

IN THE EUROPEAN COURT OF HUMAN RIGHTS

Application No. 35949/11

ALEKSEYEV AND MOVEMENT FOR MARRIAGE EQUALITY

Applicants

- v -

RUSSIA

Respondent

Application No. 58282/12

ALEKSEYEV AND OTHERS

Applicants

- v -

RUSSIA

Respondent

**WRITTEN COMMENTS BY THE EUROPEAN HUMAN RIGHTS ADVOCACY
CENTRE, THE EUROPEAN REGION OF THE INTERNATIONAL LESBIAN, GAY,
BISEXUAL TRANS AND INTERSEX ASSOCIATION AND THE INTERNATIONAL
COMMISSION OF JURISTS**

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By Mail and Fax

A. INTRODUCTION

1. These written comments are submitted by the European Human Rights Advocacy Centre (EHRAC), the European Region of the International Lesbian, Gay, Bisexual Trans and Intersex Association (ILGA-Europe) and the International Commission of Jurists (ICJ), hereinafter “the interveners”¹.
2. As set out in the application to intervene dated 13 June 2016, these comments focus on the extent of legitimate restrictions on the right to freedom of association for the protection of morals having regard, in particular, to the right to respect for private life under Article 8 of the Convention. The comments draw upon the Court’s case-law; authoritative interpretation of other applicable sources of international law and comparative international law.
3. In section B (paras 4-7) the interveners observe that the right to freedom of association can be lawfully exercised for a variety of purposes; in section C (paras 8-12) the interveners set out the general approach of the Court and other European and international bodies to restrictions of the right to freedom of association; in section D (paras 13-34) the interveners make submissions on the limited circumstances under which the protection of public morals may constitute a lawful restriction on the right to freedom of association; and in section E (para. 35) the interveners observe in conclusion that while public morality may be a possible lawful basis for restricting the right to freedom of association, European and international standards require that any such restriction be strictly construed, and that, in any event, any restriction imposed on public morality grounds will not be regarded as compatible with the said standards where it is inconsistent with other protected rights and, in particular, entails discrimination on grounds of sexual orientation.

B. THE OBJECT OF FREEDOM OF ASSOCIATION

4. Although the right to freedom of association is often linked to the taking of political action and the formation of political parties, it is well-established that these are not the only purposes for which the right to form associations can be exercised.

¹ The interveners’ letter to the President of the Court, dated 13 June 2016, provides a detailed description of each organization.

5. Thus the Court has emphasised that those associations formed for other purposes, including, for example, to protect cultural or spiritual heritage, to pursue various socio-economic aims, to proclaim or teach religion, to seek an ethnic identity or assert a minority consciousness are protected by freedom of association. In its view:

“pluralism is also built on the genuine recognition of, and respect for, diversity and the dynamics of cultural traditions, ethnic and cultural identities, religious beliefs, artistic, literary and socio-economic ideas and concepts. The harmonious interaction of persons and groups with varied identities is essential for achieving social cohesion. It is only natural that, where a civil society functions in a healthy manner, the participation of citizens in the democratic process is to a large extent achieved through belonging to associations in which they may integrate with each other and pursue common objectives collectively”².

6. This has also been recognised by the Committee of Ministers in Recommendation CM/Rec(2007)14 on the legal status of NGOs in Europe which pointed to associational activity through the formation of non-governmental organisations as providing:

“a means of personal fulfilment and of pursuing, promoting and defending interests shared with others”³.

7. Similarly, the European Commission for Democracy through Law (Venice Commission) has underlined that the right to freedom of association is a complex right:

“Its civil right element protects individual against unlawful intervention by the state into the individual wish to associate with others. The political right element helps individuals defend their interests against the state or other individuals in an organised and hence more efficient way. Finally, the economic right element allows individuals to promote their interests in the area of labour market, especially by means of trade unions.

The combination of the three elements makes the freedom of association a unique human right whose respect serves in a way as a barometer of the general standard of the protection of human rights and the level of democracy in the country...

It is impossible to defend individual rights if citizens are unable to organize around common needs and interests and speak up for them publicly”⁴.

² *Gorzelik v. Poland* [GC], no. 44158/98, 17 February 2004, para 92.

³ Preamble

⁴ CDL-AD(2011)035, Opinion on the compatibility with human rights standards of the legislation on non-governmental organisations of the Republic of Azerbaijan, paras. 39-40 & 84.

C. THE GENERAL APPROACH TO RESTRICTIONS OF FREEDOM OF ASSOCIATION

8. Although the right to freedom of association can be subject to restrictions, it is well-established in the case law of the Court and in the approach of other European and international bodies that these restrictions require a very strong justification⁵.

