



**Jurisprudence on sexual orientation,
gender identity, gender expression and
sex characteristics:
Regional human rights tribunals**

The toolkit on the United Nations Strategic Litigation is a publication of the International Lesbian, Gay, Bisexual, Trans and Intersex Association. It was conceptualised and developed by Kseniya Kirichenko, ILGA World's Senior Officer, Women and UN Advocacy.

The Toolkit includes:

- **Part 1 – Policy Paper:**
 - » the concept of strategic litigation, its aims and components, as well as some information about the use of strategic litigation by LGBTI advocates;
 - » basic information about Treaty Bodies, their working methods, and procedural aspects of Treaty Bodies' individual complaints mechanism;
 - » analysis of Treaty Bodies' SOGIESC jurisprudence and pending cases, and identifies gaps and opportunities for future developments. This chapter specifically looks into six topics: the criminalisation of same-sex relations; LGBTI asylum seekers; violence, hate crimes and hate speech; freedom of expression and freedom of assembly and association; LGBTI families; and legal gender recognition;
 - » region-specific background information on Treaty Bodies' jurisprudence, as well as evidence, recommendations and thoughts from activists, experts, lawyers, and attorneys working in six different regions; and
 - » tables with brief information about LGBTI cases reviewed by, and pending before, Treaty Bodies, as well as lists of useful resources and contacts.
- **Part 2 – Treaty Bodies' Case Digest: Treaty Bodies' decisions on 25 LGBT cases:** brief description of facts; reasoning and decision; comments; and information on follow-up.
- **Part 3 – Regional Tribunals' Case Digest:** Information on LGBT cases reviewed by the Inter-American Court of Human Rights and the European Court of Human Rights.
- **Part 4 – Table of Treaty Bodies' LGBTI Decisions and Pending Cases:** Information on the reviewed and pending Treaty Bodies' cases on SOGIESC (periodically updated), available at: <https://ilga.org/Treaty-Bodies-jurisprudence-SOGIESC>.

This Case Digest is a part of ILGA World's Treaty Bodies' Strategic Litigation toolkit.

This publication is a compilation of brief summaries of decisions made by regional human rights tribunals, namely, the Inter-American Court of Human Rights and the European Court of Human Rights, on cases related to sexual orientation, gender identity, gender expression and sex characteristics (SOGIESC).

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INTER-AMERICAN COURT OF HUMAN RIGHTS

Employment Discrimination

Flor Freire v. Equator (2016)

Mr. Flor Freire was an officer in the army. One day he was at a party with his colleagues and according to Mr. Flor Freire one of them felt sick. He took his colleague home to put him to sleep. The State alleged that Mr. Flor Freire actually went home with this colleague to have sex. He was discharged due to this supposed sexual encounter, as it was an offence under the military Code of Conduct.

The IACtHR in this case considered that knowing whether or not Mr. Flor Freire had had sex with his colleague was irrelevant to the decision. Regardless of what happened or not, he was discriminated against due to being, or perceived as being, homosexual. By doing so, the Court affirmed that the discrimination suffered by a person does not solely rely on their self-declared identity, but also on the perception of others and their consequent treatment of that person. The Court also added that the fact that homosexual and heterosexual relations were prohibited would not exonerate the State's responsibility, as the sanctions imposed to each of these acts were different in nature and severity.

LGBTI Families

Atala Riffo and daughters v. Chile (2012)

Ms. Atala Riffo was married to a man with whom she had three daughters. Following the divorce from her husband, she started living with another woman, with whom she was in a relationship. Following the revelation of the relationship, Ms. Atala Riffo's former husband petitioned the Chilean judiciary system to have sole

guardianship of their daughters, alleging that they would be discriminated against for having a mother in a lesbian relationship. Ms. Atala Riffo exhausted all domestic remedies, the case being decided in favour of the father.

The IACtHR considered that sexual orientation is a protected category under the non-discrimination mandate of the IACtHR, though not explicitly included in the list. Consequently, the Court applied a two-part test to assess if the applicant had her rights violated. To be legitimate, a distinction must be both objective and reasonable. Moreover, the burden of proving legitimacy was shifted to the State, as when considering protected characteristics under the non-discrimination there is a presumption of a violation. The IACtHR held that Chile failed to prove the distinction based on Ms. Atala's sexual orientation it made was objective and reasonable. The Court held that although the special vulnerability of children is a legitimate concern, one must not allege to protect it while advancing a discriminatory perception of their parents.

