

# Rainbow Justice:

## Supporting the enforcement of CJEU jurisprudence for LGBTI equality



Co-funded by  
the European Union





# TOOLKIT ON STRATEGIC LITIGATION

- Parental  
R i g h t s  
w i t h i n  
R a i n b o w  
Families -



# TABLE OF CONTENTS

<b>Abbreviations</b> .....	2
<b>Glossary</b> .....	2
<b>Acknowledgements</b> .....	4
<b>I. Introduction</b> .....	6
<b>II. Landmark cases in LGBTI parental rights</b> .....	8
1. Reuniting families.....	8
2. Cross-border continuity of rainbow family ties.....	13
3. Recognition and legal protection for rainbow families.....	17
<b>III. Pathways for advancing parental rights of rainbow families</b> .....	20
1. Building strong relationships with parent beneficiaries...20	
2. Guiding principles for achieving parental equality for rainbow families.....	24
3. Charting the future: Advancing legal protections for rainbow families.....	36
<b>IV. Conclusion</b> .....	41



# Abbreviations

**CJEU:** Court of Justice of the European Union

**ECHR:** European Convention on Human Rights

**ECPRD:** European Centre for Parliamentary Research and Documentation

**ECtHR:** European Court of Human Rights

**EU:** European Union

**LGBTQIA+:** Lesbian, Gay, Bisexual, Transgender, Queer, Intersex, Asexual and other identities within the spectrum of sexual orientation and gender diversity

**TFEU:** Treaty of the Functioning of the European Union

# Glossary

**Court of Justice of the European Union:** The highest court in the EU for interpreting EU law. CJEU rulings are binding on all EU Member States and play a crucial role in ensuring consistent application of EU laws, including protections for LGBTQIA+ rights.

**European Court of Human Rights:** An international court that oversees compliance with the European Convention on Human Rights. The ECtHR issues judgments that are binding on Member States and addresses cases involving human rights violations, including those affecting LGBTQIA+ individuals.

**Free Movement:** All EU citizens and their family members have the right to move and reside freely within the EU. This fundamental right



is established by Article 21 of the Treaty on the functioning of the European Union and Article 45 of the EU Charter of Fundamental Rights.

**Fundamental Rights:** This toolkit adopts the term fundamental rights throughout to emphasize their dual role: as binding obligations under EU legislation and as universal guarantees under the ECHR.

**Parental Rights:** Legal rights that a parent has in relation to their child, including custody, decision-making, and inheritance.

**Rainbow Family:** Families consisting of two persons of the same sex and their child or children.

**Strategic Litigation:** A legal approach that uses specific cases to create broad changes in the law, often with the goal of addressing systemic issues.



# Acknowledgements

**“Rainbow Justice: Supporting the enforcement of CJEU jurisprudence for LGBTI equality”** is a 2-year project designed to strengthen LGBTQIA+ legal programs and strategic litigation efforts in alignment with the Charter of Fundamental Rights of the European Union. The project aims to monitor and promote the enforcement of LGBTQIA+ rights and protections for their families under the Charter, establish a network of stakeholders to identify and support key strategic cases, and enhance awareness among LGBTQIA+ individuals regarding their rights and relevant judgements of the Court of Justice of the European Union. The project is implemented by a consortium of 2 non-governmental organizations defending and promoting the rights of LGBTQIA+ people - LGBTI Deystvie based in Bulgaria and ACCEPT Association, in Romania.

This toolkit was developed by Anca Baltac and Daria Anoaica under the coordination of Iustina-Raluca Ionescu, Human Rights Lawyer and it encapsulates the outcomes of ACCEPT Association’s dedicated efforts within its legal program. They are dedicated legal counselors specializing in supporting individuals who have experienced human rights violations, including hate crimes and discrimination. Over the years, they have collectively assisted hundreds of individuals, guiding them through legal processes and helping them seek justice. Their work involves engaging in strategic litigation, contributing to cases that address systemic human rights violations, and actively monitoring compliance with judgments from the European Court of Human Rights and the Court of Justice of the European Union. ACCEPT is a non-governmental organization in Romania promoting human rights for LGBTQIA+ persons. Our organization has a longstanding experience of working with families from the LGBTQIA+ community, providing legal assistance, psychological and social support. Among the cases we represented in courts in this field, there is the *Coman* case in front of the Court of Justice of the European Union (C-673/16, Coman and Others) and the Constitutional Court of Romania (Decision no.534/2018). ACCEPT has represented the 42 applicants in the case of *Buhuceanu and Others v. Romania* (Applications nos. 20081/19 and 20 others) in front of the European Court of Human Rights. We also coordinated the *amicus curiae* effort by a group of NGOs



promoting LGBTQIA+ rights in countries of Central and Eastern Europe in the case of *Fedotova and Others v. Russia* (17.01.2023), in front of the Grand Chamber of the European Court of Human Rights. During the legal aid sessions provided to the LGBTQIA+ community, several cases have emerged where the absence of marriage equality, recognition of parental ties within rainbow families or other such equality policies have resulted in violations of fundamental rights, such as the right to private and family life or the right to free movement. All these specific needs that we identified sparked the inspiration for this resource, which is intended for legal professionals, practitioners, experts, researchers on LGBTQIA+ fundamental rights, and, importantly, activists in this field.

This toolkit was made possible through the contributions of the following individuals and organizations:

- Iustina-Raluca Ionescu, Human Rights Lawyer;
- Teodora Roseti-Ion-Rotaru, Co-President, ACCEPT Association;
- Denitsa Lyubenova, Human rights lawyer, Youth LGBT Organisation Deystvie;
- Alina Tryfondou, Assistant Professor of EU Law and Family Law, University of Cyprus;
- Arpi Avetisyan, International Human Rights Lawyer;
- Marie-Helene Ludwig, Senior Strategic Litigation Officer, ILGA-Europe.





# I. Introduction

Drawing on the national context, which is also relevant, *mutatis mutandis*, to the other Eastern European countries that do not provide any form of legal protection or recognition for LGBTQIA+ families, this toolkit will first highlight landmark cases that serve as the foundation for advancing equal rights for same-sex parents. It will then review the current status of implementing these judgments from the Court of Justice of the European Union (CJEU) and the European Court of Human Rights (ECtHR). Finally, we will discuss potential pathways for further progress in securing equal parental rights for rainbow families.

Recognizing the diverse forms that families can take, we will use the term «*rainbow families*» in this toolkit to refer specifically to families consisting of two people of the same sex and their child or children. We use «*sex*» rather than «*gender*» because, very often, in the countries where there is no or little protection and recognition for LGBTQIA+ persons, such as Romania or Bulgaria, the legislation relevant to this discussion references sex as an element of identification, as well as a criterion protected by anti-discrimination laws.



Additionally, due to the current legal framework in Romania, which lacks a clear, predictable, and accessible legal gender recognition procedure, as highlighted by the ECtHR in the 2021 *X and Y Case*, many transgender individuals in Romania continue to face discrepancies between their gender identity and their official documents. This legal incongruity means that, in some cases, two people of the same gender could legally marry, such as a transgender woman who has not yet had her civil status documents updated marrying a cisgender woman. As a result of their union being recognized, the family may bypass some of the legal challenges that same-sex couples typically encounter in terms of marriage and parental rights that we will further discuss in this toolkit, facing, however, other specific issues regarding the recognition of the parent-child relationship. While ACCEPT Association does represent transgender individuals in cases concerning parental rights, this paper will not address trans parenthood. This subject intersects with several complex issues, including the right to private and family life, the right to self-determination of gender identity and bodily autonomy and a thorough analysis of trans parenthood necessitates a comprehensive approach that extends beyond the scope of this document.



# II. Landmark cases in LGBTI parental rights

This chapter provides an insight on landmark cases and key legal victories that have paved the way for securing parental rights for same-sex families in Europe. It begins by examining significant rulings that have advanced the legal framework for reuniting same-sex families across borders. The discussion then shifts to the challenges and legal battles related to maintaining continuity of family ties for rainbow families when moving between EU Member States. Finally, the chapter highlights the ongoing need for Member States to provide robust legal protection and recognition for LGBTQIA+ individuals and their families, stressing the importance of aligning national laws with EU standards for fundamental rights and protections.

