that the central issue in this case is the very existence of a legislative ban on promotion of homosexuality or non-traditional sexual relations among minors, which the applicants contest



as inherently incompatible with the Convention. The applicants complained about the general impact of these laws on their lives, in that it not only prevented them from campaigning for LGBT rights but in effect required them to be aware of the presence of minors in their daily activities, in order to conceal their sexual orientation from them. They pointed out that they had been convicted of administrative offences for displaying the most trivial and inoffensive banners.

62. It is of relevance that even before any administrative measures were taken against the applicants the ban on promotion of non-traditional sexual relations among minors had arguably encroached on the activities in which they might personally have wished to engage, especially as LGBT activists. The Court has previously held that the chilling effect of a legislative provision or policy may in itself constitute an interference with freedom of expression (see *Smith and Grady*, cited above, § 127). However, in the present case the Court is not required to establish the existence of an interference on the basis of the general impact of the impugned laws on the applicants' lives because these laws have actually been enforced against the applicants in the administrative proceedings. As admitted by the Government, there has been an interference with the applicants' freedom of expression.

**(b) Whether the interference was justified**

63. The measures taken against the applicants were based on the legislative provisions specifically adopted to outlaw the promotion of homosexuality and non-traditional sexual relations among minors. While there is no dispute about the authorities' compliance with law, the question of lawfulness arises in relation to the applicants' allegations that the law itself was inappropriately vague and was unforeseeable in its application. However, the Court considers that the issue with the quality of law is secondary to the question of necessity of such laws as general measures. The Court reiterates that, in order to determine the proportionality of a general measure, it must primarily assess the legislative choices underlying it, regard being had to the quality of the parliamentary and judicial review of the necessity of the measure, and the risk of abuse if a general measure were to be relaxed. In doing so it will take into account its implementation in the applicants' concrete cases, which is illustrative of its impact in practice and is thus material to the measure's proportionality (see *Animal Defenders International v. the United Kingdom* [GC], no. 48876/08, § 108, ECHR 2013 (extracts) and the cases cited therein). As a matter of principle, the more convincing the general justifications for the general measure are, the less importance the Court will attach to its impact in the particular case (*ibid.*, § 109).

64. Accordingly, the Court's assessment in this case will focus on the necessity of the impugned laws as general measures, an approach which is

to be distinguished from a call to review domestic law in the abstract (see, for example, *James and Others v. the United Kingdom*, 21 February 1986, § 36, Series A no. 98; cf. *Perinçek v. Switzerland* [GC], no. 27510/08, § 136, ECHR 2015 (extracts)).

(i) *Justification on the grounds of protection of morals*

65. As a first line of argument, the Government relied on moral imperatives and on popular support for the measures in question. They alleged that an open manifestation of homosexuality was an affront to the mores prevailing among the religious and even non-religious majority of Russians and was generally seen as an obstacle to instilling traditional family values.

66. The Court would generally accept a wider margin of appreciation in the absence of consensus among member States where the subject matter may be linked to sensitive moral or ethical issues. In the instant case, however, the Court notes that there is a clear European consensus about the recognition of individuals' right to openly identify themselves as gay, lesbian or any other sexual minority, and to promote their own rights and freedoms (see *Alekseyev*, cited above, § 84). Moreover, before deciding on the breadth of the margin of appreciation the Court must scrutinise the legitimate aim advanced by the Government in connection with their claim that the matter constitutes a sensitive moral or ethical issue. It will examine whether it is open to the Government to rely on the grounds of morals in a case which concerns facets of the applicants' existence and identity, and the very essence of the right to freedom of expression.

67. With regard to the issue of morals, the Government advanced the alleged incompatibility between maintaining family values as the foundation of society and acknowledging the social acceptance of homosexuality. The Court sees no reason to consider these elements as incompatible, especially in view of the growing general tendency to include relationships between same-sex couples within the concept of "family life" (see *P.B. and J.S. v. Austria*, no. 18984/02, §§ 27-30, 22 July 2010, and *Schalk and Kopf v. Austria*, no. 30141/04, §§ 91-94, ECHR 2010) and the acknowledgement of the need for their legal recognition and protection (see *Oliari and Others v. Italy*, nos. 18766/11 and 36030/11, § 165, 21 July 2015). It is incumbent on the State, in its choice of means designed to protect the family, to take into account developments in society and changes in the perception of social, civil-status and relational issues, including the fact that there is not just one way or one choice when it comes to leading one's family or private life (see *Kozak v. Poland*, no. 13102/02, § 98, 2 March 2010, and *X and Others v. Austria* [GC], no. 19010/07, § 139, ECHR 2013). It may be added that – far from being opposed to family values – many persons belonging to sexual minorities manifest allegiance to the institutions of marriage, parenthood and adoption, as evidenced by the steady flow of applications to

the Court from members of the LGBT community who wish to have access to them (see, among many examples, *Salgueiro da Silva Mouta*; *Oliari and Others*; *X and Others v. Austria*; and *E.B. v. France*, all cited above). The Government failed to demonstrate how freedom of expression on LGBT issues would devalue or otherwise adversely affect actual and existing “traditional families” or would compromise their future.

68. The Court has consistently declined to endorse policies and decisions which embodied a predisposed bias on the part of a heterosexual majority against a homosexual minority (see *Smith and Grady*, cited above, § 102; *Salgueiro da Silva Mouta v. Portugal*, no. 33290/96, §§ 34-36, ECHR 1999-IX; and *L. and V. v. Austria*, nos. 39392/98 and 39829/98, §§ 51-52, ECHR 2003-I). It held that these negative attitudes, references to traditions or general assumptions in a particular country cannot of themselves be considered by the Court to amount to sufficient justification for the differential treatment, any more than similar negative attitudes towards those of a different race, origin or colour (see *Smith and Grady*, cited above, § 97; *Konstantin Markin v. Russia* [GC], no. 30078/06, § 143, ECHR 2012 (extracts); *Vallianatos and Others v. Greece* [GC], nos. 29381/09 and 32684/09, § 77, ECHR 2013 (extracts); and *Hämäläinen v. Finland* [GC], no. 37359/09, § 109, ECHR 2014).

