



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

## Guide on Article 12 of the European Convention on Human Rights

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Right to marry

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## Note to readers

This Guide is part of the series of Case-Law Guides published by the European Court of Human Rights (hereafter “the Court”, “the European Court” or “the Strasbourg Court”) to inform legal practitioners about the fundamental judgments and decisions delivered by the Strasbourg Court. This particular Guide analyses and sums up the case-law on Article 12 of the European Convention on Human Rights (hereafter “the Convention” or “the European Convention”). Readers will find herein the key principles in this area and the relevant precedents.

The case-law cited has been selected among the leading, major, and/or recent judgments and decisions.\*

The Court’s judgments and decisions serve not only to decide those cases brought before the Court but, more generally, to elucidate, safeguard and develop the rules instituted by the Convention, thereby contributing to the observance by the States of the engagements undertaken by them as Contracting Parties (*Ireland v. the United Kingdom*, 18 January 1978, § 154, Series A no. 25, and, more recently, *Jeronovičs v. Latvia* [GC], no. 44898/10, § 109, 5 July 2016).

The mission of the system set up by the Convention is thus to determine, in the general interest, issues of public policy, thereby raising the standards of protection of human rights and extending human rights jurisprudence throughout the community of the Convention States (*Konstantin Markin v. Russia* [GC], 30078/06, § 89, ECHR 2012). Indeed, the Court has emphasised the Convention’s role as a “constitutional instrument of European public order” in the field of human rights (*Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland* [GC], no. 45036/98, § 156, ECHR 2005-VI, and more recently, *N.D. and N.T. v. Spain* [GC], nos. 8675/15 and 8697/15, § 110, 13 February 2020).

Protocol No. 15 to the Convention recently inserted the principle of subsidiarity into the Preamble to the Convention. This principle “imposes a shared responsibility between the States Parties and the Court” as regards human rights protection, and the national authorities and courts must interpret and apply domestic law in a manner that gives full effect to the rights and freedoms defined in the Convention and the Protocols thereto (*Grzęda v. Poland* [GC], § 324).

This Guide contains references to keywords for each cited Article of the Convention and its Additional Protocols. The legal issues dealt with in each case are summarised in a [List of keywords](#), chosen from a thesaurus of terms taken (in most cases) directly from the text of the Convention and its Protocols.

The [HUDOC database](#) of the Court’s case-law enables searches to be made by keyword. Searching with these keywords enables a group of documents with similar legal content to be found (the Court’s reasoning and conclusions in each case are summarised through the keywords). Keywords for individual cases can be found by clicking on the Case Details tag in HUDOC. For further information about the HUDOC database and the keywords, please see the [HUDOC user manual](#).

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\* The case-law cited may be in either or both of the official languages (English or French) of the Court and the European Commission of Human Rights. Unless otherwise indicated, all references are to a judgment on the merits delivered by a Chamber of the Court. The abbreviation “(dec.)” indicates that the citation is of a decision of the Court and “[GC]” that the case was heard by the Grand Chamber. Chamber judgments that were not final when this update was published are marked with an asterisk (\*).

## Introduction

1. Article 12 of the Convention guarantees the right to marry and to found a family. The Court has held that the exercise of this right gives rise to personal, social and legal consequences. Given the sensitive moral choices concerned and the importance to be attached to the protection of children and the fostering of secure family environments, the Court has held that it must not rush to substitute its own judgment for that of the authorities who are best placed to assess and respond to the needs of society (*B. and L. v. the United Kingdom*, 2005, § 36).

2. The right guaranteed under Article 12 is subject to the national laws governing its exercise. In contrast to Article 8 of the Convention, which sets forth the “right to respect for private and family life”, and with which the right “to marry and to found a family” has a close affinity, Article 12 does not include any permissible grounds for an interference by the State such as those permitted under paragraph 2 of Article 8 (“in accordance with the law” and as being “necessary in a democratic society”, for such purposes as “the protection of health or morals” or “the protection of the rights and freedoms of others”). Accordingly, in examining a case under Article 12 the Court does not apply the tests of “necessity” or “pressing social need”, used in the context of Article 8, but would have to determine whether, regard being had to the State’s margin of appreciation, the impugned interference was arbitrary or disproportionate (*Frasik v. Poland*, 2010, § 90).