## 1. Reuniting families

The first such landmark case that has served as the foundation for advancing equal rights for same-sex couples and a basis for family reunification when speaking of rainbow families is the Court of Justice of the European Union (CJEU) ruling in the case of *Coman v. Romania* (C-673/16). Adrian Coman, a Romanian national, and his husband, Clai Hamilton, a U.S. citizen, faced the denial of Clai's right to residence in Romania due to the authorities refusal to recognize their marriage, concluded in Belgium. This case highlighted the struggle for rainbow family rights, by questioning the capacity of member states to limit freedom of movement and the applicability of EU law in traditional areas of national competence, such as family life, thus becoming a classic case of strategic litigation being used to challenge restrictive national law.<sup>1</sup>

<sup>1</sup> <https://www.openglobalrights.org/landmark-case-from-romania-expands-possibilities-for-lgbt-rights/> (Accessed on 4/6/2024, 12:37 PM )



The Grand Chamber of the CJEU ruled that, while member states retain competence in the field of regulating marriage, as a component on their exclusive competence on family law matters, they cannot restrict the right to free movement by denying residence rights to a same-sex spouse lawfully married in another EU state. The court determined that the term “spouse” under EU free movement law includes the same-sex spouse of an EU citizen for the purpose of maintaining “a normal family life”. As a result, when an EU citizen exercises their right to move and reside in another Member State and marries a third-country national of the same sex under the law of that state, other Member States cannot refuse to grant residence rights to that spouse, even if they do not regulate the freedom to marry under national law. The Coman ruling extends free movement protections to LGBTQIA+ families by ensuring family reunification rights for same-sex spouses. However, it is limited in scope, as the case addressed a specific matter - returning with your same sex spouse to your country of origin as a EU citizen. The case did not involve children, and thus did not address at all the recognition of child-parent relationships within rainbow families.<sup>2</sup>

It goes without saying that this ruling has been long-awaited in the Romanian context. According to ILGA-Europe’s Rainbow Map, Romania currently ranks 39 of the 48 countries assessed on their LGBTQIA+ equality laws and policies. Although Romania adopted anti-discrimination legislation in 2000 and decriminalized same-sex consenting relationships in 2001, in 2009, a new civil code was adopted, which made same-sex marriages and civil partnerships illegal. However, a 2018 referendum to raise the same-sex marriage prohibition at the level of the Constitution failed<sup>3</sup>, leaving room for hope in terms of civic opinion and future steps for activists.

In light of the above, one might have expected Romania to be the first Member State to comply with the Coman ruling. However, more than six years after the CJEU’s 5 June 2018 judgment and

---

<sup>2</sup> <https://www.openglobalrights.org/landmark-case-from-romania-expands-possibilities-for-lgbt-rights/> (Accessed on 4/6/2024, 12:37 PM )

<sup>3</sup> <https://www.openglobalrights.org/landmark-case-from-romania-expands-possibilities-for-lgbt-rights/> (Accessed on 4/6/2024, 12:37 PM )



the Constitutional Court of Romania's 18 July 2018 ruling applying the decision, Clai Hamilton had still not received his Romanian residence permit. No Romanian court has compelled a member of the executive or administration to issue the permit, nor has any authority invited him to complete the necessary formalities for its issuance. The Romanian immigration authorities have failed to revise their policies, thus continuing to deny residence permits to same-sex spouses of EU citizens (and returning nationals).

This blatant non-compliance with EU law represents a failure on the part of Romania and warrants enforcement action by the European Commission under Article 258 TFEU. In the absence of such action, Mr. Coman and Mr. Hamilton have taken their case to the European Court of Human Rights (ECtHR), with Application no. 2663/21 lodged against Romania on 23 December 2020 and communicated on 9 February 2021. This ongoing legal battle underscores the pressing need for Romania to align its policies with EU jurisprudence and protect the rights of LGBTQIA+ families within its borders.<sup>4</sup>

The implementation of the Coman ruling across the 27 EU Member States has varied, with countries falling into three distinct groups based on their legal recognition of same-sex relationships. First, there are five Member States—Bulgaria, Lithuania, Poland, Romania, and Slovakia—where neither marriage nor registered partnerships for same-sex couples are legally recognized. These states are of particular concern regarding compliance with the Coman ruling, responses from these countries to a questionnaire sent by the ECPRD to national parliaments on 15 June 2020 revealing mixed progress:

**Bulgaria:** On 24 July 2019, the Supreme Administrative Court in case no. 11558/2018 confirmed the right of a same-sex couple (married in another EU Member State) to reside in Bulgaria.

---

<sup>4</sup> TRYFONIDOU Alina, WINTEMUTE Robert, "Obstacles to the Free Movement of Rainbow Families in the EU" p.42.



**Lithuania:** On 11 January 2019, the Constitutional Court of Lithuania ruled that a temporary residence permit may be granted for family reunification when a same-sex family member legally married or in a registered partnership abroad resides in Lithuania.

**Poland:** In principle, same-sex spouses have access to residency rights guaranteed by EU law.

**Romania:** Following the Constitutional Court's 18 July 2018 ruling applying the Coman decision, Article 277 of the Civil Code was declared partially unconstitutional, allowing residence rights for same-sex spouses from EU and third countries if their marriage was concluded in another EU state. However, it is important to note that the rulings of the CJEU and the Romanian Constitutional Court are not effectively implemented in practice by the authorities. This is evident from their responses in cases such as the case of B. and K., a case very similar to Coman, as well as in another case assisted by ACCEPT Association involving two women, one of them from Egypt.

**Slovakia:** Under Article 2(5)(h) of the Act on the Residence of Foreigners, a third-country national in a duly attested relationship with a Slovak national can exercise family member rights if they join or accompany their partner in Slovakia.<sup>5</sup>

The second group of seven Member States—Croatia, Cyprus, Czechia, Estonia, Hungary, Italy, and Slovenia—recognizes registered partnerships but not marriage for same-sex couples. In these countries, compliance with the Coman ruling seems more straightforward, though questions remain about the specific legal status granted to same-sex spouses. Notably, Latvia introduced legal partnerships in early 2024, being one of the more recent states to join.

Finally, in the 14 Member States that recognize same-sex marriage — Austria, Belgium, Denmark, Finland, France, Germany, Greece, Ireland, Luxembourg, Malta, Netherlands, Portugal, Spain,

---

<sup>5</sup> *Idem*, p.43.



and Sweden — there are no significant barriers reported to granting residency permits to same-sex spouses of EU citizens. However, the extent to which each state explicitly labels these individuals as “spouses,” “registered partners,” or “partners in durable relationships” remains unclear in some cases.<sup>6</sup>

In 2023, five years after the CJEU ruling in the Coman case, the Romanian Ministry of Internal Affairs took a tentative step towards implementing the decision with a proposed bill that seeks to amend Government Emergency Ordinance No. 194/2002 on the legal status of foreigners in Romania. However, this draft bill adopted by the Government on September 20, 2023 has stalled in Parliament and, if passed in its current form, would only partially comply with the CJEU ruling, offering limited protection to rainbow families seeking family reunification.

Under the bill, EU citizens who got married in another Member State would not be recognized as spouses in Romania; instead, they would merely be granted a right of residence under a separate category, invented exclusively for same sex spouses, and defined different than spouses, in particular “foreigners, family members of Romanian citizens, who have established a family life with them in the territory of a Member State of the European Union”. This, in turn, means they would not enjoy the full spectrum of rights that come with spousal status. It is downgrading their status and it is discriminatory. The law requires that a marriage certificate is needed to demonstrate this legal status, which, exceptionally, holds evidentiary power in the country without the need for transcription into Romanian civil status registers, but solely for the purpose of granting the right of residence on Romanian territory. This bill applies only to spouses, third-country nationals, from same-sex marriages concluded or contracted in a Member State of the European Union.

Despite it all, we remain optimistic about the future. In our work with our beneficiaries, we continue to help rainbow families cases with cross-border elements—these so-called “cross-border rainbow families”—for whom family reunification solutions, like the one in the

---

<sup>6</sup> *Idem*, p.44.



Coman case, increase the chances of success. More on this topic will be explored in the following section.

