

***Coman Relu Adrian, Hamilton Robert Clabourn and
Association Accept***

v.

***General Inspectorate for Immigration and Ministry of
Home Affairs***

Before the Constitutional Court of Romania

Written Submissions on behalf of

**the AIRE Centre (Advice on Individual Rights in
Europe), the European Commission on Sexual
Orientation Law (ECSOL), FIDH (Fédération
Internationale des Ligues des Droits de l'Homme),
ILGA-EUROPE (the European Region of the
International Lesbian, Gay, Bisexual, Trans and
Intersex Association) and the International
Commission of Jurists (ICJ)**

Interveners

April 2016

INTRODUCTION

1. These written submissions are presented by the AIRE Centre (Advice on Individual Rights in Europe), the European Commission on Sexual Orientation Law (ECSOL), FIDH (Fédération Internationale des Ligues des Droits de l'Homme), ILGA-EUROPE (the European Region of the International Lesbian, Gay, Bisexual, Trans and Intersex Association) and the International Commission of Jurists (ICJ), hereinafter "the interveners".¹
2. The present case provides this Court with an important opportunity to examine the contested refusal of the host European Union (EU) Member State to recognize either *de facto* or *de jure* same-sex marriages of migrant Union citizens with third-country nationals, and whether such refusal, in turn, violates relevant EU law and the European Convention on Human Rights.
3. In light of this, the interveners' written submissions below address the following:
 - i. A functional, EU freedom of movement and of residence argument that should such same-sex marriages -- and, where applicable, the status attached to them -- not be recognized by the host EU Member State, such refusal will impede the exercise and enjoyment of the right to freedom of movement and of residence of Union citizens who are in such relationships and will, therefore, unlawfully restrict their fundamental "right to move and reside freely"² in the territory of another EU Member State;³
 - ii. The Citizens Directive;
 - iii. An equality argument, according to which the failure of the host EU Member State to recognize the same-sex marriage (or equivalent relationship) of migrant Union citizens amounts to prohibited discrimination on the grounds of sexual orientation, contrary to Article 21 of the EU Charter of Fundamental Rights (EUCFR);⁴
 - iv. The obligation to respect and protect human rights, meaning, in turn, that the refusal of the host EU State to recognize the same-sex marriage of Union citizens and the legal status attached to them, amounts to a violation of their right to human dignity guaranteed by Article 1 of the EUCFR,⁵ which is, also, a general principle of EU law; and
 - v. The relevance of the case-law of the European Court of Human Rights to this Court's determination of the present case.

¹ See Annex 1 for a description of each of the organizations.

² The EU Charter of Fundamental Rights of the EU (EUCFR), which became legally binding on the EU with the entry into force of the Treaty of Lisbon, in December 2009, elevates the right to freedom of movement and of residence into the status of a fundamental human right. See, Article 45 of the EUCFR, which states, "1. Every citizen of the Union has the right to move and reside freely within the territory of the Member States. 2. Freedom of movement and residence may be granted, in accordance with the Treaty establishing the European Community, to nationals of third countries legally resident in the territory of a Member State", EU Charter of Fundamental Rights, Dec. 18, 2010, 2010 O.J. (C 364) 1. The EUCFR has the same legal force as the EU Treaties (see Article 6(1), Treaty on European Union, Consolidated versions of the Treaty on European Union and the Treaty on the Functioning of the European Union). The EUCFR provisions are addressed, among others, to the Member States when implementing EU law (see EUCFR, Article 51(1)) and are binding on them "when they act in the scope of Union law" (see Explanations relating to the Charter of Fundamental Rights, Official Journal of the European Union 2007/C 303/32, 14 December 2007. The Explanations set out the sources of the provisions of the Charter, and "shall be given due regard by the courts of the Union and of the Member States"; Charter of Fundamental Rights of the EU, Article 52(7)).

³ The right of EU nationals to move freely between the Member States is absolutely central to the EU project. The Treaty Provisions on Citizenship are directly effective and confer on every national of the Member States the right to move and reside freely in other Member States, regardless of whether they are carrying on an economic activity: see *Baumbast* at paras [80]-[84]. Pursuant to the EU law principle of effectiveness, these rights must be protected in substance as well as in form. Indeed, the Court of Justice of the EU has stated that citizenship is "*destined to be the fundamental status of nationals of the Member States*", see Case C-184/99 *Grzelczyk v Centre Public d'aide sociale d'Ottignies-Louvain-la-Neuve* [2001] ECR 6193.

⁴ Article 21(1) of the EUCFR reads as follows: "1. Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited."

⁵ Article 1 of the EUCFR reads as follows: "Human dignity is inviolable. It must be respected and protected."

EU law submissions

4. At the outset, the interveners acknowledge that EU Member States' approaches to same-sex relationships range from full recognition of marriage equality between different-sex and same-sex couples, to providing for registered or *de facto* same-sex partnership options, to having constitutional bans on same-sex marriage recognition. Of the 28 EU Member States, ten recognize complete marriage equality between different-sex and same-sex couples;⁶ 16 offer some form of registered same-sex partnership;⁷ nine do not offer any form of legal recognition to same-sex couples.⁸
5. The interveners do not submit that the EU law can or even must require the Member States to legally recognize same-sex marriages and/or to make available any particular legal status to same-sex couples that seek to formalize their relationship within the EU Member State/s of the spouses' nationality/ies. Indeed, as the Court of Justice of the European Union (CJEU) has recently confirmed, "as European Union law stands at present, legislation on the marital status of persons falls within the competence of the Member States."⁹ Accordingly, family law marriage issues, including the question of whether same-sex couples can marry or enter into a registered partnership, are matters that fall within the national competence of the Member States provided that they comply with EU law. Hence, for example, whether a UK national will be able to marry her or his same-sex partner in the UK is a question that falls entirely within the competence of the UK. Conversely, when a Member State seeks to apply its domestic law provisions in situations that involve migrant Union citizens whose circumstances fall within the scope of EU law, it is necessary to ensure that the application of the relevant national provisions does not breach EU law.

The scope of EU free movement and residence law

6. Accordingly, although EU Member States are free to refuse to provide any legal recognition to same-sex relationships where the circumstances exclusively concern their respective domestic legal orders, they are not free to do so in situations involving same-sex couples who -- exercising their right to freedom of movement and of residence pursuant to the EU legal order¹⁰ -- have moved to their territory from another Member State. This is because of the core EU law obligation that national measures are required to comply with EU general principles, including fundamental rights, whenever they fall within the scope of EU law.

⁶ In chronological order, starting from the EU Member State that first recognized same-sex marriage, these are: the Netherlands, Belgium, Spain, Sweden, Portugal, Denmark, France, the United Kingdom (apart from Northern Ireland), Luxembourg and the Republic of Ireland. Recent steps have paved the way for the introduction of same-sex marriage in Finland; however, the relevant law will come into force in March 2017 only. Belgium, which has recognized marriage equality for same-sex couples for over a decade, allows migration by third-country national spouses and partners of its permanent or temporary residents. See, *Ad-hoc Query on Marriage – Rights to Entry and Permanent Residence*, EUROPEAN MIGRATION NETWORK (May 3, 2011), available at http://ec.europa.eu/dgs/home-affairs/what-we-do/networks/european_migration_network/reports/docs/ad-hoc-queries/family-reunification/274_emn_ad-hoc_query_marriage_-_entry_rights_residence_22nov2010_wider_dissemination_en.pdf.