69. The legislation at hand is an example of such predisposed bias, unambiguously highlighted by its domestic interpretation and enforcement, and embodied in formulas such as “to create a distorted image of the social equivalence of traditional and non-traditional sexual relationships” (see paragraph 34 above) and references to the potential dangers of “creating a distorted impression of the social equivalence of traditional and non-traditional marital relations” (see paragraph 22 above). Even more unacceptable are the attempts to draw parallels between homosexuality and paedophilia (see paragraphs 16 and 50 above).

70. The Court takes note of the Government’s assertion that the majority of Russians disapprove of homosexuality and resent any display of same-sex relations. It is true that popular sentiment may play an important role in the Court’s assessment when it comes to the justification on the grounds of morals. However, there is an important difference between giving way to popular support in favour of extending the scope of the Convention guarantees and a situation where that support is relied on in order to narrow the scope of the substantive protection. The Court reiterates that it would be incompatible with the underlying values of the Convention if the exercise of Convention rights by a minority group were made conditional on its being accepted by the majority. Were this so, a minority group’s rights to freedom of religion, expression and assembly would become merely theoretical rather than practical and effective as required by the Convention (see *Alekseyev*, cited above, § 81).

71. In view of the above considerations, the Court rejects the Government's claim that regulating public debate on LGBT issues may be justified on the grounds of the protection of morals.

*(ii) Justification on the grounds of protection of health*

72. Next, the Government argued that the promotion of same-sex relationships had to be banned on the grounds that same-sex relationships posed a risk to public health and the demographic situation. As regards the alleged health risks, the Government have not demonstrated that the applicants' messages advocated reckless behaviour or any other unhealthy personal choices. In any event, the Court considers it improbable that a restriction on potential freedom of expression concerning LGBT issues would be conducive to a reduction of health risks. Quite the contrary, disseminating knowledge on sex and gender identity issues and raising awareness of any associated risks and of methods of protecting oneself against those risks, presented objectively and scientifically, would be an indispensable part of a disease-prevention campaign and of a general public-health policy.

73. It is equally difficult to see how the law prohibiting promotion of homosexuality or non-traditional sexual relations among minors could help in achieving the desired demographic targets, or how, conversely, the absence of such a law would adversely affect them. Population growth depends on a multitude of conditions, economic prosperity, social-security rights and accessibility of childcare being the most obvious factors among those susceptible to State influence. Suppression of information about same-sex relationships is not a method by which a negative demographic trend may be reversed. Moreover, a hypothetical general benefit would in any event have to be weighed against the concrete rights of LGBT individuals who are adversely affected by the impugned restrictions. It is sufficient to observe that social approval of heterosexual couples is not conditional on their intention or ability to have children. It follows that this argument cannot provide a justification for a restriction of freedom of speech on the subject of same-sex relationships.

*(iii) Justification on the grounds of protection of the rights of others*

74. Finally, the Government's third line of argument focused on the need to shield minors from information which could convey a positive image of homosexuality, as a precaution against their conversion to a "homosexual lifestyle" which would be detrimental to their development and make them vulnerable to abuse. They stressed the potential risk of minors being induced or forced into adopting a different sexual orientation which, quite apart from the moral aspect discussed above, touched upon issues concerning the personal autonomy of minors and encroached upon the educational choices of their parents.

75. The Court notes that the need to protect minors was the main reason for the adoption of the laws, and this is reflected in their texts. However, the restrictions on “promotion” are not limited to specific situations, as evidenced by the fact that one of the applicants was fined for a demonstration in front of the St Petersburg City Administration (see paragraph 17 above), a public place that is not specifically assigned to minors. It appears that an incidental or potential sighting by a minor would suffice to outlaw “promotion” in any venue. The essence of the offence is in fact defined by the content of the expression in question. The Constitutional Court clarified that the prohibition did not concern “information ... presented in a neutral (educational, artistic, historical) context ... devoid of indications of promotion, that is, if it is not aimed at creating preferences linked to the choice of non-traditional forms of sexual identity”. In practice, however, the requirement of neutrality may prove unattainable with regard to the expression of opinions, and even statements of facts, since the absence of a negative connotation may in itself be perceived as conveying a positive attitude. The statements “Homosexuality is not a perversion” and “Homosexuality is natural” were deemed insufficiently neutral and were considered to amount to “promotion”.

76. With regard to the scope of the ban, the Court refers to the definition provided by the Government of “promotion” or “propaganda”, describing them as “active dissemination of information aimed at inducing others to subscribe to particular sets of values ...” (see paragraph 46 above), to the judgments in the applicants’ cases, and to the decisions of the Constitutional Court. The Court shares the view of the Venice Commission, which referred to the vagueness of the terminology used in the legislation at hand, allowing for extensive interpretation of the relevant provisions (see §§ 31-37 of the Opinion, quoted in paragraph 36 above). It considers that the broad scope of these laws, expressed in terms not susceptible to foreseeable application, should be taken into account in the assessment of the justification advanced by the Government.