## 2. Cross-border continuity of rainbow family ties

Another significant case that highlights the challenges of cross-border recognition of rainbow families — particularly the parent-child relationships legally established in one state but jeopardized when exercising the right to freedom of movement in another state that does not recognize same-sex marriage, partnerships or parental ties — is the CJEU ruling *V.M.A. v. Stolichna obshtina, rayon 'Pancharevo'* (C-490/20), commonly referred to as the Baby Sara case.

The case revolves around the refusal by Sofia Municipality to register the birth certificate of a child, based on the fact that the original certificate issued by another EU member state lists the child as having two mothers without specifying the biological parent. This decision led to a legal dispute that was ultimately brought before the Administrative Court of Sofia, which sought guidance from the CJEU through a preliminary ruling request.

The CJEU Grand Chamber examined whether Baby Sara, listed as having two mothers on her Spanish birth certificate, qualifies as a Bulgarian citizen under national law and thus as an EU citizen under Article 20(1) TFEU. The Court analyzed the situation where Bulgarian authorities refuse to issue identity documents, emphasizing that even if citizenship is not definitively established, the child must still derive the right to free movement as a family member of a Bulgarian citizen. Therefore, Baby Sara, either as a Bulgarian national or as a dependent family member of her Bulgarian mother, is entitled to the protections afforded by EU law, including the right to move and reside freely across Member States under Article 21(1) TFEU.



The Court highlighted the individual rights of the Bulgarian mother, as an EU citizen, to travel and reside with her family members, including her child. It further clarified that these rights are not contingent upon the formalities of national law but must respect the family relationships legally recognized in another Member State. Article 4(3) of Directive 2004/38 obliges Member States to issue identity cards or passports to Union citizens and their family members to facilitate the exercise of freedom of movement. Bulgarian authorities cannot impose additional requirements, such as a Bulgarian birth certificate, as a precondition for issuing such documents.

Moreover, the CJEU emphasized that all Member State authorities responsible for verifying identity and familial relationships must recognize and take into account the details recorded in the child's Spanish birth certificate. This ensures the effective exercise of free movement rights for the family, safeguarding the unity of family relationships recognized in another Member State.

Furthermore, the Court reiterated that public policy exceptions, which Member States may invoke to limit fundamental freedoms, must be interpreted narrowly. This concept cannot be applied arbitrarily and must involve a genuine and serious threat to a fundamental interest of society. The CJEU underscored that such decisions are subject to oversight by EU institutions to prevent misuse of this exception.

Notably, the court emphasized that the right to free movement for EU citizens includes "the right to lead a normal family life, together with their family members". The Baby Sara case should be seen not merely as addressing a technical matter related to the scope of Directive 2004/38, but as highlighting the broader tensions between the EU's commitment to upholding LGBT+ rights and the resistance from certain Member States, which perceive these protections as an external imposition conflicting with their traditional values. This case underscores the ongoing challenges faced by rainbow families in achieving cross-border recognition of their family ties, particularly in Member States that do not fully recognize same-



sex partnerships or parental rights.<sup>7</sup>

The CJEU judgment in the Baby Sara case is yet another example of how different Member States from the aforementioned group that do not provide legal recognition and protection to same-sex couples and their families react variably to CJEU interpretations of EU law. For rainbow families, these inconsistencies pose serious challenges, as parental rights and family ties legally recognized in one Member State may not be upheld when moving to or residing in another. This fragmented legal landscape leaves same-sex parents and their children vulnerable, complicating the exercise of fundamental EU rights, such as freedom of movement and family reunification.

Following the CJEU judgment, the Bulgarian authorities were initially obligated to recognize Baby Sara. In May 2023, a District Court in Sofia ordered the city hall authorities to issue a birth certificate. However, the Supreme Administrative Court later overturned this decision, refusing to recognize the child's Bulgarian citizenship, despite the CJEU ruling. This setback has left Baby Sara without a Bulgarian birth certificate or passport, with authorities continuing to require a transcribed birth certificate for children born abroad, directly contradicting the CJEU judgment in the Baby Sara case.<sup>8</sup>

In Romania, following the CJEU judgment in the Baby Sara case, authorities have begun issuing passports to children of same-sex couples whose parentage is recorded in birth certificates from

---

7 Dafni Lima, “Towards Cross-Border Recognition of Same-Sex Parenthood”, p. 240

8 <https://www.ilga-europe.org/news/bulgarias-supreme-court-rejects-baby-saras-bulgarian-citizenship/#:~:text=After%20the%20CJEU%20judgment%2C%20the,birth%20certificate%20to%20Baby%20Sara.> (accessed on 7/9/2024, 11:13)



other EU Member States. At first, this was carried out through an administrative decision by the national authority for population records, directly relying on the CJEU ruling. In a highly exceptional move, this authority would assign a national identification number to these children, even without officially registering their birth in Romanian civil records. While this approach initially appeared to offer a practical solution for rainbow families, it remains legally ambiguous and inconsistent. The current methodological norms in Romania implement the Baby Sara ruling without explicitly addressing rainbow families. Instead, the provisions are vague and incomplete. Article 156 of the norms states that the General Directorate for Population Records assigns a national identification number to individuals whose birth certificates or multilingual extracts cannot be transcribed into Romanian civil status registers because parentage cannot be determined according to Romanian law. This omission of direct references to rainbow families reflects a lack of clarity and commitment to fully aligning domestic legislation with the spirit of the Baby Sara decision, leaving significant gaps in the protection of these families.

Moreover, these children remain without Romanian birth certificates, as Romanian authorities continue to refuse mutual recognition of birth certificates issued by other EU Member States, leaving the legal status of these rainbow families incomplete in Romania.<sup>9</sup>

The Polish case, *Rzecznik Praw Obywatelskich (Polish Ombudsman) v. Poland* (Application no. 31443/96) shows that the CJEU appears to be holding its current stance. The ruling did not push the boundaries of existing jurisprudence, merely reiterating the reasoning laid out in the earlier judgment, without advancing the legal interpretation any further.<sup>10</sup>

---

<sup>9</sup> *Strategic litigation manual JUST EU: equality and justice for LGBTI citizens through strategic litigation* p.40

<sup>10</sup> Lenka Krickova "Same-sex families' rights and the European Union: incompatible or promising relationship?" p.6



# 3. Recognition and legal protection for rainbow families

In 2023, the European Court of Human Rights (ECtHR) issued two landmark rulings that have become pivotal in shaping the legal landscape for rainbow families. These decisions address the critical issues of non-recognition and inadequate protection faced by same-sex couples in their respective countries. Given the entrenched resistance to LGBTQIA+ rights in Eastern Europe, these rulings are not only a significant judicial precedent but also a potential turning point for future legal battles. They highlight the urgent need for comprehensive legal reforms in these regions and establish a crucial reference point for advancing equality and protection for rainbow families across Europe.

With its decision in the case of *Buhuceanu and Others v. Romania* on 23 May 2023, the ECtHR returned to the subject of same-sex couples and legal recognition. To no one's surprise, the Court confirmed what it had already established just five months earlier in the Grand Chamber's decision of *Fedotova v. Russia*.

With *Fedotova v. Russia* (Applications nos. 40792/10, 30538/14 and 43439/14) involving three same-sex couples who filed against the Russian government and *Buhuceanu and Others v. Romania* (Applications nos. 20081/19 and 20 others) involving twenty-one same-sex couples challenging the Romanian government's refusal to legally recognize their relationships, both rulings focus on the states failing to uphold their right to family life by not legally recognizing same-sex partnerships and denying them legal protections available to heterosexual couples, with a violation to their rights under the European Convention on Human Rights, particularly their right to private and family life.