⁷ In chronological order, starting from the Member State that first introduced some form of registered same-sex partnership, these are the Netherlands, France, Belgium, Germany, Finland, Luxembourg, the United Kingdom, the Czech Republic, Slovenia, Hungary, Austria, Ireland, Malta, Croatia and Cyprus. Moreover, Estonia has recently amended its law to provide a form of cohabitation agreement to same-sex couples; however, this legislation will only come into force in 2016.

⁸ The interveners understand that according to Article 277, para. 2 of the Civil Code of Romania, "marriages between persons of the same sex concluded or contracted abroad, either by Romanian or by foreign citizens, are not recognized in Romania", the consequence of which is to deny a third-country national who is the same-sex spouse of an EU citizen the right to family reunification for immigration purposes pursuant to Directive [2004/38/EC](#) of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States amending Regulation (EEC) No 1612/68 and repealing Directives 64/221/EEC, 68/360/EEC, 72/194/EEC, 73/148/EEC, 75/34/EEC, 75/35/EEC, 90/364/EEC, 90/365/EEC and 93/96/EEC as it is the case in the context of the denial of family reunification rights that has given rise to the constitutional challenge presently before this Court.

⁹ Case C-147/08, *Römer v. Freie und Hansestadt Hamburg*, [2011] ECR. I-3645, paragraph 38.

¹⁰ Article 45 - Freedom of movement and of residence, EUCFR.

Therefore, in situations involving the bestowal of family reunification rights in order to ensure the functional enjoyment of the right to freedom of movement and of residence pursuant to the EU legal order, an EU Member State national, whose circumstances fall within the scope of EU law, is in a better position than a Union citizen whose situation is judged to be subject purely to relevant national provisions.¹¹ As it is the case in the context of this Court's determination of the present case, the same-sex couple at hand may be constituted by a third-country national and an EU citizen who is a national of the EU Member State to which the couple wishes to move and enjoy family reunification as a corollary to the exercise of the right to freedom of movement and of residence under the EU legal order.

7. As far as the position of the CJEU is concerned, that Court does not merely tally the number of countries or look solely to trends among EU Member States when it conducts a comparative analysis. Rather, under its evaluative method, the CJEU is also mindful of the approaches most in line with the objectives of the EU Treaties. In the context of the present case, the twin objectives of family reunification and of freedom of movement and residence clearly favour broad recognition of same-sex spouses. Furthermore, the case-law of the CJEU establishes that where EU law confers a discretion or choice on EU Member States as to the application of an EU rule, EU Member States act within the scope of EU law in exercising that choice/discretion. This includes situations where EU law gives an express or implied power to EU Member States to derogate from EU obligations. For example, in C-260/89 *ERT* [1991] ECR I-2925, the CJEU held that if a Member State derogates from a fundamental freedom -- in that case, the freedom to provide services -- it must act compatibly with the general principles of EU law, including fundamental freedoms.
8. In C-7/98 *Bamberski v Krombach* [2000] ECR I-1935, the CJEU was concerned with Article 27(1) of the Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters ("the Brussels Convention") under which, by way of exception to the ordinary operation of the Convention, judgments given in other Member States "shall not be recognised ... if such recognition is contrary to public policy in the state in which recognition is sought". The Court noted that, "while it is not for the Court of Justice to define the content of the public policy of a contracting state" -- since that is a concept which EU law regards as the preserve of Member States -- "it is nonetheless required to review the limits" of that concept because it allowed EU Member States to derogate from the general rule under the Brussels Convention of mutual recognition, and must therefore be interpreted strictly (paras 19-23, see further paras 176-179). Thus, in *Bamberski v Krombach*, the CJEU went on to make it clear that the limits of the power to derogate from the Brussels Convention on the grounds of public policy are reviewable by the CJEU itself in the light of fundamental rights. Indeed, the CJEU has held that even where an EU Regulation refers to national laws, the extent to which it can be interpreted so as to confer exclusive competence on the national laws is circumscribed by the requirement to observe fundamental rights.¹²
9. The CJEU has also held that EU Member States are acting within the scope of EU law where the rules laid down in EU legislation leave them to choose between various methods of implementation.¹³

The Citizens Directive

10. The Citizens Directive 2004/38 (hereinafter referred to as the Citizens Directive)¹⁴ is now the main instrument that governs the conditions under which nationals of one EU Member State

¹¹ Joined Cases 35&36/82, *Morson and Jhanjan*, [1982] ECR 3723.

¹² In C-400/10 PPU *McB* [2010] ECR 0000 (judgment 5 October 2010), the Court of Justice interpreted Article 2(11) of Regulation (EC) No 2201/2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility as meaning that the determination of rights of custody was exclusively for national law. However, the Court went on to review whether this interpretation of the provisions of the Regulation was compatible with fundamental rights in light of the national law in question.

¹³ Cases 201 and 202/85 *Marthe Klensch & Others v Secretaire d'Etat a l'Agriculture et a la Viticulture* [1986] ECR 3477; and C-313/99 *Mulligan* [2002] ECR I-5719.

may reside and work in other EU Member States as well as family reunification rights of migrant Union citizens with their third-country national family members, including spouses. It generally recognizes that EU citizenship “confers on every citizen . . . a primary and individual right to move and reside freely within the territory of the Member States”, “an area without internal frontiers.”¹⁵

11. The CJEU observed in *Singh* that the denial of free movement rights to family members would render ineffective the exercise of rights under Articles 45 and 49 TFEU.¹⁶ This includes family members who do not hold the nationality of any EU Member State.¹⁷ This is because the right to “free movement” has little practical meaning for someone who must leave behind a spouse and children if they move to another country.¹⁸ Words in the preamble of the original directive on non-economic residence are relevant here: “Whereas this right can only be genuinely exercised if it is also granted to members of the family”.¹⁹ Indeed in *Singh* and the family reunification case-law flowing from it, the CJEU clarified that:

“[19] A national of a member-State might be deterred from leaving his country of origin in order to pursue an activity as an employed or self-employed person as envisaged by the Treaty in the territory of another member-State if, on returning to the member State of which he is a national in order to pursue an activity there as an employed or self-employed person, the conditions of his entry and residence were not at least equivalent to those which he would enjoy under the Treaty or secondary law in the territory of another member-State.

[20] He would in particular be deterred from so doing if his spouse and children were not also permitted to enter and reside in the territory of his member-State of origin under conditions at least equivalent to those granted them by Community law in the territory of another member-State.

[...] [23] [...] the rights [provided by Articles 48 and 52 European Economic Community Treaty, now Articles 45 and 49 of the Treaty on the Functioning of the European Union, i.e. the free movement of workers and the freedom of establishment] cannot be fully effective if such a person may be deterred from exercising them by obstacles raised in his or her country of origin to the entry and residence of his or her spouse. Accordingly, when a Community national who has availed himself or herself of those rights returns to his or her country of origin, his or her spouse must enjoy at least the same rights of entry and residence as would be granted to him or her under Community law if his or her spouse chose to enter and reside in another Member State. Nevertheless, Articles 48 and 52 of the Treaty [i.e. the EEC Treaty] do not prevent Member States from applying to foreign spouses of their own nationals rules on entry and residence more favourable than those provided for by Community law.”²⁰

¹⁴ Directive 2004/38/EC of the European Parliament and of the Council On the Right of Citizens of the Union and Their Family Members to Move and Reside Freely Within the Territory of Member States 2004 O.J. L 158/77

¹⁵ The Citizens Directive, recitals 1-2, at 78.