3. The Court has held that States enjoy a wide margin of appreciation in this area but also that restrictions placed on the rights guaranteed under Article 12 of the Convention by national law must be imposed for a legitimate purpose and must not go beyond a reasonable limit to attain that purpose (*O’Donoghue and Others v. the United Kingdom*, 2010, § 84). In other words, they must not restrict or reduce the right in such a way or to such an extent that the very essence of the right is impaired (*F. v. Switzerland*, 1987, § 32; *Schalk and Kopf v. Austria*, 2010, § 49).

4. The text of Article 12 of the Convention is relatively narrow and the interpretation by the Court and by the former European Commission of Human Rights (“the Commission”) has not greatly expanded its scope. Article 12 of the Convention does not apply to family life beyond the point of marriage, other than in respect of founding of a family. In addition, the right to found a family does not arise under Article 12 of the Convention in the absence of marriage.

## I. Right to marry

### Article 12 of the Convention

“Men and women of marriageable age have the right to marry and to found a family, according to the national laws governing the exercise of this right.”

### HUDOC keywords

Men and women (12) – Marriageable age (12) – Marry (12) – Found a family (12) – National law (12)

## A. Limitations to the right to marry

5. As transpires from its text, the right to marry is subject to the national laws of the Contracting States. The Convention institutions have accepted that limitations on the right to marry laid down in the national laws may comprise formal rules concerning such matters as publicity and the solemnisation of marriage. They may also include substantive provisions based on generally recognised considerations of public interest, in particular concerning capacity, consent, prohibited degrees of affinity or the prevention of bigamy (*F. v. Switzerland*, 1987, § 32).

### 1. Procedural rules

6. When it comes to the procedural limitations, States can require marriage to be contracted as a civil marriage, but they are free to recognize religious marriage according to their national laws.

7. The Court has reiterated that marriage is not considered simply as a form of expression of thought, conscience or religion protected under Article 9 of the Convention, but is governed by the specific provision of Article 12 of the Convention, which refers to the national laws governing the exercise of the right to marry (*X v. Federal Republic of Germany*, 1974, Commission decision). An obligation to contract a marriage in accordance with forms prescribed by law rather than a particular religious ritual is not a refusal of the right to marry (*ibid.*).

8. At the same time, States remain free to exercise discretion to recognise a religious marriage. In *Muñoz Díaz v. Spain*, the Court declared inadmissible the applicant’s complaint, under Article 14 taken in conjunction with Article 12 of the Convention, that the State recognised some religious marriages by virtue of agreements, but not the applicant’s Roma marriage for which there had been no agreement with the State.

### 2. Substantive rules

#### a. Monogamy

9. The wording of Article 12 implies that the “right to marry” refers to a marriage between one single man and one single woman in accordance with the principle of monogamy adhered to in the member states (*Jonhston and Others v. Ireland*, 1986, § 52). Therefore, the Court has found no violation of Article 12 when the State precluded marriage on its territory between persons one of whom is a party to a subsisting marriage (*X v. the United Kingdom*, 1970, Commission decision).

#### b. Sex

10. The Court observed that, regarded in isolation, the wording of Article 12 might be interpreted so as not to exclude marriages between two persons of the same sex. However, all other substantive Articles of the Convention granted rights and freedoms to “everyone” or state that “no one” is to be

subjected to certain types of prohibited treatment. The choice of wording in Article 12 must thus be regarded as deliberate. Moreover, regard must be had to the historical context in which the Convention was adopted: in the 1950s marriage was clearly understood in the traditional sense as a union between partners of different sex (*Schalk and Kopf v. Austria*, 2010, § 55)

11. The Court examined for the first time the issue of whether two persons who are of the same sex could claim to have the right to marry in the case of *Schalk and Kopf v. Austria* and found that Article 12 of the Convention did not impose an obligation on the respondent States to grant same-sex couples access to marriage. While there was no Convention right to same-sex marriage, the Court allowed for the possibility that, in accordance with the Convention's character as a "living instrument", the right to marry enshrined in Article 12 might not in all circumstances be limited to marriage between two persons of the opposite sex. However, as matters stood at the material time, the question whether or not to allow same-sex marriage was left to regulation by the national law of the Contracting State (*Schalk and Kopf v. Austria*, 2010, §§ 61-62).