The Court affirmed that the respondent State had a general positive obligation to provide legal recognition to same-sex couples,



a requirement consolidated by a clear ongoing trend among Council of Europe member states (para. 73 of *Buhuceanu and Others* ruling). The Court then assessed whether the respondent State had offered a plausible and acceptable justification for failing to meet this obligation. Finding that no such justification had been provided, the Court ruled that there had been a violation of the Convention under Article 8.<sup>11</sup> The Court has consistently rejected every possible justification presented by respondent states for not providing the protections required, including the protection of the traditional family and marriage (*Fedotova v. Russia*, para. 212), the protection of minors (*ibid.*, para. 222-223), and the negative attitudes of the national population (*ibid.*, para. 219). In the *Buhuceanu* case, Romania faced the same outcome, as it relied heavily on the argument of a 'pressing social need' to respect the 'unfavourable perception' of society toward same-sex couples. The Romanian Government argued that it was reasonable to present data showing that a majority opposed equal rights for gay, lesbian, and bisexual individuals (para. 50).<sup>12</sup>

Where does that leave us? In the latest Rule 9.2 report on *Buhuceanu*, added by the ACCEPT Association, several key points regarding Romania's compliance with the ECtHR judgment highlight the yet stagnant situation regarding the effective implementation of the ruling. Six months following the final judgement, on 26 May 2024, the Government sent an official Action Plan, which came across as nothing more than an information note on the alleged steps taken: translation, publication and dissemination of the judgment; initiation of an inter-institutional discussion within the Working Group on the implementation of the ECtHR judgments against Romania on LGBT rights, organised and coordinated by the Romanian Ombudsperson, in collaboration with the Prosecutor's Office of the High Court of Cassation and Justice and ACCEPT Association, on 28 February 2024.<sup>13</sup>

---

11 <https://strasbourgobservers.com/2023/05/30/more-protection-than-recognition-for-same-sex-couples-in-buhuceanu-and-others-v-romania/> (accessed 8/9/2024, 10:32)

12 *Idem.*

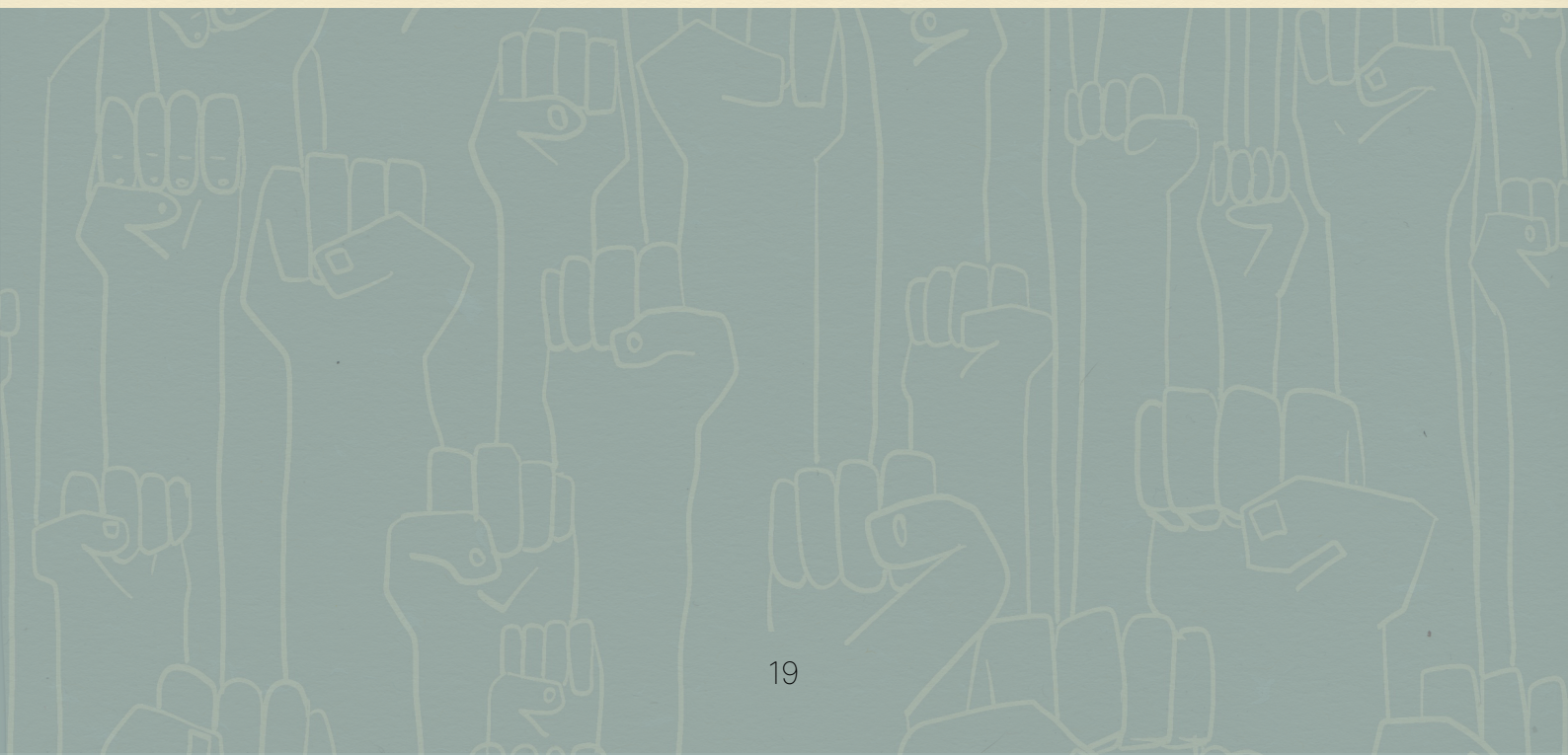
13 [https://hudoc.exec.coe.int/#{%22execidentfier%22:\[%22DH-DD\(2024\)478E%22\]}](https://hudoc.exec.coe.int/#{%22execidentfier%22:[%22DH-DD(2024)478E%22]}) (Accessed on 9/9/2024, 12:40)



The report also emphasizes the lack of concrete actions or timelines to address the issues identified by the Court, indicating a continued failure to meet the expectations set forth in the ruling.

Drawing on the national context, which is pertinent to other Eastern European countries lacking legal protection or recognition for LGBTQIA+ families, it is crucial to address the severe implications of this absence. The lack of legal recognition and protection for same-sex couples directly impacts the stability and security of rainbow families. This situation not only denies them essential rights such as family benefits, inheritance, and co-insured status but also undermines their ability to lead a normal family life.

Without legal recognition, same-sex couples face significant hurdles in securing their family's welfare and rights. For example, issues arise with accessing health insurance benefits, legal inheritance rights, and other social benefits typically available to heterosexual families. Furthermore, the lack of formal recognition can lead to complications in cross-border situations, where differences in legal standards between countries can create barriers to the free movement and residence of these families.





# III. Pathways for advancing parental rights of rainbow families

This chapter explores approaches to advancing parental rights for same-sex families. It begins by addressing how to build strong relationships with these families, followed by an examination of the guiding principles that we must not depart from in our fight for equal rights. Finally, it outlines how we can leverage European court rulings to close the gap between the Eastern European countries where legal protection and recognition for rainbow families are lacking, and Western countries that have made significant progress in overcoming these barriers.

## 1. Building strong relationships with parent beneficiaries

This toolkit will not delve into the process of building and operating a legal program and will discuss the selection of the cases for strategic litigation only from a particular perspective, as these subjects have already been thoroughly covered in earlier resources, such as the [Toolkit on Legal Programs: Practical Guide on Setting Up and Running Legal Programs for LGBTI People](#) and [the Equinet Handbook on Strategic Litigation](#). Therefore, our focus will be on the specific circumstances of same-sex parents seeking legal aid from organizations or legal professionals.

Over two decades after repealing the law that criminalized same-sex relationships, Romania has made little progress in



protecting and recognizing the rights of LGBTQIA+ individuals, particularly same-sex families. Consequently, many have exercised their right to free movement, choosing to leave Romania and settle in countries where they can live with dignity, free from discrimination. These individuals have married, entered civil partnerships, or formed *de facto* families with same-sex Romanian citizens or citizens of other countries. They have conceived or adopted children, and some have acquired citizenship in their host countries - places that, over time, may have felt more like home than Romania, which effectively pushed them away. Of course, the LGBTQIA+ persons who remained in the country did not put their lives on hold. They continued to live authentically, despite the numerous barriers imposed by the state.

All of these circumstances have created complex legal situations that seemed unsolvable, leading to serious violations of the rights of both children and their parents. Consequently, over the years, particularly following the landmark judgements from the European courts on LGBTQIA+ rights, that were discussed in the previous chapter, an increasing number of families have sought help from ACCEPT, looking for solutions to the challenges they face due to the lack of legal recognition for their families. These experiences have provided us with meaningful insights that deserve to be shared.