9. Thus, the Court has stated:

“The exceptions to the rule of freedom of association are to be construed strictly and only convincing and compelling reasons can justify restrictions on that freedom. Any interference must correspond to a “pressing social need” While the Convention leaves to those authorities a margin of appreciation in this connection, their assessment is subject to supervision by the Court, going both to the law and to the decisions applying it, including decisions given by independent courts... When the Court carries out its scrutiny ... it must look at the interference complained of in the light of the case as a whole and determine whether it was “proportionate to the legitimate aim pursued” and whether the reasons adduced by the national authorities to justify it are “relevant and sufficient ... In so doing, the Court has to satisfy itself that the national authorities applied standards which were in conformity with the principles embodied in Article 11 and, moreover, that they based their decisions on an acceptable assessment of the relevant facts....”⁶

10. A similar approach has been taken by the United Nations Human Rights Committee when adopting its views in respect of communications under the First Optional Protocol to the International Covenant on Civil and Political Rights. Thus, it has stated that:

“any restriction on the right to freedom of association must cumulatively meet the following conditions: (a) it must be prescribed by law; (b) it may only be imposed for one of the purposes set out in article 22 (2); and (c) it must be “necessary in a democratic society” in the interest of one of those purposes and proportionate in nature. Reference to “democratic society” in the context of article 22 indicates, in the Committee’s opinion, that the existence and operation of associations, including those which peacefully promote ideas that are not necessarily favourably viewed by the Government or the majority of the population, is a cornerstone of any democratic society. In that connection, the Committee recalls that it is for the State party to demonstrate that the restrictions imposed were justified in the case in question”⁷.

11. Likewise, the Venice Commission has stated that:

“Only indisputable imperatives can justify interference with the enjoyment of freedom of association under the European Convention”⁸
and that

⁵ The need for the restriction to have a legal basis is not addressed in these comments.

⁶ *The Argeş College of Legal Advisers v. Romania*, no. 2162/05, 8 March 2011, paras 32-33.

⁷ *Romanovsky v. Belarus*, Communication No. 2011/2010, Views adopted 29 October 2015, para 7.2.

⁸ CDL-AD (2011)035, Opinion on the compatibility with human rights standards of the legislation on non-governmental organisations of the Republic of Azerbaijan, para 85.

“Any limitations [...] which restrict their right to free association must be constructed to meet the specific aim pursued by authorities. Further, this aim must be objective and necessary in a democratic society. The state has the burden of establishing that limitations promote a general public interest unable to be fulfilled absent the limitation”⁹.

12. In addition, the Joint Guidelines on Freedom of Association adopted by the European Commission for Democracy through Law (Venice Commission) and the OSCE Office for Democratic Institutions and Human Rights stipulate that:

“The only legitimate aims recognized by international standards for restrictions are national security or public safety, public order (*ordre public*), the protection of public health or morals and the protection of the rights and freedoms of others. The scope of these legitimate aims shall be narrowly interpreted”¹⁰.

D. USING THE PROTECTION OF MORALS AS A RESTRICTION

13. So far there have only been a few occasions in which the protection of morals has been successfully invoked to justify a restriction on the right to freedom of association.

14. Thus, the former European Commission of Human Rights considered manifestly ill-founded an application concerned with the refusal to register an association whose aim was the defence of surrogate mothers’ moral and material interests and the promotion and moral endorsement of surrogate motherhood. It did so on the basis that this was for the legitimate aim of preventing a criminal offence, namely, incitement to abandon a child and that it met a "pressing social need". In making the assessment of the latter the Commission emphasised the margin of appreciation enjoyed by States and noted the practice of surrogacy was (at the time of the decision twenty-five years ago) a recent development not as yet regulated by any law and the subject of public controversy such that a failure to object to the association's registration might have been interpreted as a sign of the public authorities' implicit approval of the practice¹¹.

15. On a similar basis the Commission considered an application complaining about the refusal to register an association whose aim was "to influence intoxicant policy and legislation with a view to making the use, availability and domestic cultivation for

⁹ CDL-AD(2010)024, Guidelines on political party regulation by OSCE/ODIHR and Venice Commission, §50

¹⁰ Para. 34: *Principle 9: Legality and legitimacy of restrictions*; adopted 14 December 2014 (CDL-AD(2014)046).