Duque v. Colombia (2016)

Mr. Duque was a widower who complied with all the requirements to receive a pension following the death of his husband. However, being a man in a same-sex relationship, he had his request rejected. Having petitioned this decision in the national courts, Mr. Duque exhausted all domestic remedies without succeeding in his plea. The IACtHR held, following the reasoning laid by the Atala Riffo case, that distinctions must be objective and reasonable. Analysing the criteria, the Court held that the sole fact Mr. Duque was in a homosexual relationship could not be considered a reasonable justification for him to be denied his right to receive a pension. As compensation, the Court held that not only should he begin to receive his pension from that point, but that he should also receive the amount that would have been received in the months before the decision.

Criminalisation of Same-Sex Relations

Dudgeon v. the United Kingdom (1981)

The applicant sustained that the existence of legislation in Northern Ireland criminalising male homosexual relations caused him fear, suffering and distress. The ECtHR held there was a violation of article 8.

See also Norris v. Ireland (1988)

Modinos v. Cyprus (1993)

The applicant was a public figure, known for leading the movement against the criminalisation of homosexuality. Being homosexual himself, he feared being prosecuted under local legislation. The ECtHR held there was a violation of article 8.

A.D.T. v. the United Kingdom (2000)

The applicant was convicted for taking part in sexual activities with more than one consenting adult male. The ECtHR held there was a violation of article 8.

L. and V. v. Austria; S.L. v. Austria (2003)

The applicants (all male) were convicted for having sex with male adolescents, from ages 14 to 18 years old. The legal age for consenting heterosexual sex would not prohibit the same men from having sex with female adolescents aged 14 to 18. The

ECtHR held there was a violation of articles 14 (prohibition of discrimination) and article 8.

See also *B.B. v. the United Kingdom* (2004) – the applicant had same-sex relations with an adolescent aged 16, which was a criminal offence. However, the age of consent for heterosexual sex was 16. The ECtHR recognised a violation of the applicant's rights.

Asylum Seekers

M.K.N. v. Sweden (2013)

The applicant alleged that he could not return to Iraq because, amongst other things, he had had a homosexual relationship; he noted that his former partner had been killed for being gay. The ECtHR found no violation of article 3, specifically regarding his sexual orientation the Court found the allegations to lack credibility.

M.E. v. Sweden (2015) (Grand Chamber) (Strike out)

The applicant alleged that if returned to Libya he would be at risk of persecution and ill-treatment due to, amongst other things, his sexual orientation. The ECtHR decided to strike out the case when it was resolved at the national level. The applicant requested that the Court to keep analysing the case to buttress the applications of countless homosexual individuals in analogous situations in Europe.

O.M. v. Hungary (2016)

The applicant an Iranian LGBT asylum seeker. After fleeing Iran for Hungary, he was apprehended by the Hungarian authorities and detained for two months. The ECtHR held there was a violation of article 5.1, right to liberty and security.

Violence / Hate Crimes / Hate Speech

Stasi v. France (2011)

The applicant suffered ill-treatment from other inmates due to his sexual orientation and the State took no measures to protect him. The ECtHR held there was no violation of article 3 because the authorities had done all that was reasonably expected. See also *X. v. Turkey* (2012) – after complaining about the ill-treatment suffered due to his sexual orientation, the applicant was put in solitary confinement for 8 months. The ECtHR recognised a violation of articles 3 and 14.

Vejdeland and others v. Sweden (2012)

The applicant had distributed pamphlets that were offensive to LGBT persons and was convicted for it. The ECtHR held there had been no violation of article 10.

Mladina D.D. Ljubljana v. Slovenia (2014)

A publisher was convicted and ordered to pay damages to a parliamentarian for insulting him. The article criticised his conduct of ridiculing homosexuals and promoting negative stereotypes. The ECtHR found a violation of article 10.

Identoba and others v. Georgia (2015)

A peaceful demonstration organised to celebrate IDAHOT was violently disrupted by counter-demonstrating individuals. The State failed to protect the applicants from the attacks, which were motivated by discrimination. The ECtHR held there was a violation of articles 3 (prohibition of inhuman or degrading treatment) and 14. See also *M.C. and C.A. v. Romania* (2016) – the applicants were attacked after the annual gay march. The police refused to consider that the attackers were motivated by their hatred of homosexuals.

Sousa Goucha v. Portugal (2016)

The applicant complained about the dismissal of his case against a TV company, for a discriminatory comment that conflated his sexual orientation with his gender identity. The ECtHR found no violation of articles 8 and 14.