77. In expressing their concerns about the possible forceful or underhand “recruiting” of minors by the LGBT community, the Government reiterated essentially the same allegations as those dismissed by the Court in *Alekseyev*, cited above, on the following grounds:

“86. ... the [Government] considered it necessary to confine every mention of homosexuality to the private sphere and to force gay men and lesbians out of the public eye, implying that homosexuality was a result of a conscious, and antisocial, choice. However, they were unable to provide justification for such exclusion. There is no scientific evidence or sociological data at the Court’s disposal suggesting that the mere mention of homosexuality, or open public debate about sexual minorities’ social status, would adversely affect children or ‘vulnerable adults’. On the contrary, it is only through fair and public debate that society may address such complex issues as the one raised in the present case. Such debate, backed up by academic research, would benefit social cohesion by ensuring that representatives of all views are heard,

including the individuals concerned. It would also clarify some common points of confusion, such as whether a person may be educated or enticed into or out of homosexuality, or opt into or out of it voluntarily. This was exactly the kind of debate that the applicant in the present case attempted to launch, and it could not be replaced by the officials spontaneously expressing uninformed views which they considered popular. In the circumstances of the present case the Court cannot but conclude that the authorities' decisions to ban the events in question were not based on an acceptable assessment of the relevant facts."

78. The position of the Government has not evolved since *Alekseyev*, and it remains unsubstantiated. The Government were unable to provide any explanation of the mechanism by which a minor could be enticed into "[a] homosexual lifestyle", let alone science-based evidence that one's sexual orientation or identity is susceptible to change under external influence. The Court therefore dismisses these allegations as lacking any evidentiary basis.

79. In so far as the Government alleged a risk of exploitation and corruption of minors, referring to the latter's vulnerability, the Court upholds the applicants' objection to the effect that protection against such risks should not be limited to same-sex relationships; the same positive obligation should, as a matter of principle, be equally relevant with regard to opposite-sex relationships. As the applicants pointed out, Russian law already provides for criminal liability in respect of lecherous actions against minors and dissemination of pornography to minors, and these provisions are applicable irrespective of the sexual orientation of those involved. The Government have not advanced any reasons why these provisions were insufficient and why they considered that minors were more vulnerable to abuse in the context of homosexual relationships than in heterosexual ones. The Court cannot but reiterate its finding that such an assumption would be a manifestation of predisposed bias (see *L. and V. v. Austria*, cited above, § 52).

80. As regards the applicants' alleged intrusion in the field of educational policies and parental choices on sex education, the Court observes that in staging their demonstrations the applicants did not seek to interact with minors, nor intrude into their private space. Nothing on their banners could be interpreted as a proposal to provide tuition on gender issues. This case therefore does not directly touch upon the functions assumed by the State with regard to school education and teaching (cf. *Kjeldsen, Busk Madsen and Pedersen*, cited above, § 54; *Jiménez Alonso and Jiménez Merino v. Spain* (dec.), no. 51188/99, ECHR 2000-VI; and *Mansur Yalçın and Others v. Turkey*, no. 21163/11, § 75, 16 September 2014).

81. Even assuming that the authorities' obligation to respect parents' religious or philosophical views may be interpreted as requiring them to take measures beyond setting the curricula of educational institutions, it would be unrealistic to expect that parents' religious or philosophical views would have to be given automatic priority in every situation, particularly

outside school. The Court reiterates in this context that the Convention does not guarantee the right not to be confronted with opinions that are opposed to one's own convictions (see *Appel-Irrgang and Others v. Germany* (dec.), no. 45216/07, 6 October 2009, and *Dojan and Others v. Germany* (dec.), no. 319/08, 13 September 2011).

82. In sensitive matters such as public discussion of sex education, where parental views, educational policies and the right of third parties to freedom of expression must be balanced, the authorities have no choice but to resort to the criteria of objectivity, pluralism, scientific accuracy and, ultimately, the usefulness of a particular type of information to the young audience. It is important to note that the applicants' messages were not inaccurate, sexually explicit or aggressive (see, by contrast, *Vejdeland and Others*, cited above, § 57, where the Court agreed with the domestic courts' finding that the homophobic messages in question were "unwarrantably offensive to others, constituting an assault on their rights"). Nor did the applicants make any attempt to advocate any sexual behaviour. Nothing in the applicants' actions diminished the right of parents to enlighten and advise their children, to exercise with regard to their children the natural parental functions as educators, or to guide their children on a path in line with the parents' own religious or philosophical convictions (see, for similar considerations, *Kjeldsen, Busk Madsen and Pedersen*, cited above, § 54). To the extent that the minors who witnessed the applicants' campaign were exposed to the ideas of diversity, equality and tolerance, the adoption of these views could only be conducive to social cohesion. The Court recognises that the protection of children from homophobia gives practical expression to the Committee of Ministers' Recommendation Rec(2010)5 which encourages "safeguarding the right of children and youth to education in safe environment, free from violence, bullying, social exclusion or other forms of discriminatory and degrading treatment related to sexual orientation or gender identity" (see paragraph 31 of the Recommendation) as well as "providing objective information with respect to sexual orientation and gender identity, for instance in school curricula and educational materials" (see paragraph 32 of the Recommendation).

### (c) Conclusion

83. In the light of the above considerations the Court finds that the legal provisions in question do not serve to advance the legitimate aim of the protection of morals, and that such measures are likely to be counterproductive in achieving the declared legitimate aims of the protection of health and the protection of rights of others. Given the vagueness of the terminology used and the potentially unlimited scope of their application, these provisions are open to abuse in individual cases, as evidenced in the three applications at hand. Above all, by adopting such laws the authorities reinforce stigma and prejudice and encourage

homophobia, which is incompatible with the notions of equality, pluralism and tolerance inherent in a democratic society.

84. The foregoing considerations are sufficient to enable the Court to conclude that in adopting the various general measures in question and by implementing them in the applicants' cases the Russian authorities overstepped the margin of appreciation afforded by Article 10 of the Convention. Accordingly, there has been a violation of this provision.

### III. ALLEGED VIOLATION OF ARTICLE 14 OF THE CONVENTION TAKEN IN CONJUNCTION WITH ARTICLE 10

85. The applicants alleged that the ban on public statements concerning the identity, rights and social status of sexual minorities was discriminatory, given that no similar restrictions applied with regard to the heterosexual majority. They relied on Article 14 of the Convention taken in conjunction with Article 10 of the Convention. This provision reads as follows:

“The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.”