12. This approach was also upheld in subsequent cases (*Hämäläinen v. Finland* [GC], 2014; *Oliari and Others v. Italy*, 2015; *Chapin and Charpentier v. France*, 2016).

### c. Marriageable age

13. Since the right to marry guaranteed under Article 12 of the Convention is subject to internal laws governing the exercise thereof, the obligation to respect the legal marriageable age does not amount to a denial of the right to marry, even if the individual's religion permitted marriage at a younger age (*Khan v. the United Kingdom*, Commission decision, 1986).

14. In *Z.H. and R.H. v. Switzerland* the applicants sought asylum in Switzerland as a married couple, claiming that they had contracted marriage in a religious ceremony in a third country when the first and second applicants were 14 and 18 years of age, respectively. The Swiss authorities found that the applicants' religious marriage had not been valid under their national law and had, in any case, been incompatible with Swiss *l'ordre public* owing to the first applicant's young age. The Court considered that neither Articles 8 nor 12 of the Convention could be interpreted as imposing on any State party to the Convention an obligation to recognise a marriage, religious or otherwise, contracted by a 14-year-old child. Article 12 expressly provided for regulation of marriage by national law, and given the sensitive moral choices concerned and the importance to be attached to the protection of children and the fostering of secure family environments, the Court stressed that it must not rush to substitute its own judgment in place of the authorities who are best placed to assess and respond to the needs of society (*Z.H. and R.H. v. Switzerland*, 2015, § 44).

### d. Consanguinity

15. The Court has examined several cases of relatives, either by blood or by marriage, who had been denied the right to marry.

16. In *Theodorou and Tsotsorou v. Greece*, 2019, the first applicant had previously been married to the second applicant's sister. Their marriage was annulled by the State after about ten years because domestic law prohibited marriage between persons related by direct descent and collateral affinity up to the third degree. The Court firstly noted that the issue of the nullity of the applicants' marriage had only been raised *a posteriori*; there had been no objections by the competent authorities once their marriage had been announced. Furthermore, the said impediment did not serve to prevent, by way of example, either possible confusion or emotional insecurity on the part of the first applicant's daughter from his previous marriage or confusion as to the relationship or degree of kinship. Moreover, there had been a consensus within the member States of the Council of Europe in that only two of the 42 Member States reviewed maintained a non-absolute impediment to the marriage of former sisters-in-law and brothers-in-law. The nullity of the

applicants' marriage had thus disproportionality restricted their right to marry to such an extent that the very essence of that right had been impaired.

17. Similarly, in *B. and L. v. the United Kingdom*, 2005, the Court found that a bar on marriage between parents-in-law and children-in-law resulted in a breach of Article 12 of the Convention. The fact that marriage could take place if both their former spouses died, a hypothetical situation impossible to foretell and on the whole unlikely as children tend to outlive their parents, did not remove the impairment of the essence of the applicants' right to marry. Nor did the possibility of applying to Parliament do so: it was an exceptional and relatively costly procedure, which was at the total discretion of the legislative body and subject to no discernible rules or precedent (*B. and L. v. the United Kingdom*, 2005, § 35).

#### **e. Consent**

18. Consent is a condition for marriage in all Council of Europe Member States. Generally speaking, a forced marriage would violate the right to marry of the party not giving consent. The Commission also held that the right to marry did not include a right to marry a deceased person (*M. v. Federal Republic of Germany*, Commission decision, 1987).