Freedom of Expression / Freedom of Assembly and Association

Baczowski and Others v. Poland (2007)

The applicants had their request to hold a march for minority rights denied by the government, while other types of marches received authorisation. The ECtHR found a violation of articles 11, 13, and 14.

See also Genderdoc-M v. Moldova (2012)

Alekseyev v. Russia (2010)

The applicant claimed the ban on 'gay rights' marches, the lack of remedies to challenge the ban, and the discrimination suffered by the marches' participants, violated their rights. The ECtHR found a violation of articles 11, 13, and 14.

Kaos GI v. Turkey (2016)

All copies of a magazine published by a gay and lesbian association were seized. The president of the association was criminally charged. The ECtHR found a violation of article 10.

Bayev and others v. Russia (2017)

The applicants complained about the administrative sanction (fine) they received for holding signs with positive messages about homosexuality near a school. The ECtHR found a violation of articles 10 and 14.

Lashmankin and Others v. Russia (2017)

The authorities had imposed severe restrictions in peaceful public demonstrations (marches and pickets) that favoured the rights of LGBTI people. The ECtHR found a violation of articles 10, 11 and 13.

Employment Discrimination

Perkins and R. v. the United Kingdom; Beck, Copp and Bazeley v. the United Kingdom (2002)

The applicants were discharged from the armed forces for being homosexuals. The ECtHR found a violation of articles 8 and 13, and no violation of article 3.

Ladele and McFarlane v. the United-Kingdom (2013)

The applicants were dismissed from their jobs¹ for failing to preside at a same-sex marriage ceremony and counsel a same-sex couple, respectively, as it conflicted with their religious beliefs. The ECtHR found no violation of articles 9 and 14.

LGBTI Families

X. Y. and Z. v. the United Kingdom (1997)

X, a trans man had a stable relationship with Y, a cisgender woman. Z was born through artificial insemination of Y; however, the United Kingdom refused to recognise the relation between X and Z. The ECtHR concluded there was no violation of the right to family life, but did recognise X as the de facto father of Z.

1 Registrar of Births, Deaths and Marriages and a Counsellor for Sex Therapy and Relationship Counselling.

Salgueiro da Silva Mouta v. Portugal (1999)

The applicant was barred by his ex-wife from visiting their daughter because he was living with another man. He was also forced by the national courts to hide his sexuality from his daughter. The ECtHR found a violation of articles 8 and 14.

Karner v. Austria (2003)

The applicant complained about not being able to continue a tenancy following the death of his partner. By the time the case was decided by the ECtHR, the applicant had also passed away. The ECtHR found a violation of articles 8 and 14.

See also Kozak v. Poland (2010)

E.B. v. France (2008) (Grand Chamber)

The applicant wanted to individually adopt a child, but suffered discrimination throughout the process because she was a lesbian. The ECtHR held there was a violation of articles 8 and 14 because the French legislation recognised the possibility of single adoptions and therefore, the possibility of a single homosexual person adopting.

J.M. v. the United Kingdom (2010)

The applicant divorced the father of her two children and started living with a woman. As the children were taken care of by their father, she was required to pay alimony. However, the amount of alimony she was required to pay while in a relationship with a woman was more than three times the amount she would have to pay if in a relationship with a man. The ECtHR found a violation of article 14 and, article 1 of the Protocol 1.

P.B. and J.S. v. Austria (2010)

The applicants complained about being unable to include a same-sex partner as a dependant in a sickness insurance cover. The ECtHR found a violation of articles 8 and 14.

P.V. v. Spain (2010)

A trans woman was prevented from seeing her son, who she had parented from a previous relationship with a cisgender woman, due to her alleged mental instability. The ECtHR found no violation of her rights.

Schalk and Kopf v. Austria (2010)

The applicants tried to marry in Austria, but had their request denied because they were not opposite sexes. The ECtHR found no violation of articles 8, 12 and 14.

Gas and Dubois v. France (2012)

The first applicant wanted to adopt the second applicant's child, as they were two lesbian women living in a civil partnership. The ECtHR held there was no violation of articles 8 and 14 because unmarried heterosexual couples were also prohibited from adopting their partner's child. On the allegation that heterosexual couples could marry and be able to adopt, the ECtHR restated its decision on Schalk and Kopf v. Austria, saying there is no duty for States to recognise same-sex marriages. See also X and others v. Austria (2013) (Grand Chamber) – second parent adoption was allowed for heterosexual couples even if they were not married. Thus, the ECtHR found a violation of articles 8 and 14.