#### **A. Admissibility**

86. The Court notes that this complaint is linked to the Article 10 complaint examined above and must therefore likewise be declared admissible.

#### **B. Merits**

87. In their submissions under this head the parties reiterated essentially the same arguments as those they had made under Article 10 of the Convention (see, in particular, paragraphs 48 and 54 above).

88. According to the Court's established case-law, in order for an issue to arise under Article 14 there must be a difference in treatment of persons in relevantly similar situations. Such a difference of treatment is discriminatory if it has no objective and reasonable justification; in other words, if it does not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realised. The Court reiterates that the Contracting States enjoy a margin of appreciation in assessing whether and to what extent differences in otherwise similar situations justify a difference in treatment (see *Vallianatos and Others*, cited above, § 77, and *Burden v. the United Kingdom* [GC], no. 13378/05, § 60, ECHR 2008).



89. However, with specific regard to differences in treatment based on sexual orientation, the Court has held that the State's margin of appreciation is a narrow one; in other words, such differences require particularly convincing and weighty reasons by way of justification (see *X and Others v. Austria*, cited above, § 99, and the cases cited therein). The Court has stressed that differences based solely on considerations of sexual orientation are unacceptable under the Convention (see *E.B. v. France* [GC], no. 43546/02, §§ 93 and 96, 22 January 2008, and *Salgueiro da Silva Mouta*, cited above, § 36).

90. The Court observes that the Code of Administrative Offences specifically bans "promoting the attractiveness of non-traditional sexual relationships, creating a distorted image of the social equivalence of traditional and non-traditional sexual relationships", in concert with the Constitutional Court's position. The legislation at hand thus states the inferiority of same-sex relationships compared with opposite-sex relationships.

91. The Court has already found above that the legislative provisions in question embodied a predisposed bias on the part of the heterosexual majority against the homosexual minority and that the Government have not offered convincing and weighty reasons justifying the difference in treatment.

92. The foregoing findings also give rise to a violation of Article 14 of the Convention taken in conjunction with Article 10 of the Convention.

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

93. Article 41 of the Convention provides:

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

##### A. Damage

94. The applicants submitted the following claims in respect of pecuniary and non-pecuniary damage.

95. The first applicant claimed 8,000 euros (EUR) in respect of non-pecuniary damage. The second applicant claimed EUR 15,000 in respect of non-pecuniary damage and 1,800 Russian roubles (RUB) in respect of pecuniary damage on account of the fine payable by him as an administrative penalty, plus the adjustment of this amount for inflation. The third applicant claimed EUR 30,000 in respect of non-pecuniary damage and RUB 7,000 in respect of pecuniary damage on account of the total

amount paid by him as an administrative penalty, plus the adjustment of this amount for inflation.

96. The Government contested the applicants' non-pecuniary claims as excessive and unsubstantiated. They asked the Court that, in the event of finding of a violation, the amount of any awards should be significantly lower, similar to the EUR 1,500 award made by the Court in the case *Sergey Kuznetsov v. Russia* (no. 10877/04, § 53, 23 October 2008). As regards the pecuniary claims, they considered these to be unlawful in that the fines in question were payable under the domestic courts' orders. They also contested the second applicant's pecuniary claim, referring to a lack of evidence that he had actually paid the fine.

97. The Court notes that the fines imposed in the administrative proceedings were penalties incurred by the applicants in connection with the exercise of their freedom of expression and are directly related to the violations found in this case. As to the amount of the damages, the applicants have not submitted the applicable inflation rate to substantiate their claims for the unspecified inflation-adjusted amounts. Accordingly, the Court makes no increase on that count and awards the second and the third applicants the amounts of the fines: EUR 45 and EUR 180 respectively. The second applicant's award in respect of pecuniary damage is only to be paid if the fine in question has been paid by him; otherwise the applicant should not be required to pay the said fine and consequently will have no entitlement to an award in respect of pecuniary damage.

98. As regards non-pecuniary damage, the Court has found in this case a violation of Article 10 of the Convention and of Article 14 taken in conjunction with Article 10, and it considers that the applicants suffered stress and anxiety as a result of the application of the discriminatory legal provisions against them. It also notes that the impugned legal provisions have not been repealed and remain in force (cf. *L. and V. v. Austria*, cited above, § 60), and thus the effects of the harm already sustained by the applicants have not been mitigated. It therefore awards the first and the second applicants the amounts claimed in respect of non-pecuniary damage: EUR 8,000 to the first applicant, and EUR 15,000 to the second applicant. It awards EUR 20,000 to the third applicant in respect of non-pecuniary damage.

## **B. Costs and expenses**

99. The applicants submitted the following claims in respect of costs and expenses.

100. The first applicant claimed EUR 5,880 for legal fees incurred in the proceedings before the Court. He submitted copies of a legal service agreement and a statement listing the acts performed by the applicant's lawyer pursuant to that agreement. He requested that the above amount,

which is due for payment in respect of the above legal services, be transferred directly to his representative's bank account.

101. The second applicant claimed RUB 8,600 for an airplane ticket for his trip from Moscow to Arkhangelsk on 10 January 2012 and the return journey on 13 January 2012.

102. The third applicant claimed RUB 15,028 for travel expenses and submitted airplane tickets for his return trip from Moscow to Arkhangelsk (the same dates as the second applicant) and train tickets from Moscow to St Petersburg on 12 April 2012, 4 May 2012 (a return ticket) and 6 June 2012 (a return ticket).

103. The Government contested these claims as unsubstantiated and in any event excessive. They specified that the first applicant's claims under this head related to expenses which were not actually incurred. As regards the second applicant, they considered that the trips on the indicated dates had no connection with the proceedings in his case. As regards the third applicant's claim in respect of travel expenses, they accepted that four of the trips were related to the domestic proceedings, accountable for a total of RUB 5,407, but not the remaining sum.

104. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum. In the present case, the Court notes the first applicant's outstanding obligation to pay legal fees under the legal services agreement and rejects the Government's objection in respect of this claim. It awards the first applicant EUR 5,880 under this head, payable directly to the applicant's representative's bank account.

105. As regards the travel expenses of the second and the third applicants, the Court considers that the trips for the performance of the static demonstrations, as opposed to the trips for attending the court hearings, cannot be accounted for as expenses incurred in the domestic proceedings or before the Court. The Court therefore rejects the second applicant's claim and makes a partial award to the third applicant in the amount accepted by the Government. Given that the third applicant has not stated the applicable inflation rate in order to substantiate his claim for an unspecified inflation-adjusted amount, the Court has no basis for calculating any increase. It awards the third applicant EUR 83 (the equivalent of RUB 5,407) under this head.

### **C. Default interest**

106. The Court considers it appropriate that the default interest rate should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

## FOR THESE REASONS, THE COURT

1. *Decides* to join the applications;
2. *Declares*, unanimously, the applications admissible;
3. *Holds*, by six votes to one, that there has been a violation of Article 10 of the Convention;
4. *Holds*, by six votes to one, that there has been a violation of Article 14 in conjunction with Article 10 of the Convention;
5. *Holds*, by six votes to one,
  - (a) that the respondent State is to pay, within three months of the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts, to be converted into the currency of the respondent State at the rate applicable at the date of settlement:
    - (i) EUR 8,000 (eight thousand euros) to the first applicant, plus any tax that may be chargeable, in respect of non-pecuniary damage;
    - (ii) EUR 5,880 (five thousand eight hundred and eighty euros), plus any tax that may be chargeable, in respect of the first applicant's costs and expenses, to be transferred directly to Mr Bartenev;
    - (iii) EUR 15,000 (fifteen thousand euros) to the second applicant, plus any tax that may be chargeable, in respect of non-pecuniary damage;
    - (iv) EUR 45 (forty five euros) to the second applicant, plus any tax that may be chargeable, in respect of pecuniary damage, conditional on his prior payment of the fine;
    - (v) EUR 20,000 (twenty thousand euros) to the third applicant, plus any tax that may be chargeable, in respect of non-pecuniary damage;
    - (vi) EUR 180 (one hundred and eighty euros) to the third applicant, plus any tax that may be chargeable, in respect of pecuniary damage;
    - (vii) EUR 83 (eighty three euros) to the third applicant, plus any tax that may be chargeable, in respect of costs and expenses;
  - (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

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

Done in English, and notified in writing on 20 June 2017, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Stephen Phillips  
Registrar

Helena Jäderblom  
President

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

H.J.  
J.S.P

## DISSENTING OPINION OF JUDGE DEDOV

### **Scope of review**

To my regret, I voted against finding a violation of Article 10. The Court has found that the legal provisions in question do not serve to advance the legitimate aim of the protection of morals, and that such measures are likely to be counter-productive in achieving the declared legitimate aims of the protection of health and the protection of the rights of others.

Briefly, my reasoning is as follows. The Court refused to accept that the interference had a legitimate aim, namely the protection of public morals, public health and the rights of others. The Court did not take into account the fact that the impugned Law sought to protect the privacy (including the dignity and integrity) of the children and the convictions of their parents as to how their children should organise their family life. In the present case the Court deals not with the conflicting views, but with the conflict of rights, namely, the right to freedom of expression and the right to private and family life. In the situation of conflicting interests in cases regarding freedom of expression the Court usually strikes a balance between conflicting rights. The Court completely refused to do that in the present case, even in the part of the judgment assigned to the analysis of the rights of others.

The problem is that the Court performed its analysis under Article 10 in a manner applicable to discrimination cases. The applicants had insisted that the Law sought to oppress the sexual minority and that this was incompatible with the values of diversity, tolerance and broadmindedness. The Court supported that view and reiterated that it would be incompatible with the underlying values of the Convention if the exercise of the Convention rights by the minority group were made conditional on its being accepted by the majority (see paragraph 70 of the judgment). Again, the present case is not about whether the majority should accept that homosexuality is normal or natural. This problem is an integral part of freedom of expression. When you disseminate your ideas or views, you expect to convince others so that they accept your position and agree with you. However, the right to freedom of expression could be limited if it conflicts with the rights of others, to the extent that it could destroy those rights. The Court had to strike a balance between those conflicting rights rather than considering whether the disseminated views should or should not be accepted by the majority.

### **General principles and established case-law**

Owing to the above inconsistencies, the Court did not involve general principles in the sphere of private and family life in the present case. This is

again unusual, because the present case cannot be resolved without considering elements such as the positive obligations of the State, the margin of appreciation, or principles governing limitation of freedom of expression.

Certainly, the notion of positive obligations was involved in the present case. According to the Court's own general principles, Article 8 of the Convention does not merely compel the State to abstain from such interference: in addition to this primarily negative undertaking, there are positive obligations inherent in an effective respect for private or family life. These obligations may involve the adoption of measures designed to secure respect for private life even in the sphere of the relations of individuals between themselves (see, *inter alia*, *Söderman v. Sweden* [GC], no. 5786/08, § 78, ECHR 2013).

Under the margin of appreciation doctrine, which takes into account how the Convention is interpreted at a national level, States are given a certain amount of discretion in how they regulate expression (see *Handyside v. the United Kingdom*, 7 December 1976, §§ 47-50, Series A no. 24). The extent of this discretion, which is subject to supervision by the Court, varies depending on the nature of the expression in question. Whereas States only have a narrow margin of appreciation in respect of political expression, they should enjoy a wider margin of appreciation in respect of public morals, decency and religion.

Owing to its wide margin of appreciation and its positive obligation towards children and their families, the State concluded that the impugned measure was necessary in a democratic society. Unfortunately, the Court refused to apply the proportionality test in full.