#### **f. Legal capacity**

19. The right to marry can be subject to prior authorisation, owing to the restriction on a person's legal capacity, one of the substantive limitations the relevance of which is acknowledged in the case-law. In *Delecalle v. France*, 2018, the applicant, who had been placed under enhanced protective supervision (*curatelle renforcée*), sought authorisation from his supervisor in order to marry his partner, which was denied. The guardianship judge confirmed that decision on the basis of a welfare investigation and a psychiatric assessment, and ultimately the Court of Cassation rejected the applicant's appeal. The Court accepted that the authorities had a margin of appreciation, as regards both the impugned legal provisions and the denial of authorisation, in order to be able to protect the applicant effectively in light of the circumstances and thus to foresee any consequences that might harm his interests. The applicant used the relevant domestic remedies and had been able to submit his arguments in adversarial proceedings to challenge the decision to deny him authorisation. The restrictions were properly regulated and subjected to judicial review so they did not restrict or reduce his right to marry in an arbitrary or disproportionate manner.

20. In *Lashin v. Russia*, 2013, a case which the Court examined under Article 8 of the Convention (and found no need for a separate examination under Article 12), a person suffering from schizophrenia had been deprived of legal capacity, including the right to marry and unable to have it restored. The Court held that the confirmation of the applicant's incapacity had not been justified because no fresh assessment of his mental condition had been conducted, he had not been personally present in court and it was doubtful whether his mental condition, as described in the relevant medical report, had indeed required a finding of complete incapacity. Since the applicant's guardian had opposed the review of his status, the applicant had no effective legal remedy to challenge that finding.

21. In the context of immigration laws, the Court has held that, for justified reasons, States may be entitled to prevent marriages of convenience, entered into solely for the purpose of securing an immigration advantage. However, the relevant laws - which must meet the usual standards of accessibility and clarity required by the Convention - may not otherwise deprive a person, or a category of persons, with full legal capacity of the right to marry the partners of their choice (*Frasik v. Poland*, 2010, § 89).

### g. Certificates to marry

22. The substantive rules requiring a certificate of capacity to marry, the purpose of which is, *inter alia*, to preclude marriages of convenience, were not found, in themselves, to be contrary to Article 12 of the Convention (*Sanders v. France*, Commission decision, 1996).

23. In *Klip and Krüger v. the Netherlands*, Commission decision, 1997, no violation of Article 12 was found where the applicants had only a limited period of time within which they could get married in view of the date of expiry of the validity of their statement. It was not found established that the Aliens Department had been unable or unwilling to issue them with a new statement when it appeared that its validity would not cover the date of marriage chosen by the applicants.

24. In *O'Donoghue and Others v. the United Kingdom*, 2010, the Court found that the requirement for persons subject to immigration control to submit an application for a certificate of approval before being permitted to marry gave rise to a number of grave concerns. In particular, the decision whether or not to grant a certificate of approval was not based solely on the genuineness of the proposed marriage and certain versions of the relevant scheme had imposed a blanket prohibition on the exercise of the right to marry on all persons in a specified category. In addition, the fee, fixed at a level which a needy applicant could not afford, was also found to have impaired the essence of the right to marry.

### h. Location of marriage

25. The right to marry does not, in principle, include the right to choose the geographical location of the marriage. A refusal to allow entry into a State of a foreign fiancé would not therefore contravene the individual's right to marry under Article 12, if the couple could marry in the fiancé's country of residence (*A v. the United Kingdom*, Commission decision, 1992, *A v. the Netherlands*, Commission decision, 1986; *Walter v. Italy* (dec.), 2006; *Savoia and Bounegru v. Italy* (dec.), 2006)

26. Furthermore, no violation of Article 12 was found where an alien did not put forward any evidence capable of showing that, as a result of having to leave German territory, his right to marry had been restricted. An alien who alleges that the refusal of a residence permit prevented him from marrying must present his marriage plans in a credible way (*X. v. Germany*, Commission decision, 1976).