¹⁶ Case C-370/90 *The Queen v Immigration Appeal Tribunal ex parte Surinder Singh*, [1992] ECR. I-4265, paras 19, 20 and 23

¹⁷ Article 18 Treaty on the Functioning of the European Union and Case C-59/85, *Netherlands v. Reed*, [1986] ECR. I-01283, para 30 (requiring member states that grant family reunification to non-married partners of their own nationals to extend reunification to the partners of workers from other EU member states, even if that treatment exceeds the minimum requirements of the Citizens Directive).

¹⁸ Case C-60/00, *Carpenter v. Secretary of State for the Home Department*, [2002] ECR. I-06279, paragraph 38. Also Case C-457/12 *S and G* judgment of 12 March 2014 a recent case applying *Carpenter* to the free movement of workers, where the Court held that “a derived right of residence is based on the fact that a refusal to allow it would be such as to interfere with the exercise of fundamental freedoms guaranteed by the FEU Treaty” and found that this would be the case if a citizen was thereby ‘discouraged’ from exercising their rights, paras 41-44.

¹⁹ Directive 90/364/EEC on the right of residence [1990] OJ L180/26.

²⁰ Case C-370/90 *R v Immigration Appeal Tribunal and Surinder Singh ex parte Secretary of State for the Home Department* [1992] ECR I-04265; [1992] 3 All E.R. 798 (“*Surinder Singh*”).

12. The Citizens Directive does not apply to the return of an EU citizen to the Member State of which he was a national. However, it is applied by analogy by the CJEU given that in both cases it is the EU citizen who is the reference point for the grant of a derived right of residence to his or her family member, even in cases where the relevant EU national was not present in another Member State as a worker (see the Grand Chamber's judgment in Case C-456/12 *O v Minister voor Immigratie, Integratie en Asiel* [2014] Q.B. 1163 ("O&B") at [48]-[50]). In *O&B*, the spouses of nationals of the Netherlands returned with the relevant national to that Member State and sought recognition of their right to reside. Their Dutch national spouses had been resident in other Member States not by virtue of the free movement provisions but by virtue of their EU citizenship (Article 21 TFEU). The CJEU held that this did not alter the application of the *Surinder Singh* principle (at [49]-[50]), the objective of EU law being to "guarantee[] that that citizen will be able, in his Member State of origin, to continue the family life which he created or strengthened in the host Member State". In the context of Article 21 TFEU alone, this required "genuine residence in the host Member State of the Union citizen and of the family member who is a third-country national, pursuant to and in conformity with the conditions set out in Article 7(1) and (2) and Article 16(1) and (2) of Directive 2004/38 respectively" (at [56]).
13. The Citizens Directive recognizes the right of Union citizens and their "family members" to enter any Member State, generally without any formal requirements for the first three months.²¹ If employed, self-employed, studying, or otherwise not a burden on the social assistance or healthcare system of the host country, a citizen and his or her family members, including their third country national spouses, can reside in any member state for a longer term, with the possibility of acquiring the right to permanent residence.²² The Citizens Directive also provides continuing residence rights to spouses and partners, even if the sponsoring Union citizen dies or terminates the relationship.²³
14. Article 2(2) of the Citizens Directive defines "family member" as, *inter alia*, "(a) the spouse;²⁴ (b) the partner with whom the Union citizen has contracted a registered partnership, on the basis of the legislation of a Member State, if the legislation of the host Member State treats registered partnerships as equivalent to marriage and in accordance with the conditions laid down in the relevant legislation of the host Member State".²⁵ These family members, irrespective of whether they are EU Member State nationals or third-country nationals, have the *automatic* right to accompany or join the Union citizen in the host State.
15. Even for "persons who are not included in the definition of family members under [the Citizens] Directive", it charges Member States with the duty to examine their "situation . . . in determining whether entry and residence could be granted", in the interest of the "unity of the family in a broader sense."²⁶ The Citizens Directive states that a "Member State *shall*, in accordance with its national legislation, *facilitate entry and residence* of . . . the partner with whom the Union citizen has a durable relationship, duly attested [,]" as well as "any

²¹ Citizens Directive, arts. 5-6.

²² Citizens Directive arts. 9-11, 16

²³ Citizens Directive arts. 12-13

²⁴ The Citizens Directive must be implemented in a way that does not create any discrimination on, *inter alia*, sexual orientation (see Recital 31). Also, as an EU instrument the Directive must comply with Articles 20 and 21 of the EU Charter of Fundamental Rights. Interpreting "spouse" to exclude married same-sex couples would undermine the primary European treaty guarantees of free movement, the right to marry and found a family, the right to family life, and protection against discrimination on the grounds of sexual orientation. See also the Charter of Fundamental Rights, Articles 7 and 9.

²⁵ One view suggests an autonomous heterosexual E.U. definition of "spouse," relegating same-sex spouses to this separate paragraph covering "registered partner[s]" whose relationships are "equivalent to marriage" in the host member state. Certainly, same-sex marriages are "equivalent to marriage," but describing a legal marriage as a "registered partnership equivalent to marriage" would reflect bizarre and circular drafting that leads to absurd results: read literally, Article 2(b) would require recognition of same-sex foreign spouses in Germany, which authorizes marriage-like same-sex registered partnerships, but not in Sweden, which recognizes same-sex marriages, but not marriage-like registered partnerships see Joined cases C-122/99 *P* and C-125/99 *P, D. and Sweden v. Council*, [2001] ECR. I-4319, paragraph 36

²⁶ Citizens Directive recital 6.

other family members" who have been "dependents or members of the household of the Union citizen."²⁷

The prohibition of discrimination on the grounds of sexual orientation under EU law

16. Arguments militating against recognition of same-sex marriage based on "the need to protect public morality" and/or "the traditional notion of marriage" would still be circumscribed by the requirement to observe fundamental rights, including the prohibition of discrimination on the grounds of sexual orientation. As Advocate General Jääskinen has pointed out, "the aim of protecting marriage or the family cannot legitimise discrimination on grounds of sexual orientation. It is difficult to imagine what causal relationship could unite that type of discrimination, as grounds, and the protection of marriage, as a positive effect that could derive from it."²⁸ Indeed, discrimination on the grounds of sexual orientation is expressly prohibited under various EU treaties and legal acts.²⁹ Article 10 of the Treaty on the Functioning of the European Union calls on Member States to combat discrimination based on sexual orientation in defining and implementing the Union's policies and activities. The EU Charter of the Fundamental Rights includes sexual orientation as a prohibited ground of discrimination, being the first international human rights instrument to expressly do so.
17. The CJEU has not had the opportunity to consider application of Article 21 of the EUCFR in cases concerning discrimination based on sexual orientation yet. However, as Article 21 draws, in part, on Article 14 of the European Convention on Human Rights,³⁰ relevant interpretative principles should apply. Furthermore, in *Jürgen Römer v Freie und Hansestadt Hamburg*, the CJEU expressly held that the prohibition of discrimination "derives from various international instruments and from the constitutional traditions common to the Member States" and that it includes "discrimination on various grounds, including sexual orientation".³¹ Indeed, as emphasized by Advocate General Ruiz-Jarabo Colomer in *Maruko*, "the principle of non-discrimination on grounds of sexual orientation is included in Article 14 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, 1950 and is specifically laid down in Article 21 of the Charter of Fundamental Rights of the European Union. The fact that it is fundamental in nature means that respect for the right is guaranteed in the European Union, pursuant to Article 6 EU".³² As to application of Article 21, in *Römer*, Advocate General Jääskinen further elaborated that, "[t]he prohibition of 'any discrimination based on any ground such as ... sexual orientation' was ... laid down in Article 21(1) of the Charter of Fundamental Rights of the EU, the aim of which is not to create new rights but to reaffirm the fundamental rights recognised by Union law".³³
18. In its judgment in the case of *Frédéric Hay v Crédit agricole mutuel de Charente-Maritime et des Deux-Sèvres*, concerning employment benefits, the CJEU found direct discrimination in that "only persons of different sexes may marry and homosexual employees are therefore unable to meet the condition required for obtaining the benefit claimed".³⁴ In a similar vein, the interveners would argue that the express exclusion of homosexual couples from benefiting from the freedom of movement right under the Citizens Directive amounts to discrimination based on sexual orientation incompatible with EU values.
19. Article 27(2) of the Citizen Directive also requires that measures taken by the host State relying on public policy "shall be based exclusively on the personal conduct of the individual concerned." The interveners submit that this requirement will not be satisfied where Member

²⁷ Citizens Directive art. 3(2) (emphasis added).