Perhaps the Russian authorities are the only ones who would like to protect private life in this way. No comparative research was carried out in the present case. However, the Court has already respected the margin of appreciation when a State (being in the minority) protected the right to life of the embryo in the case of *Parrillo v. Italy* ([GC], no. 46470/11, 27 August 2015) or traditional values in the case of *Lautsi and Others v. Italy* ([GC], no. 30814/06, 18 March 2011). That means that in a situation where the State is in the minority among European States, the European consensus does not come into play if the State has demonstrated more scrutiny in a sensitive case. The Court also acted in the best interests of the child in the case of *Dubská and Krejzová v. the Czech Republic* ([GC], nos. 28859/11 and 28473/12, § 165, ECHR 2016), even though the risk was one of a general nature and was not imminent. The best interests of the child, as required by the Convention on the Rights of the Child and the ECHR, were not the subject of consideration by the Court in the present case.

As regards the limits to freedom of expression, the Court has previously found that Article 10 § 2 of the Convention stated that freedom of

expression carried with it “duties and responsibilities”, which also applied to the media even with respect to matters of serious public concern. These duties and responsibilities are liable to assume significance when there is a question of infringing the “rights of others” (see *Axel Springer AG v. Germany* [GC], no. 39954/08, § 82, 7 February 2012, with further references).

The Commission previously interpreted Article 17 of the Convention in a way that the right to freedom of expression might not be used by any group in order to lead to the destruction of any of the rights and freedoms granted by the Convention (see *Kuhnen v. Federal Republic of Germany*, no. 12194/86, 13 May 1988, and *D.I. v. Germany*, 26551/95, 26 June 1996). The new Court has also encouraged any measures aimed at protecting children from sexual abuse, whether real or potential. In the case of *K.U. v. Finland* (no. 2872/02, 2 December 2008) concerning the positive obligations of the State to protect children from being targeted by paedophiles via the Internet, the Court stressed that the legislature should have provided a framework for reconciling Internet services with the protection of the rights and freedoms of children and other vulnerable individuals. The Court preferred “to highlight these particular aspects of the notion of private life, having regard to the potential threat to the applicant’s physical and mental welfare brought about by the impugned situation and to his vulnerability in view of his young age” (*ibid.*, § 41). In the case of *Kaos GL v. Turkey* (no. 4982/07, 22 November 2016) regarding the distribution of a magazine published by a LGBT society, the Court supported the measures taken to prevent access to the publication by specific groups of individuals including minors, as such measures satisfied the criterion of a pressing social need.

The above case-law was not used by the Court in the present case. Instead, the Court referred to paragraph 86 of the *Alekseyev* judgment (*Alekseyev v. Russia*, nos. 4916/07 and 2 others, 21 October 2010), saying that there was no scientific evidence or sociological data suggesting that the mere mention of homosexuality in the public domain would adversely affect children. Such a liberal position ignores the fact that the sexuality education of children is a very delicate process which should be handled on an individual basis. In other cases the Court has usually supported measures to protect children from “broadcasts containing violence or any other material likely to impair their physical, mental or moral development”, if such materials exploited children’s inexperience and credulity (see *Sigma Radio and Television Ltd v. Cyprus*, §§ 15, 16 and 200, nos. 32181/04 and 35122/05, 21 July, 2011). That means that the forcible informing of children without their desire or consent, in any form, about sex in general should be prevented; as regards non-traditional sex, it is a much more complex issue on which children should be informed as late as possible when they become mentally mature.



In the present case, freedom of expression conflicts with the private life of the children and the right of their parents to educate their children in accordance with their religious and philosophical convictions. The State took measures to protect those rights against such interference and destruction. However, the Court ignored the above risk stating that the Convention did not guarantee the right not to be confronted with opposite opinions. The Court makes reference to the cases of *Appel-Irrgang* and *Dojan* (both cited above, see paragraph 81 of the judgment); however those cases dealt with education relating to ethics, inter-cultural dialogue, and awareness of the problem of sexual abuse of children by strangers. In the present case the purpose of the demonstration is the opposite – to raise awareness of non-traditional sex, thus making children more vulnerable to sexual abuse. Such a dangerous approach creates grey zones in sensitive areas of fundamental rights where the Convention becomes ineffective.

According to the Court's case-law the concept of private life covers, in particular, the psychological, physical and moral integrity of a person and can embrace gender identification and sexual orientation (see *Axel Springer*, cited above, § 83; *K.U. v. Finland*, no. 2872/02, § 41, ECHR 2008; and *X and Y v. the Netherlands*, 26 March 1985, § 22, Series A no. 91).

The fundamental principles concerning private life and freedom of expression and the criteria relevant for the weighing-up of the competing interests have also been summarised in the case of *Von Hannover v. Germany (no. 2)* ([GC], nos. 40660/08 and 60641/08, ECHR, 2012). However, in the above case the Court assessed the privacy of public figures, not the impact of disseminated information on the dignity and integrity of the children, thus making the context of analysis quite different.

In the context of the right to private and family life, I would like to present some important elements which, in my view, are vital for the proper examination of the present case.

### **Vulnerability of children**

This element of privacy was not seriously taken into consideration by the Court. The Court did not make use of the Convention on the Rights of the Child (CRC), which plays a special role, however, in understanding the importance of the vulnerability of the child. The CRC provides that the child, by reason of his physical and mental immaturity, needs special safeguards and care. The CRC obliges the States to respect the right of the child to preserve his or her identity without unlawful interference. States should take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, including sexual abuse. States should take measures to prevent the inducement or coercion of a child to engage in any unlawful sexual activity (Articles 8, 9 and 34).

Mental immaturity is a decisive element of vulnerability. It is well known that children are vulnerable and credulous because of their lack of experience and incapacity to judge. Children may easily become interested in any information or ideas, especially in homosexual relations, without understanding their nature. The idea that same-sex sexual relations are normal indeed creates a situation where they are ready to engage in such relations, just because of the curiosity which is an integral part of a child's mind. This is how the dissemination of ideas works *vis-à-vis* children. The Court has already supported the protection of children from any detrimental information (even when not linked to sexual relations, in particular, in the *Sigma Radio and Television* case).