## ▪ **Building trust and maintaining regular communication**

In many cases, particularly in countries where rainbow families receive no legal recognition or protection, the journey we embark on with these families is long and complex. Consequently, the relationship we build must be nurtured with care, patience, and thoughtfulness from the outset. Establishing trust is a gradual process, as the parents are often entrusting us, as professionals, with deeply personal aspects of their and their children's lives. They will share their happiest moments as well as their most challenging struggles. Therefore, those who engage with them must show empathy, understanding, and resilience. Regular check-ins are vital



to maintain a strong relationship and to remind the families that we stand by them, regardless of the progress of their legal case and even when legal actions have yet to begin.

## ▪ **Understanding family dynamics**

When working with families, it is important to recognize that you are dealing with a partnership, a duo. This involves managing different personalities, needs and aspirations, which may not always align between the two partners. Behind the scenes, there may be private discussions or disagreements that influence the overall situation but are not visible to you. There may be situations where two divorced individuals seek assistance in navigating their separation, especially in contexts where the national law does not recognize their marriage and, as a consequence, the effects of their divorce. It is crucial to approach each conversation with care, being mindful not to trigger sensitive issues or exacerbate any concerns one or both partners may have. The aim is to foster a safe space where they can openly share their legal, social, or personal concerns without fear of judgment. Therefore, it is advisable to hold discussions with both partners whenever possible, accommodating each of their needs. This could involve arranging joint in-person meetings, online consultations, or a hybrid format, depending on what works best for them.

## ▪ **Balancing legal advice with emotional support**

As a legal advisor, your role often goes beyond providing legal expertise. The families you work with may reach out to share significant life events, from milestones like their child's first day of school to personal challenges. In these moments, your role evolves into that of a trusted confidant who understands their story and offers a supportive presence. Depending on the circumstances, it may be necessary to form a multidisciplinary team, including professionals such as social workers and psychologists. While your primary focus remains on managing the legal aspects of their case,



it's important to provide reassurance that their situation is being handled with care. This can help alleviate some of their stress regarding the legal procedures and allow them to focus on other aspects of their lives. However, this does not reduce the burden of the daily sufferings they face due to structural barriers imposed by the state that can only be truly addressed through systemic change.

## ▪ **Transparency regarding case progress**

In addition to the core responsibility of keeping your beneficiaries updated on the progress of their legal cases once proceedings have begun, there are other considerations to keep in mind. Given the ongoing development of case law related to parental equality for LGBTQIA+ individuals and the specific circumstances of each family, there may be times when legal progress is slower than anticipated. It is essential to communicate these limitations with care and compassion, clearly explaining why their case may need to be postponed until more favorable legal conditions arise. These conversations can be challenging, as they involve informing families that their issues may remain unresolved for an extended period and that their legal status will continue to be uncertain. By addressing these discussions with empathy and clarity, you help manage expectations and support families through the ongoing journey toward legal recognition.

## ▪ **Empowering families through peer connections**

It should not be overlooked that families, particularly those in Romania or other countries lacking any form of recognition, often find it difficult to join parent groups due to the stigma they may fear, preventing them from engaging in discussions about even the most basic aspects of raising a child. If possible, consider linking families with contact persons within your organization who are parents themselves, as it could help significantly in strengthening relationships with parents, making them feel better understood. Additionally, if families are open to it, facilitating connections



between them can help foster a sense of belonging to a group and enable them to empower each other.

## 2. Guiding principles for achieving parental equality for rainbow families

In this section, we will focus on key principles that have been firmly established through international treaties and consistently upheld by the European courts. Each principle should not only be considered individually but also interpreted in relation to and alongside the others, as they are essential in our pursuit of equal parental rights for rainbow families and offer a solid legal framework to guide our efforts.

### ▪ Human dignity

Human dignity, although it is not frequently tackled in the case law regarding parental rights within same-sex families, is a core principle of EU law, as established in Article 1 of the Charter of Fundamental Rights. This principle emphasizes the inherent worth of every individual and is essential for ensuring that all rights are respected and upheld. In the context of parental rights for rainbow families, the failure to recognize their family ties often results in a direct violation of human dignity. These families are frequently subjected to additional and unnecessary hurdles to secure legal protection and recognition, which forces them to disclose highly personal aspects of their lives and navigate complex bureaucratic processes. This not only diminishes their family bonds but also deeply undermines their dignity, sending the harmful message that their family is somehow less valid or worthy of respect than a heterosexual family. The attack on human dignity goes far beyond legal hurdles and paperwork. For parents, the constant fight for recognition can erode their sense of self-worth and legitimacy, as they are forced to defend the value of their role as parents. For



children, the lack of official recognition can lead to feelings of exclusion and inferiority, severely impacting their self-esteem and emotional well-being.

## ▪ Equality and Non-discrimination

The principles of non-discrimination and equality before the law should serve as the foundation for all national policies within EU Member States. Despite this, some of them, including Romania, continue to use the pretext of exclusive national competence in areas such as civil status, to circumvent these principles. These areas often have the most profound and far-reaching effects on citizens' daily lives, affecting them in dramatic ways.

However, Member States must ensure that their regulations on same-sex relationships and parenthood comply with EU law obligations. This requirement has been highlighted in cases like *V.M.A.*, where the Court of Justice of the European Union addressed issues of free movement and non-discrimination.

In addition, when they determine who can found a family, the Member States must do so without discrimination on any of the grounds prohibited under Article 14 ECHR. Thus, in the ECHR case law we can distinguish between 3 different categories of situations: that of the single person who wishes to adopt, that of unmarried same-sex couples when the state does not allow unmarried couples to access second-parent adoption or when the state allows second-parent adoption in case of unmarried couples exclusively for heterosexuals.

For instance, in *E.B. v. France*, the ECtHR found that the refusal of the French authorities to grant a single woman the authorization to adopt, based on her sexual orientation constituted unjustified discrimination, as long as the national law permits adoption by single individuals, violating Article 14 in conjunction with Article 8 of the Convention<sup>14</sup>. The authorities had rejected her application

---

14 *E.B. v. France*, App. no. 43546/02, 2008, para. 98.



primarily due to the absence of a paternal referent in her household, a reason the Court deemed illegitimate and may have led to an arbitrary refusal<sup>15</sup>. Although French law permitted single individuals, which includes people who might be homosexual, to adopt, the applicant's sexual orientation had implicitly influenced the decision of the authorities. The Court concluded that her homosexuality had been a decisive factor, leading to differential treatment without justification, thus constituting discrimination under the Convention.

In *Gas and Dubois v. France*, the ECtHR found that the refusal by French authorities to grant a simple adoption order to a woman wishing to adopt her same-sex partner's child did not constitute discrimination under Article 14 in conjunction with Article 8. The applicants, in a civil partnership, were denied the adoption because, under French law, simple adoption would transfer parental responsibility solely to the adoptive parent, depriving the biological mother of her rights, a change deemed contrary to the child's best interests.<sup>16</sup> The Court held that, unlike married couples, civil partners, whether same-sex or opposite-sex, were not eligible to share parental responsibility in this way. Thus, the refusal was not based on sexual orientation but on the applicants' non-marital status, and there was no comparable legal basis for discrimination.<sup>17</sup> Consequently, the Court ruled there was no violation of the Convention.

However, in *X and Others v. Austria*, the ECtHR found that Austria's legal prohibition on second-parent adoption within same-sex couples was discriminatory. The case involved two women in a stable relationship, one of whom sought to adopt her partner's son without severing the child's relationship with his biological mother. Austrian law, however, only allowed second-parent adoption in unmarried different-sex couples and refused the application on the grounds that adoption by the first applicant would sever the child's relationship with his mother.

---

15 *Idem*, para. 73.

16 *Gas and Dubois v. France*, App. no. 25952/07, 2012, para. 62.

17 *Idem*, para. 69.



The Court held that the applicants were in a comparable situation to an unmarried different-sex couple where one partner wished to adopt the other's child<sup>18</sup>. Since Austrian law permitted second-parent adoption for such couples but denied it to same-sex couples, this amounted to differential treatment based on sexual orientation. Unlike *Gas and Dubois v. France*, where neither same-sex nor different-sex unmarried couples could adopt, Austrian law created a clear distinction that favored heterosexual couples.