¹¹ *Lavissee v. France* (dec.), no. 14223/88, 5 June 1991.

personal use of cannabis legal for Finnish citizens of age as well as to study the use of cannabis in different cultures and periods of time" to be manifestly ill-founded. The Supreme Administrative Court in Finland had accepted that the association's aim to change the law could not as such be regarded as incompatible with public decency and morals. However, in its evaluation, the Supreme Administrative Court considered that the aim of the association was to encourage a habit detrimental to health and that the use of cannabis was a criminal offence. In the Commission's view, the Supreme Administrative Court's conclusion that the aim of the association was in violation of public decency and morals could not be regarded as unreasonable¹².

16. While in these Commission cases the actual or possible illegality under national law of the aim being pursued was a key consideration in the conclusion that the restriction imposed on the exercise of the right to freedom of association was necessary in a democratic society, the Court has subsequently clearly recognised that an association can be established to pursue a change in the law or the constitution, including to legalize conduct that is currently illegal, so long as the means to be used and the outcome to be achieved are compatible with fundamental democratic principles, including in particular non-discrimination, pluralism and respect for human rights¹³.

17. In *Fedotova v. Russia*, the UN Human Rights Committee recalled that:

“the concept of morals derives from many social, philosophical and religious traditions; consequently, limitations ... for the purpose of protecting morals must be based on principles not deriving exclusively from a single tradition“. Any such limitations must be understood in the light of universality of human rights and the principle of non-discrimination”. In the present case, the Committee observes that section 3.10 of the Ryazan Region Law establishes administrative liability for “public actions aimed at propaganda of homosexuality (sexual act between men or lesbianism)” – as opposed to propaganda of heterosexuality or sexuality generally – among minors. With reference to its earlier jurisprudence, the Committee recalls that the prohibition against discrimination under article 26 comprises also discrimination based on sexual orientation....The Committee also recalls its constant jurisprudence that not every differentiation based on the grounds listed in article 26 of the Covenant amounts to discrimination, as long as it is based on reasonable and objective criteria, in pursuit of an aim that is legitimate under the Covenant. While noting that the State party invokes the aim to protect the morals, health, rights and legitimate interests of minors, the Committee considers that the State party has not shown that a restriction

¹² *Larmela v. Finland* (dec.), no. 26712/95, 28 May 1997. A similar conclusion about an association which had taken steps to actually plant cannabis was reached in *Asociación Ramón Santos de Estudios sobre el Cannabis (ARSEC) v. Spain* (dec.), no. 42916/98, 15 June 1999.

¹³ See, e.g., *United Communist Party of Turkey and Others v. Turkey* [GC], no. 19392/92, 30 January 1998 and *Refah Partisi (the Welfare Party) and Others v. Turkey* [GC], nos. 41340/98, 41342/98, 41343/98 and 41344/98, 13 February 2003.

on the right to freedom of expression in relation to “propaganda of homosexuality” – as opposed to propaganda of heterosexuality or sexuality generally – among minors is based on reasonable and objective criteria. Moreover, no evidence which would point to the existence of factors justifying such a distinction has been advanced.”¹⁴

18. This has also been recognised by the Committee of Ministers in Recommendation CM/Rec(2007)14 on the legal status of NGOs in Europe, which provides that:

“NGOs should be free to undertake research, education and advocacy on issues of public debate, regardless of whether the position taken is in accord with government policy or requires a change in the law”¹⁵.

19. Moreover, a potential incompatibility between existing domestic law and the aim of an association is not something that is recognised either by the Court or international standards as a consideration that can be decisive in determining whether the right to form an association is protected. This is particularly important where the domestic legal restriction that creates the incompatibility impacts adversely upon the enjoyment of another right that is secured under the European Convention on Human Rights or other international standards. Furthermore, even if the government or some parts of society oppose particular kinds of activities on moral grounds, this is not necessarily in itself sufficient to justify restrictions on the activity, particularly where the activity is something protected by the European Convention or other human rights standards.

20. Thus, the Court rebutted a suggestion that an association’s aim of asserting a “minority consciousness” was incompatible with Greece’s cultural traditions and historical and cultural symbols by noting that this aim was recognised in the Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE (Section IV) of 29 June 1990 which that country had signed¹⁶.

21. Also the General Assembly of the United Nations in its resolution on the Promotion of the Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms: protecting women human rights defenders, called upon:

“States to ensure that the promotion and protection of human rights are not criminalized or met with limitations in contravention of their obligations and commitments under international human rights law and that women human rights

¹⁴ UN Human Rights Committee, *Fedotova v. Russia*, Communication No. 1932/2010, CCPR/C/106/D/1932/2010, 19 November 2012, paras 10.5-10.6, footnotes in the original omitted.