²⁸ Op. Advoc. Gen., *Römer*, [2011] ECR. I-3594, paragraph 175

²⁹ TEU Article 10, EU Charter of Fundamental Rights, Article 21, Council Directive [2000/78/EC](#) of 27 November 2000 establishing a general framework for equal treatment in employment and occupation.

³⁰ Official Journal of the European Union C 303/17 - 14.12.2007, Explanations Relating to the Charter of Fundamental Rights.

³¹ *Jürgen Römer v Freie und Hansestadt Hamburg* [2011] Case C-147/08, para 59.

³² *Tadao Maroku v. Versorgungsanstalt der deutschen Bühnen* [2008] Case C-267/06, para 78

³³ *Römer*, para. 130.

³⁴ *Frédéric Hay v Crédit agricole mutuel de Charente-Maritime et des Deux -Sèvres* [2013] Case C-267/12, para. 44.

States engage in a blanket refusal to recognize and/or admit within their territory the same-sex spouse/registered partner/unmarried partner of a migrant Union citizen, since such blanket refusal excludes a *whole category* of persons (i.e. LGB individuals who are in a same-sex relationship) *simply* because those individuals fall within that category (i.e. a category defined by same-sex sexual orientation), and, hence, their exclusion is not based on their personal conduct. Rather, the exclusion is premised exclusively on the grounds of sexual orientation, and thus is tantamount to discrimination prohibited by EU law.

20. As to the position of same-sex couples *once* they are within the territory of the host EU Member State, Article 24 of Directive 2004/38 requires that EU citizens (and their family members) be treated equally with the nationals of the host State. From this it follows that if there is any discrimination on the ground of nationality against a (same-sex) couple in the host EU State, it is contrary to the Citizens Directive.
21. Moreover, if the host EU Member State refuses to recognize the legal status attached to a migrant same-sex couple for the purposes of, e.g., taxation assessment or the provision of social benefits, this will clearly amount to discrimination on the ground of sexual orientation in breach of Article 21 EUCFR, if a migrant opposite-sex couple in a comparable position would have its legal status recognized. In addition, if, once such couples are admitted into the host EU Member State's territory, they are treated worse than opposite-sex couples, with regards to matters in the sphere of employment, occupation, and vocational training, such treatment may amount to a violation of Directive 2000/78³⁵ and/or a breach of Article 21 of the Charter.

Violation of the right to human dignity, Article 1, EUCFR

22. A host EU Member State's denial to recognize the legal status attached by another State to a certain same-sex relationship, its refusal to admit within its territory same-sex couples, and its discriminatory treatment against them once they are within its territory may amount to a violation of the right to human dignity provided under Article 1 EUCFR, which is also a general principle of EU law.³⁶ Advocate General Poiares Maduro in his Opinion in *Coleman* stated that: "*At its bare minimum, human dignity entails the recognition of the equal worth of every individual. Therefore, individuals and political institutions must not act in a way that denies the intrinsic succession of choices among different valuable options. The exercise of autonomy presupposes that people are given a range of valuable options from which to choose.*"³⁷
23. The ability to form a stable intimate relationship with another individual is of fundamental importance for every human being, irrespective of his or her sexual orientation. As Baroness Hale put it in the English case of *Ghaidan v. Godin-Mendoza*, "*Some people, whether heterosexual or homosexual, may be satisfied with casual or transient relationships. But most human beings eventually want more than that. They want love. And with love they often want not only the warmth but also the sense of belonging to one another which is the essence of being a couple. And many couples also come to want the stability and permanence which go with sharing a home and a life together, with or without the children who for many people go to make a family. In this, people of homosexual orientation are no different from people of heterosexual orientation.*"³⁸

³⁵ Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation, see, in particular, Articles 1, 2 and 3. Article 1, which sets out the purpose of the Directive, states "The purpose of this Directive is to lay down a general framework for combating discrimination on the grounds of religion or belief, disability, age or sexual orientation as regards employment and occupation, with a view to putting into effect in the Member States the principle of equal treatment."

³⁶ See Case C-36/02, *Omega Spielhallen- und Automatenaufstellungs-GmbH v. Oberbürgermeisterin der Bundesstadt Bonn*, 2004 E.C.R. I-9641, para 34.

³⁷ Opinion of Advocate General Maduro, Case C-303/06, *Coleman v. Law & Law*, 2008 E.C.R. I-5603, para 9.

³⁸ *Ghaidan v. Godin-Mendoza*, [2004] UKHL 30, [2004] 2 A.C. 557 (H.L.) [142] (appeal taken from Eng.).

24. Accordingly, every human being should be free to form an intimate relationship with another human being, and should be able to (legally) formalize such a relationship and through this to require everyone else to recognize and respect it. Forming intimate relationships with other individuals, choosing to formalize these relationships and consequently attaching to them a legal status, is an exercise of personal autonomy, which is an aspect of the dignity of every human being. All human beings are equal in dignity.³⁹ The EU, by prohibiting discrimination on the grounds of sexual orientation in situations that fall within the scope of EU law, (tacitly) admits the equal worth of all individuals *irrespective of their sexual orientation*, and with it, the equal moral worth of opposite-sex and same-sex relationships.

Is the current legal regime compliant with EU law?

25. To date, the CJEU has never been directly confronted with the question of the legal recognition of a migrant same-sex couple in the territory of the host State. Accordingly, the Court has never had to address the question of whether EU law requires the host Member State to recognize the same-sex marriage/registered partnership/durable relationship of migrant Union citizens, for family reunification purposes.

26. The provisions of the Citizens Directive do not define the term "spouse" nor do they make specific reference to same-sex couples.⁴⁰ This means that differences in the meaning attributed to the term "spouse" through national laws may undermine the uniform and effective protection of rights granted by the Treaty and secondary legislation.⁴¹

27. The CJEU interprets EU law "in accordance with generally accepted methods of interpretation, in particular by reference to the fundamental principles of the EU legal system and, where necessary, general principles common to the legal systems of the Member States".⁴² The CJEU regularly departs from its traditional readings of EU law provisions, when they seem to no longer reflect the actual social reality.⁴³ Like the Council of Europe's European Convention of Human Rights and Fundamental Freedoms (hereinafter "ECHR"), which is a "living instrument" and, as such, "must be interpreted in the light of present-day conditions,"⁴⁴ the meaning attributed to EU law provisions must be constantly reassessed in order to come to grips with modern times and to be brought into line with the changing European social landscape.

28. A refusal by the national authorities of a Member States to consider as "spouses" for the purposes of EU free movement law, a same-sex couple that has married in accordance with the law of one Member State, disregards the national family law of that Member State and creates two statuses: marriages valid throughout (increasingly) the EU and national law; and marriages only valid within the national sphere.

³⁹ See Opinion of Advocate General Villalón, Case C-447/09, *Prigge & Others v. Deutsche Luftanthsa AG*, 2011 E.C.R. I-8006, para 31.