Austria argued that the law aimed to replicate a “*biological family*” model to protect traditional family structures<sup>19</sup>, but the Court found no evidence that adoption by a same-sex couple would harm a child. In fact, Austrian law allowed adoption by single individuals, including homosexuals, which indirectly acknowledged that children could be raised within same-sex families<sup>20</sup>. Additionally, some European countries allowed second-parent adoption regardless of the couple's orientation, which cast doubt on the necessity of Austria's restrictions. Therefore, Austria had failed to provide compelling justification for this discrimination and the Court found a violation of Article 14 in conjunction with Article 8.

This aspect of the case law is highly significant, setting a precedent, clarifying that while Member States may establish their own conditions regarding adoption, they must not be based on the discriminatory criteria of sexual orientation.

## ▪ Right to private and family life in the context of freedom of movement

The importance of recognizing familial ties under Article 8 of the ECHR has constantly been highlighted even since the 1979 landmark decision in the case of *Marckx v. Belgium*, the ECtHR establishing that “*when the State determines in its domestic legal*

---

18 *X and Others v. Austria*, App. no.19010/07, 2013, para. 112.

19 *Idem*, para. 137.

20 *Idem*, para. 146.



system the regime applicable to certain family ties such as those between an unmarried mother and her child, it must act in a manner calculated to allow those concerned to lead a normal family life. As envisaged by Article 8, respect for family life implies in particular, in the Court's view, the existence in domestic law of legal safeguards that render possible as from the moment of birth the child's integration in his family"<sup>21</sup>. Therefore, the right to family life includes the automatic legal recognition of the parent-child relationship, especially between a child and their biological parent. This principle requires that legal safeguards be in place from birth to ensure the child's integration into their family.<sup>22</sup> A failure to recognize these ties, as also evidenced in the *Johnston v. Ireland*<sup>23</sup> case, constitutes a breach of this fundamental right. The case concerned the lack of recognition of the family ties between a father and his biological child, due to Ireland's interdiction on divorce at that time.

Although this precedent can also be used to support cases related to LGBTQIA+ rights, the Court's view on recognition of rainbow families, specifically, has also evolved over time. In *Gas and Dubois v. France* the ECtHR confirmed that a family consisting of same-sex parents and their child qualifies as a family under Article 8 ECHR once it has established *de facto* family ties<sup>24</sup>. This is especially the case when these ties have been established and already recognized by another state, similar to the circumstances in the V.M.A. case. Clearly, these *de facto* family bonds can also be formed between children and at least one parent with whom there is no biological link.

A significant issue for rainbow families involves cross-border recognition of parental rights. When a legal parent-child relationship is established in one country but not recognized in another, the host country's refusal to acknowledge these ties may violate Article 8 of

21 *Marckx v. Belgium*, App. no. 6833/7, 1979, para. 31.

22 See A. Tryfonidou, "The Parenting Rights of Same-Sex Couples under European Law".

23 *Johnston and Others v. Ireland*, App. no. 9697/82, 1986, para. 76

24 *Gas and Dubois v. France*, App. no. 25952/07, 2012, para. 37.



the ECHR. This was addressed in a series of cases, such as *Wagner v. Luxembourg*, a case concerning Luxembourg's refusal to grant enforcement of the Peruvian adoption judgment of a child, due to national provisions preventing single individuals from obtaining full adoption. The Court found this denial "*an 'interference' with the right to respect for the applicants' family life.*"<sup>25</sup>

Notably, the Court observed that the adopted child experienced daily disadvantages due to her unrecognized legal status validly created abroad. Unlike other children with formally recognized adoption ties, she was deprived of Luxembourg nationality and associated rights, such as residency stability and ease of travel within the European Union. Additionally, when she reaches the age of 16, she would not benefit from the Community preference in terms of access to certain educational and work opportunities.<sup>26</sup> Despite Luxembourg's argument that the refusal aimed to protect traditional family structures, the Court found that this aim did not justify the significant burdens placed on the child, who "*cannot be blamed for circumstances for which she is not responsible. It must be noted that, because of her status as a child adopted by a Luxembourg unmarried mother who has not obtained recognition in Luxembourg of the family ties created by the foreign judgment, she is penalised in her daily existence.*"<sup>27</sup>

Thus, the Court concluded that Luxembourg's refusal to recognize the Peruvian adoption left the child in a "*legal vacuum*" and created an unjustifiable and disproportionate disadvantage for the child, constituting discrimination based on her adoptive family structure and violating Article 14 in conjunction with Article 8.<sup>28</sup> This decision underscores the importance of consistent parental recognition across borders to ensure children's equal access to legal rights and protections.

Similarly, in *Menesson v. France*, a case concerning the

---

25 *Wagner v. Luxembourg*, App. no. 76240/01, 2007, para. 123.

26 *Idem*, para. 156.

27 *Idem*, para. 158.

28 *Idem*, para. 160.



French authorities' refusal to grant legal recognition to a surrogacy arrangement legally established in the United States - and, consequently, to the parent-child relationship between the child and the heterosexual parents who had engaged in this arrangement - the ECtHR found that this refusal constituted a breach of Article 8 with respect to the child. Despite surrogacy being prohibited under national law, the Court underlined that *"the state overstepped the permissible limits of its margin of appreciation."*<sup>29</sup>

It is notable that the ECtHR found no violation of the parents' right to respect for family life, despite the practical difficulties they faced. The lack of French recognition of the parent-child relationship created obstacles, such as the need to present U.S. civil documents for school and social security registration, and concerns about the children's long-term residency. Nevertheless, the Court held that the applicants could still live in France as a family without risk of separation. In light of these circumstances, the Court concluded that the situation *"strikes a fair balance between the interests of the applicants and those of the State in so far as their right to respect for family life is concerned."*<sup>30</sup>

However, in cases deviating from the *Mennesson* "family template", where there is a genetic link between at least one of the intended parents and the child, the ECtHR has been less willing to intervene, focusing on whether practical hindrances to family life exist<sup>31</sup>. For instance, in *Valdís Fjölnisdóttir and Others v. Iceland*, the Court found no violation of family life rights, emphasizing that Iceland's foster care provision enabled the two mothers to maintain a stable family life with the child.<sup>32</sup> It also considered that Icelandic authorities secured a foster arrangement that allowed the child to remain under the care of both mothers, even after their divorce, thus preserving family continuity. As the Court noted, while non-recognition of a formal parental link did affect the family, *"the*

---

29 *Mennesson v. France*, App. no. 65192/11, 2014, para. 100.

30 *Idem*, para. 94.

31 L. Bracken, "Accommodations of private and family life and non-traditional families: the limits of deference in cases of cross-border surrogacy before the European Court of Human Rights", in *Medical Law Review*, 2024, Vol. 32, No. 2, p.142.

32 *Valdís Fjölnisdóttir and Others v. Iceland*, App. no. 71552/17, 2021, para. 71.



*enjoyment of that family life was also safeguarded by the foster care arrangement being rendered permanent, which must be considered to substantially alleviate the uncertainty and anguish cited by the applicants.*<sup>33</sup> Therefore, the ECtHR ruled that this arrangement mitigated potential harm to the child's welfare by ensuring a stable and lasting family environment.

Moreover, in *K.K. v. Denmark*, the Court found a violation of the children's right to private life. The case concerned Denmark's refusal to allow the wife of the children's biological father to adopt them, even though the children, born through surrogacy in Ukraine, had been raised by the applicants since birth and had Ukrainian birth certificates recognizing them both as parents. While Denmark granted the wife joint custody, it denied adoption due to a legal prohibition on adoption following surrogacy arrangements. The Court noted that *"besides adoption, domestic law does not provide for other possibilities of recognition of a legal parent-child relationship with the intended mother."*<sup>34</sup>

In addition, the Court emphasized the impact of non-recognition on the child's identity and inheritance rights, concluding that *"such lack of recognition per se had a negative impact on the children's right to respect for their private life, in particular because it placed them in a position of legal uncertainty regarding their identity within society"*<sup>35</sup> and *"in terms of inheritance, it is also clear that although the first applicant could make a will to that effect, the children would not be her heirs by virtue of a legal parent-child relationship, unlike the situation for other children in Denmark."*<sup>36</sup>

The Court considered the case in a comparable situation to *Menesson*, which means that the parent-child relationship formed through a surrogacy cross-border arrangement was already established both legally and *de facto* in another state and, also, one of the parents is genetically linked to the child. In such

---

33 *Ibid.*

34 *K.K. and Others v. Denmark*, App. no. 25212/21, 2023, para. 72.