Even if they do not directly create a situation of violence – if based on a “mutual agreement” – sexual relations with minors are prohibited in many countries because their legal capacity (and therefore, adequate understanding of information) is limited due to their age and lack of life experience. Regulation may differ depending on the age of the minor and the local traditions and environment, but in this sphere of criminal policy the State should enjoy a wide margin of appreciation.

The Government stressed that a positive image of homosexuality would be detrimental to their development and make them vulnerable to sexual abuse. The Court, however, upheld the applicants' objection to the effect that protection against such risks should not be limited to same-sex relationships; the same positive obligations should be equally relevant with regard to opposite-sex relationships. The Court supported the applicants' view that criminal liability for sexual abuse, irrespective of sexual orientation, is sufficient, and found that it would be a manifestation of predisposed bias to assume that minors were more vulnerable to abuse in the context of homosexual relations (see paragraph 79 of the judgment).

The above reaction of the Court deals more with the context of discrimination and it does not take into account the fact that any information about sexual relations imparted by strangers to children could be detrimental to their integrity. I should mention that the public demonstration to children (even from 16 to 18 years old) of sexual relations between men and women is also prohibited by the same Law (Federal Law “On the Protection of Children from Information that is Harmful to their Health and Development”). In particular, section 10(5) of the Law prohibits any images inciting an interest in sexual relations regardless of their nature. I believe that this provision should be taken into account.

I would agree with the applicants that this is just a neutral dissemination of information if the problem of paedophilia were completely resolved. According to the statistics, every year up to 50,000 children in Russia are subjected to sexual abuse (in the USA, according to David Finkelhor<sup>1</sup>, there

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<sup>1</sup> Finkelhor, D., “Current information on the scope and Nature of child sexual abuse”, *The*

are approximately 150,000 such cases, therefore the statistics in Russia seem to be credible). They were all considered victims and they all played a passive role in sexual relations. Only half of such cases constitute domestic violence. Up to thirty per cent of children subjected to sexual abuse are boys, and seventy per cent are girls. If we note that all offenders are men, then same-sex violence constitutes a significant part of such cases, so that it deserves to be taken into consideration by making a special reference to same-sex relations in the law.

David Finkelhor shows that child sexual abuse requires two elements: sexual activity and abusive conditions (coercion or a large age-gap between the participants, indicating a lack of consensuality). Sexual activity has a broad meaning. It includes activity intended for sexual stimulation. Sexual abuse may have different forms, and there is no uniform definition. This phenomenon may include an abusive impact on the child's sexual development or emotional maltreatment. In any event, an unauthorised dissemination of information seeking to attract a child's interest in sexual relations may destroy the child's own perceptions of private and family life. The risks become higher depending on unsatisfactory family and economic problems, in particular where there is a lack of supervision of, or attention to, the children by their parents. Needy and emotionally deprived children are vulnerable to the ploys of abusers, who commonly entrap children by offering affection, attention and friendship<sup>2</sup>.

The above could be used by way of sociological data, as requested by the Court in the previous case of *Alekseyev* (cited above) regarding gay parades. It should be noted that in the *Alekseyev* case the Court did not examine the situation where views were expressed in front of a school or children's library, as in the present case.

Again, the Law is limited to the promotion of any sexual relations *vis-à-vis* children. The applicants in the first and second episodes held their demonstrations in the vicinity of facilities specially assigned to children. In the third episode the demonstration was held near the building of the City Administration, and it should be clarified whether the authorities applied the Law correctly. The Russian Constitutional Court expressed the same position and granted the applicants the right to reopen administrative proceedings in respect of all three episodes to clarify whether the demonstrations targeted children. However, the Court did not take this into account, simply saying that the Russian Constitutional Court had dismissed the claim. This also raises the issue of the exhaustion of effective remedies, which the Court should have examined of its own motion, at least in relation to the third episode.

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*Future of Children*, Summer/Fall 1994.

<sup>2</sup> Finkelhor, D. and Baron, L., *High Risk Children*, 1986.

However, the position of the Court could be understood as saying that such demonstrations, even if held in the vicinity of the schools, are relevant and even useful in a democratic society. I am not sure that the parents would agree with such a far-reaching liberal approach!

### **Protection of the traditional family**

Needless to say, sexual identification, as well as sexual orientation, is a very intimate process, albeit influenced by social life and social relations. The international instruments, including the CRC, recognise that children should primarily consult their parents or close members of the family, rather than obtaining information about sex from the applicants' posters in the street.

Indeed, the impugned provision of the Law pursues the primary aim of protecting the values of a traditional family. This provision could be interpreted as supporting the family and maternity. It could not be interpreted as preventing adults from engaging in same-sex relations, as it could be in a discrimination case. Fortunately, the Court has already supported the State's duty to protect the right to family and maternity of vulnerable female prisoners in a life-sentence case (see *Khamtokhu and Aksenchik v. Russia* [GC], nos. 60367/08 and 961/11, ECHR 2017). The present case also raises issues relating to positive discrimination as a result of asserting a preference for a traditional family. The positive discrimination sought not only to support a group of persons, but also to protect the traditional values of Russian society without interference with the rights of the LGBT community. The conclusion reached by the Court in the present case, unfortunately, is the opposite of its own previous position.