⁴⁰ The European Commission made clear that the EU requires a uniform rule or definition of "spouse", that the CJEU had not yet settled the question, and that the subject area has been in flux and is subject to change in *Proposal for a Directive of the European Parliament and of the Council on the Right of Citizens of the Union and Their Family Members to Move and Reside Freely Within the Territory of the Member States*, COM (2001) 257 Final (Dec. 18, 2001) [hereinafter *Council Document dated Dec. 2001*].

⁴¹ In order to ensure EU law has a uniform and consistent meaning throughout the Union, the European Court of Justice, as the Court of Justice of the European Union was previously known, has long recognized the "autonomy principle" whereby EU terms generally have a single definition, independent of any national understandings of the same term, see Case C-174/8, *NCC Construction Danmark A/S v Skattenministeriet*, [2009] ECR I-10567, paragraph 24.

⁴² Joined cases C-46/93 & C-48/93, *Brasserie du Pecheur S.A v Bundesrepublik Deutschland and The Queen v Secretary of State for Transport, ex parte Factorame Ltd and others*, [1996] ECR I-1029 paragraph 27.

⁴³ See generally Opinion of Advocate General Geelhoed, Case C-413/99, *Baumbast and R v. Secretary of State for the Home Dept.*, [2002] ECR. I-7091. Similarly, in his Opinion in *P. v. S and Cornwall County Council*, Advocate General Tesouro stressed that "the law cannot cut itself off from society as it actually is, and must not fail to adjust to it as quickly as possible. Otherwise, it risks imposing outdated views and taking a static role."

⁴⁴ *Tyrer v. United Kingdom*, 26 Eur. Ct. H.R. (ser. A) 1, 12 (1978).

29. In addition a change in the civil status of incoming same-sex couples is also an obstacle to free movement. Even, the conversion of a certain legal status into another, often "lesser" status (e.g. from married couple to registered partners) may, *in itself*, be considered to amount to a restriction on free movement. *A fortiori*, the denial to recognize at all that a same-sex relationship formalized elsewhere does have a legal status attached to it, can, also, constitute an obstacle to free movement. A parallel can be seen between situations where the host EU Member State does not recognize the marital/partnership status of migrant Union citizens with the situations in the citizenship cases of *Garcia Avello*⁴⁵ and *Grunkin-Paul*,⁴⁶ which involved the denial of the host State to recognize the surnames registered in another Member State of Union citizens whose situation involved a cross-border element. In these two cases, the CJEU held that the contested denial would create an obstacle to free movement since the discrepancy in surnames that would be created as a result could cause serious inconvenience to the persons concerned. In light of this, the interveners submit that, "a limping status" as to marriage is likely to cause even greater obstacles to the parties and to deter them from lawfully exercising their right to freedom of movement and of residence.
30. If each State is allowed to determine whether or not it will recognize a same-sex marriage or a registered partnership contracted in another Member State, it would mean that a married couple will be considered as married in some Member States, as registered or *de facto* partners in others, while in some Member States they will not be considered a couple at all. This again would cause serious obstacles to the couple's exercise of their right to freedom of movement and of residence between States of recognition and non-recognition. The host State's refusal to recognize the same-sex relationships (and the legal status attached to them) of incoming Union citizens, would negatively affect same-sex couples in two ways: a) when they seek to be admitted into the host State as a couple (in essence, an immigration and family reunification issue entailing in addition to the right to freedom of movement and of residence, the right to private and family life, principally); and b) once within the territory of the host State, when they seek to claim benefits or tax advantages or, simply, a certain other kind of beneficial treatment available only to couples (or in some cases "married couples").
31. It has always been considered that Member State nationals would only be willing to move to another Member State if they were guaranteed that they would be able to be accompanied or joined there by their close family members. The EU legislature has always "recognised the importance of ensuring the protection of family life of nationals of the Member States in order to eliminate obstacles to the exercise of the fundamental freedoms guaranteed by the EC Treaty".⁴⁷ Similarly, the CJEU has held in a long line of cases that the unjustified refusal of the host State to admit within its territory the close family members of the EU migrant amounts to a restriction on free movement that is contrary to the free movement provisions of the Treaty.⁴⁸ Therefore, the CJEU has clarified that the right to family reunification under EU law entails a right to be joined by existing family members and the right to family formation in the host State.⁴⁹
32. The complete refusal by the host State to admit within its territory the same-sex spouse/registered partner of the migrant Union citizen amounts to a clear obstacle to free movement. If a migrant Union citizen cannot be accompanied in the host State by his or her spouse or registered/*de facto* same-sex partner, this can clearly dissuade him or her from actually moving to the host State and will thus amount to a restriction on free movement. Accordingly, it can amount to a *prima facie* violation of the free movement of person

⁴⁵ Case C-148/02, *Garcia Avello v Belgium*, [2003] ECR. I-11613.

⁴⁶ Case C-353/06, *Grunkin and Paul v Grunkin-Paul and Stadesamt Stadt Niebull*, [2008] ECR. I-7639.

⁴⁷ Case C-127/08, *Metock et al v Minister for Justice, Equality and Law Reform*, [2008] ECR. I-6241 para 56

⁴⁸ Case C-219/05, *O and B v Minister voor Vreemdelingenzaken en Integratie v. R. N. G. Eind*, [2007] ECR. I-10719 para 33-37, Case C-370/90 *The Queen v Immigration Appeal Tribunal ex parte Surinder Singh*, 1992 ECR. I-4265, para 18-20

⁴⁹ Case C-127/08, *Metock et al v Minister for Justice, Equality and Law Reform*, [2008] ECR. I-6241 paragraph 87-90 and Case C-456/12, *O and B v Minister voor Vreemdelingenzaken en Integratie v. R. N. G. Eind*, [2007] E.C.R. I-10791

provisions.⁵⁰ As the CJEU noted, “Establishing an internal market implies that the conditions of entry and residence of a Union citizen in a Member State whose nationality he does not possess are the same in all the Member States.”⁵¹ Consequently, the freedom of movement of Union citizens in a Member State, whose nationality they do not possess, should not vary from one Member State to another according to the provisions of national law concerning immigration and family law, with some Member States permitting entry and residence of same-sex spouses/registered partners/de facto partners of a Union citizen and other Member States refusing them.⁵²

33. Accordingly, EU free movement law requires Member States to mutually recognize the legal status attached to the same-sex relationships of migrant Union citizens.⁵³ This enables same-sex couples to be recognized as such once they are admitted into the territory of the host State for the purposes of taxation, social benefits, and so on. Article 2 of the Citizens Directive allows them to claim *automatic* family reunification rights with their same-sex spouse or, if the condition laid down in that provision is satisfied, registered partner in the host State, just as heterosexual Union citizens are under all circumstances entitled to do.
34. Moreover, when the host State conducts its assessment under Article 3(2) of the Directive as to whether it should facilitate the entry into its territory of the (same-sex unmarried) partner of the migrant Union citizen, this should be free from any discrimination on the ground of sexual orientation. The impediment to free movement is exactly the same, whether an LGB Union citizen cannot be accompanied in the host State by his same-sex partner or whether a heterosexual Union citizen cannot be accompanied by his opposite-sex partner.
35. In respect of the discretion to the final national court as to whether a case is *acte clair*, the interveners would respectfully draw the Constitutional Court’s attention to the case of *Ferreira da Silva*,⁵⁴ where the CJEU stated that a supreme court had breached its duty to make a preliminary reference under article 267.3 TFEU. The triggering factor in *Ferreira Silva* was the fact that there had been strong contradictions between the courts of different Member States that had resulted in preliminary references to the Court. In the case of the precise formal and substantive content and the requirements of the registration referred to in Article 2(2)(b) of Directive 2004/38/EC concerning same sex this has been the subject of a Hungarian reference in the case of *Cocaj*⁵⁵ though the case was later removed from the CJEU list. It would therefore to be a very strong argument that this Court, in light of the different ways in which Member States deal with this issue, should make a reference to the CJEU in this case.