35 *Ibid.*

36 *Idem*, para 73.



cases, where we can also add *D.B. and Others v. Switzerland*, the ECtHR established that states have limited discretion in refusing to recognize these relationships, as doing so could undermine the child's right to family life<sup>37</sup> and result in a *de facto* "state of parentlessness" for the child<sup>38</sup>.

*D.B. and Others v. Switzerland* is a case concerning a same-sex couple who had entered into a surrogacy agreement in the United States, resulting in a U.S. court declaring them both as legal parents of the child. The Swiss authorities refused to recognize the U.S. judgment for the non-biological father, leading to nearly eight years of legal uncertainty. The Court emphasized that the lengthy denial of recognition put the child in a position of legal uncertainty regarding their identity and deprived them of a stable environment.<sup>39</sup> The ECtHR concluded that "the child's right to respect for his or her private life requires that domestic law provide the possibility of recognizing a parent-child relationship between the child and the intended parent. Accordingly, the States' margin of appreciation is limited concerning the fundamental principle of establishing or recognizing parentage."<sup>40</sup> However, the Court found no violation of the parents' rights under Article 8, considering that the Swiss authorities' refusal to recognize the legal parent-child relationship for the non-biological father did not significantly affect the couple's ability to live as a family.

As previously discussed, non-discrimination is a critical aspect of the right to family life, as outlined in Article 14 of the ECHR. This provision prohibits discrimination based on sexual orientation in the enjoyment of Convention rights, including family life. The ECtHR has affirmed that same-sex couples and their children are entitled to family life on an equal footing with heterosexual families, as demonstrated in cases like *Schalk and Kopf v. Austria*<sup>41</sup>, and the more recent *Fedotova and Others v. Russia*<sup>42</sup> and *Buhuceanu and*

---

37 *D.B. and Others v. Switzerland*, Apps. nos. 58817/15 and 58252/15, 2023, para. 93.

38 L. Bracken, *ibid.*, p. 152.

39 *D.B. and Others v. Switzerland*, Apps. nos. 58817/15 and 58252/15, 2023, para. 88.

40 *Idem*, para. 85.

41 *Schalk and Kopf v. Austria*, App. no. 30141/04, 2010, para. 90.

42 *Fedotova and Others v. Russia*, Apps. nos. 40792/10, 30538/14 and 43439/14, 2023, para. 178.



*Others v. Romania*<sup>43</sup>, where it is reminded that the Member States have the positive obligation, under Article 8, to grant same sex families a form of protection and legal recognition.

In the same note, the CJEU underlined in the Coman case, as well as in the V.M.A. case that *“the relationship of a homosexual couple may fall within the notion of ‘private life’ and that of ‘family life’ in the same way as the relationship of a heterosexual couple in the same situation.”*<sup>44</sup>

In summary, the European case law highlights the fundamental right to family life for all families, including rainbow families, emphasizing the importance of cross-boarder legal recognition. These judgements provide essential protections against unjust refusals to acknowledge familial ties and ensure that states uphold the integrity and continuity of family life for children and their parents, which cannot be overlooked invoking the Member States’ margin of appreciation.

## ▪ Best interest of the child

The principle of the best interests of the child is grounded in Article 3(1) of the Convention on the Rights of the Child and Article 24(2) of the Charter of Fundamental Rights of the European Union. Both instruments guarantee that in all actions and decisions taken by public authorities or private institutions affecting the child, the best interests of the child must be a primary consideration. Additionally, Article 24(3) of the Charter grants every child the right to maintain a personal relationship and direct contact with both parents on a regular basis, unless doing so is contrary to the child’s best interests.

When discussing the best interests of the child, it encapsulates the child’s overall well-being, including their physical and psychological development, education, and emotional security.

43 *Buhuceanu and Others v. Romania*, Apps. nos. 20081/19 and 20 others, 2023, para. 74.

44 C-490/20, *Stolichna obshtina, rayon “Pancharevo”*, 2021, para. 61.



Children's rights, such as the right to a name, nationality, and immediate registration after birth must be protected without discrimination. This includes ensuring that these rights are upheld regardless of their parents' sexual orientation, aligning with international standards such as the UN Convention on the Rights of the Child and the Charter of Fundamental Rights, which prioritize non-discrimination and child welfare.

In the context of parental rights for rainbow families, the principle of the child's best interest becomes even more crucial, particularly in states that do not provide any legal protection or recognition for such families. These states often overlook the established legal and de facto family relationships formed in other countries. European case law emphasizes that states, by ratifying international treaties, are obligated to respect the best interest of the child, including recognizing cross-border family ties, and failure to do so can violate free movement rights and other fundamental protections. As Lenaerts beautifully noted, "*no area of national law—not even areas traditionally reserved to the Member States—remains a "safe haven" with the sweet of free movement law.*"<sup>46</sup>

As established in the above-mentioned cases of *Wagner v. Luxembourg* and *Mennesson v. France*, it is crucial that cross-border family ties are maintained to avoid situations where children are left in legal uncertainty or deprived of their relationship with parents due to conflicting national laws. The ECtHR has consistently emphasized that states should prioritize the continuity of family ties across borders, regardless of genetic connections, to ensure children's well-being.

For instance, the *Wagner v. Luxembourg* case highlighted the need to respect foreign judgements that establish family relationships, emphasizing that the best interest of the child overrides national restrictions – "*Bearing in mind that the best interests of the child are paramount in such a case, the Court*

---

45 K. Lenaerts, "*Federalism and the Rule of Law: Perspectives from the European Court of Justice*", in *Fordham International Law Journal*, Vol. 33, Issue 5, 2011, Article 2, p. 1340.

46 *Idem*, p. 1349.



*considers that the Luxembourg courts could not reasonably disregard the legal status validly created abroad and corresponding to a family life within the meaning of Article 8 of the Convention. However, the national authorities refused to recognise that situation, making the Luxembourg conflict rules take precedence over the social reality and the situation of the persons concerned in order to apply the limits which Luxembourg law places on full adoption.*<sup>47</sup>

In surrogacy cases like *Mennesson v. France*, the Court emphasized the importance of acknowledging biological connections and the child's right to an identity, demonstrating how not recognizing parent-child relations can harm the child's right to family life, the best interest of the child being prevalent to the other competing interests at stake.<sup>48</sup>

In the *V.M.A.* case, the CJEU also stated the importance of protecting the child's right to a family, noting that non-recognition of a parent due to the sexual orientation of the parents is contrary to fundamental rights – *"It would be contrary to the fundamental rights which are guaranteed to the child under Articles 7 and 24 of the Charter for her to be deprived of the relationship with one of her parents when exercising her right to move and reside freely within the territory of the Member States or for her exercise of that right to be made impossible or excessively difficult in practice on the ground that her parents are of the same sex."*<sup>49</sup>

The Court concluded that the child is a Bulgarian national, therefore *"the Bulgarian authorities are required to issue to her an identity card or a passport stating her nationality and her surname as it appears on the birth certificate drawn up by the Spanish authorities, the Court having previously had occasion to rule that Article 21 TFEU precludes the authorities of a Member State, in applying their national law, from refusing to recognise a child's surname as determined and registered in a second Member State in*

---

47 *Wagner v. Luxembourg*, App. no. 76240/01, 2007, para. 133.

48 *Mennesson v. France*, App. no. 65192/11, 2014, para. 101.

49 C-490/20, *Stolichna obshtina, rayon "Pancharevo"*, 2021, para. 65.



*which the child was born and has been resident since birth*".<sup>50</sup> The CJEU clarified that *"the Member State cannot rely on its national law as justification for refusing to draw up such an identity card or passport"*<sup>51</sup> for the child. Therefore, this case links the best interests of the child to the need for cross-border recognition of parenthood, reinforcing the idea that children's rights should not be hindered by national barriers or discrimination.