¹⁵ Paragraph 12. This principle is also stated in the Fundamental Principles on the Status of Non-governmental Organisations in Europe adopted by the Committee of Ministers on 13 November 2002 (para 10).

¹⁶ *Sidiropoulos and Others v. Greece*, no. 26695/95, 10 July 1998, para. 44.

defenders are not prevented from enjoying universal human rights owing to their work, including by ensuring that all legal provisions, administrative measures and policies affecting women human rights defenders, including those aimed at preserving public morals, are clearly defined, determinable, nonretroactive and compatible with relevant provisions of international human rights law ...”¹⁷

22. Similarly, the 2015 UN General Assembly resolution on Recognizing the role of human rights defenders and the need for their protection calls on States:

“to create and maintain a safe and enabling environment for the defence of human rights and specifically to ensure that...Human rights defenders, their family members, associates and legal representatives are not prevented from enjoying universal human rights owing to their work, including by ensuring that all legal provisions, administrative measures and policies affecting them, including those aimed at preserving public safety, public order and public morals, are minimally restrictive, clearly defined, determinable, non-retroactive and compatible with relevant provisions of international human rights law”.¹⁸

23. The Human Rights Council of the United Nations has also called upon States to ensure that:

“Legislation aimed at preserving public morals is compatible with international human rights law”¹⁹.

24. Furthermore, the Joint OSCE/ODIHR and Venice Commission Guidelines on Freedom of Association state that:

“Legislation should not restrict the dissemination of and access to information with the justification of protecting public health or morals, since this can prevent associations from carrying out advocacy and awareness raising work or from providing services, such as education concerning maternal and reproductive health, or measures to combat gender-based discrimination or discrimination against minority or marginalized groups”²⁰.

25. Moreover, Principle 20 of the Yogyakarta Principles, “Principles on the application of international human rights law in relation to sexual orientation and gender identity”, which were developed and unanimously adopted by a distinguished group of human rights experts, from diverse regions and backgrounds, including judges, academics, a former UN High Commissioner for Human Rights, UN Special Procedures, members of treaty bodies, NGOs and others, provides that:

“Everyone has the right to freedom of peaceful assembly and association, including for the purposes of peaceful demonstrations, regardless of sexual orientation or gender identity. Persons may form and have recognised, without discrimination, associations

¹⁷ Resolution 68/181, 18 December 2013, para. 10.

¹⁸ Resolution A/C.3/70/L.46/Rev.1., 18 November 2015, para 10(b).

¹⁹ Resolution 22/6 Protecting human rights defenders, 21 March 2013, para. 11(g).

²⁰ Interpretative notes, para. 100.

based on sexual orientation or gender identity, and associations that distribute information to or about, facilitate communication among, or advocate for the rights of, persons of diverse sexual orientations and gender identities. States shall: a) Take all necessary legislative, administrative and other measures to ensure the rights to peacefully organise, associate, assemble and advocate around issues of sexual orientation and gender identity, and to obtain legal recognition for such associations and groups, without discrimination on the basis of sexual orientation or gender identity; b) Ensure in particular that notions of public order, public morality, public health and public security are not employed to restrict any exercise of the rights to peaceful assembly and association solely on the basis that it affirms diverse sexual orientations or gender identities; c) Under no circumstances impede the exercise of the rights to peaceful assembly and association on grounds relating to sexual orientation or gender identity, and ensure that adequate police and other physical protection against violence or harassment is afforded to persons exercising these rights; d) Provide training and awareness-raising programmes to law enforcement authorities and other relevant officials to enable them to provide such protection; e) Ensure that information disclosure rules for voluntary associations and groups do not, in practice, have discriminatory effects for such associations and groups addressing issues of sexual orientation or gender identity, or for their members”²¹.

26. In this context it is also pertinent to note the extent of the protection that the Court has recognised for homosexual activity and same-sex relationships.

27. Thus in its judgment in *Dudgeon v. United Kingdom* some thirty-five years ago, the Court considered that the criminalisation of homosexual activity concerned a most intimate aspect of private life and that, therefore, such an interference with it required particularly serious reasons. In this connection, it noted that:

“As compared with the era when [the] legislation was enacted, there is now a better understanding, and in consequence an increased tolerance, of homosexual behaviour to the extent that in the great majority of the member States of the Council of Europe it is no longer considered to be necessary or appropriate to treat homosexual practices of the kind now in question as in themselves a matter to which the sanctions of the criminal law should be applied; the Court cannot overlook the marked changes which have occurred in this regard in the domestic law of the member States.