⁵⁰ See TFEU art. 21 (for economically inactive Union citizens); TFEU art. 45 (for workers); TFEU art. 49 (for the self-employed who exercise their freedom of establishment); TFEU art. 56 (for service-providers). Which provision will be applicable will depend on the “status” of the migrant Union citizen. For instance, if he is a “worker,” Article 45 will apply, whereas if he is economically inactive, the applicable provision will be Article 21.

⁵¹ *Metock*, 2008 E.C.R. I-6241, para 68.

⁵² *Metock*, 2008 E.C.R. I-6241, para 67

⁵³ Article 67(1) of the Treaty on the Functioning of the European Union provides that the Union is to constitute an area of freedom, security and justice with respect for fundamental rights and the different legal systems and traditions of the Member States. Paragraph 4 of that article provides that the Union is to facilitate access to justice, in particular through the principle of mutual recognition of judicial and extrajudicial decisions in civil matters. Article 81 of the Treaty explicitly refers to measures aimed at ensuring ‘the mutual recognition and enforcement between Member States of judgments and of decisions in extrajudicial cases’ and ‘the compatibility of the rules applicable in the Member States concerning conflict of laws and of jurisdiction’. Many instruments have already been adopted on this basis, in particular Regulation (EC) No 2201/2003 of 27 November 2003.

⁵⁴ Case C-160/14 *Ferreira da Silva e Britos v Esatdio Portugues* – judgment 9th September 2015 (paras 43-44).

⁵⁵ Preliminary reference C-459/14 *Fadil Cocaj v Bevándorlási és Állampolgársági Hivatal*.

The relevance of the case-law of the European Convention on Human Rights to this Court's determination of the present case

36. The rights under the Convention for the Protection of Human Rights and Fundamental Freedoms (hereafter: "the Convention" or ECHR) are not applied in a vacuum,⁵⁶ but fall to be interpreted in the light of and in harmony with other international law standards and obligations,⁵⁷ including under treaty and customary international law.⁵⁸ In addition, for those Contracting Parties that are Member States of the EU, relevant EU law should be interpreted as constituting "national law" for the purposes of the Convention. While it is not generally the role of the European Court of Human Rights to decide whether States have acted in accordance with EU law "unless and in so far as they may have infringed rights and freedoms protected by the Convention",⁵⁹ it is for the Strasbourg Court to consider any EU Respondent State's obligations under applicable relevant provisions of EU law (see above) – as interpreted and construed by the CJEU – when assessing whether the Contracting Party's proposed actions will be "in accordance with the law" under the ECHR.⁶⁰ The Strasbourg Court can also optimally supervise a Contracting Party's compliance with Article 53 of the ECHR by adopting an approach that guarantees at least the protection required under the applicable EU law.
37. The case law of the European Court of Human Rights makes clear that not every distinction or difference in treatment constitutes discrimination. As the Court held in its judgment in the case of *Abdulaziz, Cabales and Balkandali v. the United Kingdom*, "a difference of treatment is discriminatory if it 'has no objective and reasonable justification', that is, 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'".⁶¹ In its judgment in the case of *D.H. and Others v. Czech Republic*, the Court held that, "[d]iscrimination means treating differently, without an objective and reasonable justification, persons in relevantly similar situations...".⁶² Thus, not every distinction in or difference of treatment amounts to prohibited discrimination.⁶³
38. However, consistent with international human rights law, the case law of the European Court of Human Rights has reiterated on numerous occasions that discriminatory treatment on certain grounds is inherently suspect, attracting enhanced scrutiny, and highly unlikely to be considered as lawful under the Convention. For example, in *D.H. and Others v. the Czech Republic*, the Court held that, "the notion of objective and reasonable justification must be interpreted as strictly as possible" in circumstances where the difference in treatment is based on race or ethnic origin.⁶⁴
39. Under international human rights law, including the case-law of the European Court of Human Rights, lesbian, gay and bisexual people are entitled to enjoy equality before the law and equal protection of the law on the basis of equality and non-discrimination.⁶⁵ The right

⁵⁶ *Öcalan v. Turkey* [GC], no. 46221/99, judgment, 12 May 2005, para. 163.

⁵⁷ *Demir and Baykara v. Turkey* [GC], no. 34503/97, judgment, 12 November 2008, § 67; *Al-Adsani v. the UK* [GC], no. 35763/97, judgment, 21 November 2001, para. 55.

⁵⁸ *Al-Adsani; Waite and Kennedy v. Germany* [GC], no. 26083/94, judgment, 18 February 1999; *Taskin v Turkey*, no. 46117/99, 10 November 2004.

⁵⁹ See *Jeunesse v. the Netherlands* [GC], no. 12738/10, judgment, 3 October 2014, para. 110, and *Ullens de Schooten and Rezabek v. Belgium*, cited therein.

⁶⁰ *Aristimuño Mendizabal v. France*, no. 51431/99, judgment, 17 January 2006, para. 69 and paras 74-79; and *Suso Musa v. Malta*, no. 42337/12, judgment, 23 July 2013, para. 97.

⁶¹ *Abdulaziz, Cabales and Balkandali v. the United Kingdom*, nos. 9214/80; 9473/81; 9474/81, judgment, 28 May 1985, Series A, No. 94, para. 72.

⁶² *D.H. and Others v. the Czech Republic* [GC], no. 57325/00, judgment, 13 November 2007, para. 175.

⁶³ See also Explanatory Report on Protocol No. 12, paras 18-19.

⁶⁴ *D.H. and Others v. the Czech Republic*, § 196.

⁶⁵ The May 2015 Update Report of the United Nations High Commissioner for Human Rights on Discrimination and violence against individuals based on their sexual orientation and gender identity, UN Doc. [A/HRC/29/23](#), for example, states: "[a]pplication of international human rights law is guided by the fundamental principles of universality, equality and non-discrimination. All human beings, irrespective of their sexual orientation and gender identity, are entitled to enjoy the protection of international human rights law with respect to the rights to life, security of person and privacy, to freedom from torture and ill-

to identity and therefore sexual identity/sexual orientation is fundamental to the concept of human dignity. In recent times sexuality/sexual orientation has been accorded a similar protected status as race and gender.