Overall, these cases illustrate that in line with the Convention on the Rights of the Child and the EU Charter of Fundamental Rights, the best interest of the child requires that states ensure legal continuity for family relationships across borders. By doing so, states can safeguard the rights and well-being of children in rainbow families, ensuring they grow up in a stable, loving, and legally secure environment.

### 3. Charting the future: Advancing legal protections for rainbow families

In this section, we will focus on the background of Eastern European states like Romania, where progress on LGBTQIA+ rights has been limited. We will explore real-life scenarios involving rainbow families that could potentially become cases for strategic litigation that we might support.

The ongoing struggle for LGBTQIA+ rights often conveys that these persons must earn each right individually through *"blood, sweat and tears"*, rather than these rights being inherently granted, as they should be to all human beings. This situation deepens the division between LGBTQIA+ individuals and heterosexual individuals, who enjoy these rights automatically and with relative

---

50 *Idem*, para. 44

51 *Idem*, para 45.



ease. Heterosexual individuals can marry or enter a registered partnership with the person they love, have children, or adopt, and their relationships are recognized without significant obstacles, both domestically and internationally.

This approach of litigating rights individually, one right at a time, often fails to achieve comprehensive change, as seen in cases like *V.M.A.* and *Coman*, which remain unimplemented in their respective countries. In *Coman*, the recognition of the couple's marriage, as reiterated multiple times by the CJEU, is contingent on respecting the right to free movement. This situation is particularly aggravating because Romania is required, under this ruling, to grant the third-country spouse the right to reside in Romania for more than three months for family reunification. Yet even such a basic requirement has not been implemented in Romania.

Similarly, in the *V.M.A.* case, which was addressed primarily in terms of free movement rights, the CJEU stated that under EU law the Member State is not obligated to issue a birth certificate for a child from a same-sex family who is a Bulgarian citizen but must provide a travel document. However, a travel document does not replace a birth certificate issued by the child's country of citizenship, which is essential for establishing citizenship, identity, and access to rights and benefits due to any child, as well as the legal ties to the parents. As the ECtHR emphasized in *S.W. v. Austria*, "*the role of a birth certificate is to show legal parenthood, and not the biological relationship.*"<sup>52</sup> Even with a passport, if this family needed to return to their country of origin, their parent-child relationship would not be recognized. This lack of recognition would make it impossible to exercise fundamental parental rights, such as enrolling the child in school, attending medical appointments, making important decisions, and managing inheritance matters. Without effective recognition of the parent-child relationship established in another state, these rights cannot be fully exercised once the family decides to leave the host state. This situation undermines the right to free movement, as a family like that in *V.M.A.* does not have a genuine choice about returning to Bulgaria,

---

52 *S.W. and Others*, Application no. 1928/19, Admissibility Decision, 2022, para. 46.



knowing their parent-child bond will evaporate upon crossing the border and only reappear when visiting another country.

Therefore, situations where rights are fought for individually often lead to the perception that LGBTQIA+ persons should be content with the slight satisfaction they receive, as it is better than nothing. This approach also encourages European courts to offer only minimal concessions, so as not to provoke too much opposition from states that, at least superficially, more readily accept the argument of free movement.

Therefore, considering the issues discussed in Chapter II regarding the implementation (or lack thereof) of the *Coman* and *V.M.A.* judgements in Romania, as well as the prohibition of same-sex marriages and the non-recognition of such marriages performed abroad, and the similar situation with same-sex adoptions, and the non-implementation of civil partnerships, these are some of the real-life situations that could challenge European courts in future cases:

In the case where a Romanian citizen marries a third-country national abroad, and they adopt a child and return to Romania, the third-country spouse would encounter significant challenges regarding their right to reside in Romania for more than three months for family reunification. Additionally, neither parent's relationship with the child would be recognized under Romanian law, obstructing the exercise of parental rights in the home country of one of the spouses. This scenario is clearly untenable, effectively preventing the family from living a normal family life in Romania. If such a situation were to arise, it would represent a serious violation of the fundamental rights of all family members, and particularly undermine the child's best interests.

Moreover, if a same-sex marriage between a Romanian citizen and a foreign national contracted abroad cannot be recognized in Romania, the effects of any potential divorce would also remain unrecognized. The situation becomes even more complex if the couple has children and shares parental authority.



Interestingly, in the *D.B. and Others v. Switzerland* case, the ECtHR extends the principles established in *Mennesson* by stating that it is up to the state to determine the most appropriate form of recognition for the parent-child relationship. However, it clarifies that the state must ensure a mechanism for recognizing this relationship.<sup>53</sup> The case also demonstrates that where adoption is the only means to secure a legal parent-child relationship, access to it cannot be restricted.<sup>54</sup> Therefore, if this principle applies in surrogacy cases, it should also be applicable to rainbow families where second-parent adoption is the sole method for recognizing the parent-child relationship. For instance, consider a family consisting of two women, one of whom gives birth to a child in Romania. According to current national legislation, only the birth mother is listed on the birth certificate, leaving the field for the father empty, thus not recognizing the other parent in any way.

Naturally, this is not an exhaustive inventory of the potential scenarios in the lives of rainbow families, caused by an unjustified reluctance, veiled in the form of the sweet margin of appreciation of the States. All these situations and many others create enormous, unnecessary suffering for these families and represent severe violations of their human rights, capable of challenging national provisions before European courts.


If you or someone you know feels that their rights are being violated, or if you are a lawyer or legal professional with questions about handling cases involving the rights of rainbow families, you can reach out to the following organizations for guidance and support:

---

53 *D.B. and Others v. Switzerland*, Apps. nos. 58817/15 and 58252/15, 2023, para. 80.

54 *Idem*, para. 88.





**ACCEPT – For cases involving Romanian citizens**

**Email: [accept@acceptromania.ro](mailto:accept@acceptromania.ro)**

**LGBTI Deystvie – For cases involving Bulgarian citizens**

**<https://en.deystvie.org>**

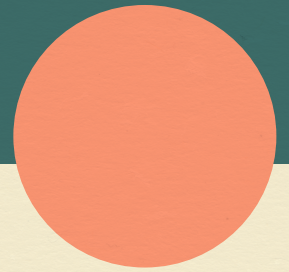
**ILGA-Europe - <https://www.ilga-europe.org>**

**NELFA - <http://nelfa.org>**

**TGEU - <https://tgeu.org>**



# IV. Conclusion



The advancement of LGBTQIA+ rights, particularly those concerning parental and family recognition within rainbow families, requires continued commitment to strategic litigation and legal reform. This toolkit has explored landmark cases and current legal contexts in the EU and Romania, highlighting the potential and limitations of existing jurisprudence and policy frameworks. Through analyzing cases such as *Coman v. Romania*, *Baby Sara*, and *Buhuceanu and Others v. Romania*, we gain insight into the gradual but significant steps towards achieving legal recognition and protections for rainbow families across borders.

The incremental yet impactful changes achieved through strategic litigation create momentum for a more inclusive EU legal landscape. As Member States become more familiar with rulings that uphold LGBTQIA+ rights, national courts and policymakers may increasingly see the value in harmonizing domestic laws with EU standards. Advocacy efforts should therefore focus not only on enforcing judgments but also on encouraging Member States to voluntarily adopt inclusive policies.

Moreover, the European Union has a role to play in holding Member States accountable to the CJEU and ECtHR judgments. EU institutions and bodies, including the European Commission and European Parliament, should prioritize protecting LGBTQIA+ rights and apply political pressure on non-compliant states. Such support can accelerate the alignment of national laws with established European human rights standards.

This toolkit's exploration of landmark cases and strategic litigation tools underlines the need for ongoing advocacy to protect and expand the rights of rainbow families. The path to full recognition of LGBTQIA+ family rights is still fraught with legal and social obstacles, yet the gains achieved through recent cases reflect the potential of strategic litigation as a vehicle for change.



In the coming years, as more cases reach the CJEU and ECtHR, a continued focus on enforcing rulings, fostering collaboration across borders, and advocating for legal reforms will be essential. Ultimately, the goal is to achieve a framework where LGBTQIA+ families enjoy equal rights and protection, upholding the EU principles, such as human dignity and equality.

*"Funded by the European Union. Views and opinions expressed are however those of the author(s) only and do not necessarily reflect those of the European Union or the European Education and Culture Executive Agency (EACEA). Neither the European Union nor the EACEA can be held responsible for them."*