The Court quotes the following position of the Venice Commission (paragraph 48 of its Opinion): "...measures which seek to remove from the public domain promotion of other sexual identities except heterosexual, affect the basic tenets of a democratic society, characterised by pluralism, tolerance and broadmindedness, as well as the fair and proper treatment of minorities" (again, in my view, a notion of discrimination is involved in the examination of Article 10). The Venice Commission, however, does not take seriously the point that "heterosexuality" could create any values (like maternity) which deserve to be prioritised. I am not convinced that the Council of Europe is willing to support the dialogue with the Russian Constitutional Court, which explained the purpose of the Law in the judgment of 23 September 2014: "In so far as one of the roles of the family is the birth and upbringing of children, an understanding of marriage as the union of a man and a woman underlies the legislative approach to resolving demographic and social issues in the area of family relations in the Russian Federation". In the context of the upbringing and development of children in Russia in accordance with the perception of family by their parents, I think

that the Council of Europe should respect “family relationships as these are traditionally understood in Russia and expressed in the Constitution of the Russian Federation”. The Russian Constitutional Court also focuses on the values of maternity in the cultural and historical perspective and other relevant issues, but they were not used in the present case. I regret that the above judgment was not reproduced in full.

The CRC also stresses the importance of the family as the fundamental group of society and the natural environment for the growth and well-being of children, and that the family should be afforded the necessary protection. That constitutes a legitimate aim, again, contrary to the Court’s conclusion in the present case.

### **Sexual education**

The Court has concluded that the minors who witnessed the applicants’ campaign were exposed to the ideas of diversity, equality and tolerance, and that the adoption of these views could only be conducive to social cohesion. I am not sure that that was clear enough for the children, or that they could come to such a conclusion, which requires knowledge and understanding of those high principles. The various research confirms that younger children do have difficulty in maintaining a consistent view on universal rights, expressing uncertainty about prohibiting freedom of speech<sup>3</sup>. It should be added that the above values have not been explicitly expressed by the applicants.

Obviously, education in the context of sexual relations (a very intimate and sensitive subject) should be dispensed with great caution. Therefore, it is difficult to agree that a slogan raised on the street can satisfy any educational purposes.

Personally, I agree that children should be educated in an environment free from violence based on different sexual orientation; however, the applicants did not provide the Court or national authorities with any evidence that there was such a case (namely, a case of violence among children) in the particular school or library where the applicants held their demonstrations. Also, no such application was lodged with the Court.

Moreover, the CRC provides that the education of the child should be directed at the development of the child’s personality, talents and mental and physical abilities, to their fullest potential. Also it should be directed at the development of respect for the child’s parents, their values and for the national values of the country in which the child is living (Article 28). As regards sexuality education, all the respective manuals warn that it is normal for all children to express a curiosity about sex. They also warn that the

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<sup>3</sup> Helwig, C., “Children’s Conceptions of Fair Government and Freedom of Speech”, *Child Development*, v69 n2 1998.

parents should speak to the child's teacher to determine what is appropriate for the child's age and maturity level. Since each person is unique with different abilities and learning styles, it is required to determine (and the parents are best positioned for that) when and how much information the child needs in order to explore his or her sexuality fully and safely. One of the most reliable sources is the UNICEF's "International Technical Guidance on Sexuality Education".

Sexuality education also deals with sexual abuse of children. The "Guidance" indicates that currently far too few young people are receiving adequate preparation, thus leaving them vulnerable to coercion, abuse, exploitation and sexually transmitted infections, including HIV (the latter was exactly the point raised by the Government and rejected by the Court). The "Guidance" also provides a lot of sociological data regarding exploitation of sexual maturity at an earlier age, without making a responsible choice. This is useful for understanding the gap between sexual maturity and mental immaturity which is normally attributable to the children after the age of twelve.

Therefore, it is commonly recognised that sex education is a very sensitive area where the dissemination of information should be carried out very carefully.

### **Freedom of expression**

The Court, in the present case, did not seriously take into account the fact that the private life of children is more important than the freedom of expression of homosexuals.

It appears from the circumstances of the case that all the demonstrations were held in order to promote non-traditional sexual relations (which is not itself an issue of public interest); they were not held to express opinions on issues of public interest such as same-sex marriage or adoption. Two of the demonstrations were held in front of the school, without consultation with the teachers, and without targeting a certain category of pupils of a certain advanced age, and there was no other evidence to conclude that the purpose of the demonstration was to involve children in a discussion of social problems like tolerance. The applicants themselves acknowledged that the choice of venues and the content of the banners had been intentional to protest against the legislative acts in question (see paragraph 52 of the judgment).

The applicants would like to demonstrate that homosexuality is normal and natural. However, homosexuality is not persecuted either by the State authorities or by the children of the school or their parents, and society in Russia in general is tolerant of this phenomenon. Many homosexuals are public figures who are accomplished in the arts, business and State governance. In the event of violence against homosexuals, any such case

could be brought before the Court if the national authorities have failed to fulfil their positive obligations. However, there was no reason based on factual circumstances to hold demonstrations in those particular places.

The Court has concluded that the promotion of same-sex relations is not detrimental for public morals, health or rights of others, even if the opinion was expressed in direct conflict with the right to private life. The Court was satisfied that in staging their demonstrations the applicants did not seek to interact with minors, nor intrude into their private space (see paragraph 80 of the judgment). I believe that this view is completely contrary to the Court's established case-law, because the existence of a conflict between freedom of expression and private life is not dependent on any intrusion into a private place in its literal sense, but in the present case it constitutes an intrusion into a perception of a lifestyle!

### **Conclusion**

The present case is quite complex. It presents not merely a conflict between the right to freedom of expression and the right to private and family life; there is also a conflict between different forms of self-identification of a person. This issue is vital for both conflicting parties, and they will never come to an agreement. Until now, the Council of Europe has favoured unrestricted public recognition of non-traditional sexual relations, even in sensitive areas such as the vulnerability of a particular group of persons (children) owing to their immaturity, the religious and philosophical convictions of their parents (on how the family should be organised), the national traditions and values including maternity, the national demographic policy and the sensitivity of sexuality education.

**APPENDIX****List of applications**

1. 67667/09 – Bayev v. Russia
2. 44092/12 – Kiselev v. Russia
3. 56717/12 – Alekseyev v. Russia