40. For historical reasons, neither Article 14 of the Convention nor Article 1 of Protocol 12 explicitly lists sexual orientation (or gender identity) as a protected status. However as the Convention is a living instrument,⁶⁶ in a series of cases, the European Court of Human Rights has expressly stated that the list of grounds in Article 14 is non-exhaustive and that the concept of one's sexual orientation is included among the "other" grounds protected by Article 14,⁶⁷ reiterating on several occasions that sexual orientation attracts the protection of Article 14 of the Convention.⁶⁸ The European Court of Human Rights, for example, has repeatedly confirmed that the prohibition of discrimination under Article 14 of the European Convention on Human Rights: "duly covers questions related to sexual orientation and gender identity".⁶⁹
41. In *Smith and Grady v. the United Kingdom*, for example, the European Court of Human Rights reiterated that, "when the relevant restrictions concern 'a most intimate part of an individual's private life'", such as is the case with respect to differences in treatment based on sexual orientation, "there must exist 'particularly serious reasons' before such interferences can satisfy the requirements of Article 8 § 2 of the Convention".⁷⁰ Moreover, in the case of *Alekseyev v. Russia*, the European Court held that: "when the distinction in question operates in this intimate and vulnerable sphere of an individual's private life, particularly weighty reasons need to be advanced before the Court to justify the measure complained of. Where a difference of treatment is based on sex or sexual orientation the margin of appreciation afforded to the State is narrow, and in such situations the principle of proportionality does not merely require the measure chosen to be suitable in general for realising the aim sought; it must also be shown that it was necessary in the circumstances. Indeed, if the reasons advanced for a difference in treatment were based solely on the applicant's sexual orientation, this would amount to discrimination under the Convention".⁷¹
42. Furthermore, the fact that there is "a predisposed bias on the part of the heterosexual majority against a homosexual minority" does not amount to sufficient justification for the differential treatment any more than similar negative attitudes towards those of a different

treatment, discrimination and arbitrary arrest and detention, and to freedom of expression, association and peaceful assembly, and all other civil, political, economic, social and cultural rights", § 9.

⁶⁶ *Tyrer v. the United Kingdom*, no. 5856/72, judgment, 25 April 1978, § 31.

⁶⁷ See, for example, *Salgueiro da Silva Mouta v. Portugal*, no. 33290/96, judgment, 21 December 1999, § 28, ECHR 1999- IX; *Fretté v. France*, no. 36515/97, judgment, 26 February 2002, § 32; *S.L. v. Austria*, no. 45330/99, judgment, 9 January 2003, § 37; and *E.B. v. France* [GC], no. 43546/02, judgment, 22 January 2008, § 50; *Kozak v. Poland*, no. 13102/02, judgment, 2 March 2010, §§ 91-92; *Alekseyev v. Russia*, nos. 4916/07, 25924/08 and 14599/09, judgment, 21 October 2010, § 108; *X v. Turkey*, no. 24626/09, judgment, 9 October 2012, § 50.

⁶⁸ *Kozak v. Poland*, no. 13102/02, judgment, 2 March 2010, § 83; *Alekseyev v. Russia*, nos. 4916/07, 25924/08 and 14599/09, judgment, 21 October 2010, § 108; *X v. Turkey*, no. 24626/09, judgment, 9 October 2012, § 50.

⁶⁹ *Identoba v. Georgia*, no. 73235/12, 12 May 2015, judgment, § 96.

⁷⁰ *Smith and Grady v. the United Kingdom*, nos. 33985/96 and 33986/96, judgment, 27 September 1999, § 89; see also, *Karner v. Austria*, no. 40016/98, European Court of Human Rights, judgment, 24 July 2003, §§ 37 and 42; and *X and Others v. Austria* [GC], no. 19010/07, European Court of Human Rights, judgment, 19 February 2013, § 99.

⁷¹ *Alekseyev v. Russia*, nos. 4916/07, 25924/08 and 14599/09, judgment, 21 October 2010, § 108. "Where a difference of treatment is based on sex or sexual orientation, the margin of appreciation afforded to the State is narrow, and in such situations the principle of proportionality does not only require that the measure chosen be generally adapted to the objective pursued; it must also be shown that it was necessary in the circumstances", *X v. Turkey*, § 50. Indeed, "[d]ifferences based solely on considerations of sexual orientation are unacceptable under the Convention", *Pajić v. Croatia*, no. 68453/13, judgment, 23 February 2016, § 59 and *Salgueiro da Silva Mouta v. Portugal*; *E.B. v. France*; *X and Others v. Austria*; and *Vallianatos and Others v. Greece* cited therein.

race, origin or colour.⁷² Thus, discrimination on the grounds of sexuality/sexual orientation is considered 'suspect' and subject to 'particularly severe scrutiny'.

43. In the context of discrimination on the grounds of sexual orientation, the European Court of Human Rights has found violations in respect of the enjoyment of the right to private and family life, *inter alia*, when applicants have been refused child custody;⁷³ in respect of adoption matters;⁷⁴ in connection with granting of parental responsibility;⁷⁵ in connection with army discharge;⁷⁶ when people have been denied the right to succeed to a deceased partner's tenancy,⁷⁷ social security cover,⁷⁸ and access to marriage or other form of legal partnership recognition.⁷⁹
44. In addition, and of particular relevance to the Court's determination of the present case, most recently, in *Pajić v. Croatia*, the European Court of Human Rights had occasion to consider the situation of the applicant in that case, a national of Bosnia and Herzegovina, who had applied for, and been refused, a family reunification residence permit with a view to enjoying family life with her same-sex partner, a Croatian national, in Croatia.⁸⁰ The Croatian authorities had refused to grant her such a family reunification permit since, while the relevant domestic law allowed it for unmarried different-sex couples, it excluded such a possibility for same-sex couples. In light of this, the European Court of Human Rights considered that the applicant was in a comparable situation to a partner in a heterosexual extramarital relationship who had applied for a family reunification residence permit. It then went on to deem that the relevant domestic law operated to exclude same-sex couples from its scope, thereby introducing a difference in treatment based on the sexual orientation of the persons concerned. In considering whether such a different treatment pursued an objective and reasonable justification, the European Court deemed that, where such a difference in treatment was based on sexual orientation, the principle of proportionality did not merely require the measure chosen to be suitable in principle to achieve the aim pursued (i.e. immigration control), the State also had to demonstrate that it was necessary, in order to achieve that aim, to exclude certain categories of people – in this instance persons in a same-sex relationship – from the scope of application of the relevant provisions of domestic law. The European Court concluded that the Croatian authorities had failed to advance any or any adequate justification for the difference in treatment between same-sex and different-sex couples in this context. Indeed, the difference in treatment was based solely or decisively on the applicant's sexual orientation and amounted to a prohibited distinction under the Convention. The European Court therefore held that the difference in treatment was thus incompatible with the provisions of Article 14 read in conjunction with Article 8 of the Convention, and, therefore, that Croatia had violated the applicant's rights under Article 14 taken in conjunction with Article 8 of the Convention.

⁷² *S.L. v. Austria*, no. 45330/99, judgment, 9 January 2003, § 44.

⁷³ *Salgueiro da Silva Mouta v. Portugal*, no. 33290/96, judgment, European Court of Human Rights, 21 December 1999.

⁷⁴ *Fretté v. France*, no. 36515/97, European Court of Human Rights, judgment, 26 February 2002; and *Gas and Dubois v. France*, no.25951/07, European Court of Human Rights, judgment, 15 March 2012; *X and Others v. Austria* [GC], no. 19010/07, European Court of Human Rights, judgment, 19 February 2013.

⁷⁵ *Salgueiro da Silva Mouta v. Portugal*.

⁷⁶ *Lustig Prean and Beckett v. the United Kingdom*, nos 31417/96 and 32377/96, European Court of Human Rights, judgment, 27 September 1999; *Smith and Grady v. the United Kingdom*, nos 33985/96 and 33986/96, European Court of Human Rights, judgment, 27 September 1999; *Perkins and R. v. the United Kingdom*, nos 43208/98 and 44875/98, European Court of Human Rights, judgment, 22 October 2002; and *Beck, Copp and Bazeley v. the United Kingdom*, nos 48535/99, 48536/99 and 48537/99, European Court of Human Rights, judgment, 22 October 2002.

⁷⁷ *Karner v. Austria*, no. 40016/98, European Court of Human Rights, judgment, 24 July 2003; *Kozak v. Poland*, no. 13102/02, European Court of Human Rights, judgment, 2 March 2010.