It cannot be maintained in these circumstances that there is a "pressing social need" to make such acts criminal offences, there being no sufficient justification provided by the risk of harm to vulnerable sections of society requiring protection or by the effects on the public. On the issue of proportionality, the Court considers that such justifications as there are for retaining the law in force unamended are outweighed by the detrimental effects which the very existence of the legislative provisions in question can have on the life of a person of homosexual orientation like the applicant. Although members of the public who regard homosexuality as immoral may be shocked, offended or disturbed by the commission by others of private homosexual acts, this cannot on its own warrant the application of penal sanctions when it is consenting adults alone who are involved.

²¹ Adopted on 26 March 2007 and available at http://www.yogyakartaprinciples.org/principles_en.htm.

Accordingly, the reasons given by the Government, although relevant, are not sufficient to justify the maintenance in force of the impugned legislation in so far as it has the general effect of criminalising private homosexual relations between adult males capable of valid consent. In particular, the moral attitudes towards male homosexuality in Northern Ireland and the concern that any relaxation in the law would tend to erode existing moral standards cannot, without more, warrant interfering with the applicant's private life to such an extent. "Decriminalisation" does not imply approval, and a fear that some sectors of the population might draw misguided conclusions in this respect from reform of the legislation does not afford a good ground for maintaining it in force with all its unjustifiable features"²².

28. This ruling was followed without qualification in *Norris v. Ireland*²³ and *Modinos v. Cyprus*²⁴.

29. The Court has also recognized that the European Convention on Human Rights both requires protection for same-sex relationships and the exercise of the right to freedom of expression and peaceful assembly by lesbian, gay, bisexual and transgender (LGBT) persons.

30. The former can be seen in a series of cases in which the Court has held that same-sex couples are just as capable as different-sex couples of entering into stable, committed relationships, and that they are in a relevantly similar situation to a different-sex couple as regards their need for legal recognition and protection of their relationship notwithstanding that sensitive moral or ethical issues may be involved²⁵.

31. The latter has been established by the judgments in *Identoba and Others v. Georgia*²⁶ and *Genderdoc-M v. Moldova*²⁷.

32. Thus, in *Identoba* the Court found violations of Articles 3 and 11 (together with Article 14) as a result of a failure by Georgian authorities to protect the freedom of LGBT people to participate in a march of 17 May 2012, when participants were subjected to bias-motivated violence. It stated, in particular, that:

“given the attitudes in parts of Georgian society towards the sexual minorities, the authorities knew or should have known of the risk of tensions associated with the

²² *Dudgeon v. United Kingdom*, no. 7525/76, 22 October 1981, paras. 60-61.

²³ No. 10581/83, 26 October 1988.

²⁴ No. 15070/89, 22 April 1993.

²⁵ *Schalk and Kopf v. Austria*, no. 30141/04, 24 June 2010, *Vallianatos and Others v. Greece* [GC], no. 29381/09, 7 November 2013 and *Oliari v. Italy*, no. 18766/11, 21 July 2015.

²⁶ No. 73235/12, 12 May 2015.

²⁷ No. 9106/06, 12 June 2012.

applicant organisation's street march to mark the International Day Against Homophobia. They were thus under an obligation to use any means possible, for instance by making public statements in advance of the demonstration to advocate, without any ambiguity, a tolerant, conciliatory stance ...as well as to warn potential law-breakers of the nature of possible sanctions"²⁸.

33. In *Genderdoc-M*, there was found to be a violation of Article 14 in conjunction with Article 11 of the Convention where the applicant association was discriminated against on the basis of sexual orientation because the bans imposed on events proposed by it were solely the result of the opposition of many Moldovan citizens to homosexuality.

34. Furthermore 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 specifically provides that:

“Member states should take appropriate measures to ensure, in accordance with Article 11 of the Convention, that the right to freedom of association can be effectively enjoyed without discrimination on grounds of sexual orientation or gender identity; in particular, discriminatory administrative procedures, including excessive formalities for the registration and practical functioning of associations, should be prevented and removed; measures should also be taken to prevent the abuse of legal and administrative provisions, such as those related to restrictions based on public health, public morality and public order”²⁹.

E. CONCLUSION

35. Thus, although the Convention provides for public morality as a possible basis for imposing restrictions on the exercise of freedom of association, European and international practice require that any such restriction be strictly construed. Moreover, a restriction imposed on grounds of public morality will not be regarded as compatible with European and international standards where this is inconsistent with other protected rights and, in particular, entails discrimination on grounds of sexual orientation.

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²⁸ Para. 99.

²⁹ Adopted 31 March 2010, paragraph 9.