Vallianatos and others v. Greece (2013)

The applicants questioned the civil union law which discriminatorily excluded same-sex couples. The ECtHR held there was a violation of articles 8 and 14.

Oliari and others v. Italy (2015)

The applicants questioned the possibility of same-sex couples marrying or entering any type of civil union. The ECtHR held there was a violation of article 8.

Aldeguer Tomás v. Spain (2016)

The applicant claimed he was discriminated against because, following the death of his partner, he was denied a survivor's pension. They were not married as same-sex legislation only came into force three years after his partner's death. The ECtHR found no violation of articles 8, 14 and of article 1 of the Protocol 1 of the Convention.

Chapin and Charpentier v. France (2016)

The applicants had a same-sex marriage conducted by a Mayor, but it was later nullified by the courts. The ECtHR found no violation of articles 8, 12 and 14.

Pajić v. Croatia (2016)

The applicant was from Bosnia and Herzegovina and was discriminated against when applying for a residence permit in Croatia because of their same-sex relationship. The ECtHR found a violation of articles 8 and 14.

Taddeucci and McCall v. Italy (2016)

The applicants complained about the Italian authorities rejecting a residency permit to one of them because they were a same-sex couple. The ECtHR found a violation of articles 8 and 14.

Ratzenböck and Seydl v. Austria (2017)

The applicants alleged they were discriminated against for being heterosexual because they were denied access to registered partnership, exclusive to same-sex couples. The ECtHR found no violation of articles 8 and 14.

Orlandi and Others v. Italy (2017)

The applicants had their request denied when they tried to register a same-sex marriage contracted abroad. The ECtHR found a violation of article 8.

Legal Gender Recognition

Rees v. the United Kingdom (1986)

The applicant was a trans man who complained to the ECtHR that national laws did not provide him legal recognition of his gender identity. No violation was found to either the right to a private and family life or the right to marry and found a family. See also *Cossey v. the United Kingdom (1990)* – did not depart from the *Rees* precedent.

See also *Sheffield and Horsham v. the United Kingdom (1998)* – the ECtHR recognised that the issue of gender identity should be under constant review by the contracting States. Did not find a violation.

B. v. France (1992)

The applicant was a transwoman who had her petition to alter her civil status denied by France. This was the first case related to trans persons in which a violation of article 8 ECHR was declared (right to respect for private and family life).

Christine Goodwin v. the United Kingdom (2002) (Grand Chamber)

The applicant was not legally recognised as a woman, and more specifically had issues with employment, social security, pension and the possibility of marriage. The ECtHR recognised a violation of the right to respect for private and family life, due to the failure to amend her legal status, and a violation of the right to marry- a consequence of the complete ban on the marriage of trans persons. The issue of surgery is still a central part of recognising a person as transgender.

See also *I. v. the United Kingdom (2002) (Grand Chamber)*

Grant v. the United Kingdom (2006)

The applicant was an elderly trans woman who had her pension denied when she reached the age of retirement for women. The ECtHR recognised a violation of article 8 ECHR, following the precedent of the *Christine Goodwin* case.

Hämäläinen v. Finland (2014) (Grand Chamber)

The applicant was a trans woman who, while legally recognised as a man, married a cisgender woman and had a child. When amending her legal status, she was told she could only do so by either changing her marriage to a civil partnership or by divorcing. The ECtHR found no violation of her rights.

Y.Y. v. Turkey (2015)

The applicant was a trans man who was barred by Turkish authorities from changing his legal status because he was not permanently unable to have children. The ECtHR found a violation of article 8.

A.P. Garçon and Nicot v. France (2017)

The applicants were three trans persons who requested legal recognition without undergoing gender reassignment surgery. The surgery had a high chance of causing sterility. The ECtHR held that it was a violation of article 8 to require an irreversible change in their bodies in order to register them according to their gender identity.

S.V. v. Italy (2018)

S.V., a trans woman, was denied the ability to officially change her name by the Italian authorities, on the grounds that there was no judicial decision confirming that she had completed gender reassignment surgery. The Court found a violation of article 8 due to the length of the procedure.

Legal Gender Recognition

Van Kück v. Germany (2003)

The applicant asked for a reimbursement for gender reassignment surgery's costs from a private health insurance company. The ECtHR found a violation of article 8 and recognised gender identity as one of the most intimate aspects of a person's identity.

See also Schlumpf v. Switzerland (2009)

L. v. Lithuania (2007)

Although Lithuania had a gender identity law, there was no provision on gender reassignment surgeries. This impaired the applicant from undergoing surgery and changing their legal status. A violation of article 8 ECHR was found.