⁷⁸ *P.B. and J.S. v. Austria*, no. 18984/02, European Court of Human Rights, judgment, 22 July 2010.

⁷⁹ *Schalk and Kopf v. Austria*, no.30141/04, European Court of Human Rights, judgment, 24 June 2010; *Vallianatos and others v. Greece* [GC], nos 29381/09 and 32684/09, European Court of Human Rights, judgment, 7 November 2013; and *Oliari and Others v. Italy*, nos. 18766/11 and 36030/11, European Court of Human Rights, judgment, 21 July 2015.

⁸⁰ *Pajić v. Croatia*, no. 68453/13, judgment, 23 February 2016.

45. Succinctly put, in *Pajić v. Croatia* the European Court of Human Rights held that discrimination solely based on sexual orientation between unmarried same-sex couples and unmarried different-sex couples in obtaining family reunification constitutes prohibited discrimination under the Convention.
46. The interveners draw attention to another feature of the European Court of Human Rights' judgment in *Pajić v. Croatia* of particular relevance to this Court's determination of the present case. Namely, that in light of the facts of that case the European Court found that the same-sex relationship between the applicant and her partner fell not only within the notion of "private life" but also of "family life" within the meaning of Article 8 just as the relationship of a different-sex couple in the same situation would (see also *Schalk and Kopf v. Austria*). In light of this, the interveners submit that, *mutatis mutandis* and *a fortiori*, the relationship between two individuals that are married to one another, whether through a same-sex or different-sex marriage, constitutes family life within the meaning of Article 8 of the European Convention on Human Rights, and would therefore entail the application of Article 14 of the Convention as well as Protocol 1, for those Contracting Parties to the Convention that are parties to Protocol 12.
47. The principle of equality before the law and equal protection of the law and the right to be free from discrimination are at the core of the values that the Convention seeks to guarantee. They are enshrined in Article 14 of the Convention, which, albeit not free-standing, sets out the right to the enjoyment of Convention rights without discrimination.⁸¹ Protocol no. 12 to the Convention provides a free-standing right not to be subjected to discrimination.⁸²
48. In light of the above, the interveners invite this Court in its determination of the present case, *a fortiori*, to consider the scope of Protocol 12,⁸³ Article 1, which provides a general non-discrimination clause, thereby affording expanded protection (as compared to Article 14 of the Convention) in cases concerning, among others, discrimination "in the enjoyment of a right which may be inferred from a clear obligation of a public authority under national law, that is, where a public authority is under an obligation under national law to behave in a particular manner".⁸⁴ In this context, the interveners further submit that the relevant EU law considered above in the section entitled "EU law submission" constitutes "national law" for present purposes.

⁸¹ Article 14 provides that, "[t]he enjoyment of the rights and freedoms set forth in this 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."

⁸² Article 1 of Protocol No. 12 to the Convention for the Protection of Human Rights and Fundamental Freedoms CETS No.: 177 reads as follows: "(1) The enjoyment of any right set forth by law 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. (2) No one shall be discriminated against by any public authority on any ground such as those mentioned in paragraph 1." The Explanatory Report to Protocol 12 explains that "20. The list of non-discrimination grounds in Article 1 is identical to that in Article 14 of the Convention. This solution was considered preferable over others, such as expressly including certain additional non-discrimination grounds (for example, physical or mental disability, sexual orientation or age), not because of a lack of awareness that such grounds have become particularly important in today's societies as compared with the time of drafting of Article 14 of the Convention, but because such an inclusion was considered unnecessary from a legal point of view since the list of non-discrimination grounds is not exhaustive, and because inclusion of any particular additional ground might give rise to unwarranted *a contrario* interpretations as regards discrimination based on grounds not so included. It is recalled that the European Court of Human Rights has already applied Article 14 in relation to discrimination grounds not explicitly mentioned in that provision (see, for example, as concerns the ground of sexual orientation, the judgment of 21 December 1999 in the case of *Salgueiro da Silva Mouta v. Portugal*)."

⁸³ Protocol 12 entered into force in respect of Romania on 1 November 2006.

⁸⁴ Protocol No. 12, Explanatory Memorandum, para. 22.

Annex I: the interveners

1. The **AIRE Centre** founded in 1993 is a charity and specialist law centre whose mission is to promote awareness of EU and ECHR rights and to assist marginalised individuals and those in vulnerable circumstances in asserting those rights. The Centre has two main areas of activity: litigating cases before the European Courts and providing free specialist legal advice to individuals and other lawyers and advisers on European law. The vast majority of that advice (approximately 600 cases per year) involves advice on the law relating to the free movement of EU citizens within the EU. The AIRE Centre also trains judges, public officials, lawyers and non-governmental organisations across Europe on fundamental rights and matters of European law. The AIRE Centre work in this field has also included expert advice to the European Commission and speaking at academic seminars across Europe on the subject of human rights law.
2. **ECSOL** (<http://www.sexualorientationlaw.eu>), founded in 2004 and based in Vienna, is a non-governmental and non-political network of legal experts from across Europe, covering all Council of Europe member states. Its mission is to strengthen research partnerships and to promote equality and legal recognition for LGBT individuals and same-sex couples in Europe. Its 54 members (at least one expert per member state) have a range of professional backgrounds: they include legal academics, practising lawyers, judges, and legal professionals working in governmental and non-governmental organisations. They regularly exchange information on important legal developments at the national, European and international levels. ECSOL is a member of the Fundamental Rights Platform of the Fundamental Rights Agency of the EU.
3. **FIDH** (<http://www.fidh.org>), founded in 1922 and based in Paris, is an international human rights non-governmental organisation bringing together 178 national human rights organisations from 120 countries. FIDH's mandate is to defend all human rights enshrined in the Universal Declaration of Human Rights, including the right to private and family life and the right to not be discriminated against. FIDH is involved in strategic litigation before national courts (France, Guinea Conakry, Ivory Coast, etc), regional courts and bodies (African Commission and Court on Human and Peoples' Rights, Inter-American Court of Human Rights, European Committee of Social Rights, European Court of Human Rights) and international/ised courts (International Criminal Court, Extraordinary Chambers in the Courts of Cambodia).
4. **ILGA EUROPE** (the European Region of the International Lesbian, Gay, Bisexual, Trans and Intersex Association: <http://www.ilga-europe.org>), founded in 1996 and based in Brussels, seeks to defend at European level the human rights of those who face discrimination on the grounds of sexual orientation, gender identity, or gender expression. It was granted consultative status with the Council of Europe in 1998 and with the United Nations Economic and Social Council in 2006. Its membership consists of over 400 non-governmental organisations across the Council of Europe countries, whose members are mainly lesbian, gay, bisexual, transgender or intersex individuals. ILGA-Europe has intervened in a number of cases before the European Court of Human Rights and national high courts concerning rights of LGBTI people.
5. The **International Commission of Jurists** (ICJ, www.icj.org) is an international non-governmental organization (NGO) working to advance understanding and respect for the rule of law as well as the protection of human rights throughout the world. It was set up in 1952 and has its headquarters in Geneva, Switzerland. It is made up of some 60 eminent jurists representing different justice systems throughout the world and has national sections and affiliated organizations in all regions of the world. The ICJ holds consultative status at the Council of Europe, the United Nations Economic and Social Council, the United Nations Educational, Scientific and Cultural Organization and the African Union. The ICJ also cooperates with various bodies of the Organization of American States and the Inter-Parliamentary Union. Alone and jointly with other NGOs, the ICJ has intervened in numerous cases before the European Court of Human Rights and domestic courts, including before the Grand Chamber of the European Court of Human Rights in the case of *Vallianatos and Others v. Greece*.