## 3. Special groups

### a. Transsexuals

27. In a number of cases the question arose whether the refusal to allow a post-operative transsexual to marry a person of the opposite sex to his or her assigned gender violated Article 12 of the Convention. In its earlier case-law the Court found that the attachment to the traditional concept of marriage which underpins Article 12 provided sufficient reason for the continued adoption by the respondent State of biological criteria for determining a person's sex for the purposes of marriage. Consequently, this was considered a matter encompassed within the power of the Contracting States to regulate by national law the exercise of the right to marry (*Sheffield and Horsham v. the United Kingdom*, 1998; *Cossey v. the United Kingdom*, 1990; *Rees v. the United Kingdom*, 1986).

28. The Court reversed that stance in *Christine Goodwin v. the United Kingdom*, 2002, where the applicant lived as a woman and was legally prevented from marrying a man because she had been denied legal recognition of the change of gender. While noting that the first sentence of Article 12 explicitly referred to a man and woman, the Court held that, at the time of deciding the case, it could no longer be assumed that those terms necessarily referred to a determination of gender by purely biological criteria, since there had been major social changes in the institution of marriage as well as

dramatic changes brought about by developments in medicine and science in the field of transsexuality since the adoption of the Convention.

29. As regards existing marriages by persons who have changed gender, the Court has held that States could not be required to make allowances for a relatively small number of such marriages, where both partners wished to continue, and that the matter of how to regulate the effects of the change of gender in the context of marriage thus fell within the appreciation of the Contracting State (*Parry v. the United Kingdom* (dec.), 2006; *R. and F. v. the United Kingdom* (dec.), 2006). Similarly, *Hämäläinen v. Finland* [GC], 2014 concerned the examination under Article 8 of the complaints of a transgender applicant who had wished to preserve her own marriage. In the absence of a European consensus on the matter and taking into account that the case undoubtedly raised sensitive moral or ethical issues, the Court considered that the margin of appreciation to be afforded to the respondent State still had to be a wide one and, in principle, extended both to the State's decision whether or not to enact legislation concerning legal recognition of the new gender of post-operative transsexuals and to the rules it laid down in order to achieve a balance between the competing public and private interests. (*ibid.*, §§ 70-75). Contrary to the situation in some other countries, in Finland a pre-existing marriage could not be unilaterally annulled or dissolved by the domestic authorities. Accordingly, nothing prevented the applicant from continuing her marriage. In the Court's view, it was not disproportionate to require, as a precondition to legal recognition of an acquired gender, that the applicant's marriage be converted into a registered partnership as that was a genuine option which provided legal protection for same-sex couples that was almost identical to that of marriage. (*ibid.*, §§ 76 and 87).

## b. Same-sex marriage

30. As already stated, in *Schalk and Kopf v. Austria*, 2010, the Court examined for the first time whether two persons of the same sex could claim the right to marry. Recognising that the institution of marriage had undergone major social changes since the adoption of the Convention, the Court noted that there was still no European consensus regarding same-sex marriage (*Schalk and Kopf v. Austria*, 2010). Although the Court no longer considered that the right to marry enshrined in Article 12 had in all circumstances to be limited to marriage between two persons of the opposite sex, as matters stood at the time of deciding the case, the question whether or not to allow same-sex marriage was left to regulation by the national law of the Contracting State. The Court found that Article 12 of the Convention did not impose an obligation on the respondent Government to grant a same-sex couple, such as the applicants, access to marriage (*Schalk and Kopf v. Austria*, 2010, §§ 61-63).

31. At the same time, in respect of various domestic legislations, the Court has already held that civil unions provided an opportunity to obtain a legal status equal or similar to marriage in many respects (see *Schalk and Kopf v. Austria*, 2010, § 109; *Hämäläinen v. Finland* [GC], 2014, § 83; and *Chapin and Charpentier v. France*, 2016, §§ 49 and 51). In *Oliari and Others v. Italy*, 2015, while reiterating that Article 12 of the Convention did not impose an obligation on the respondent Government to grant same-sex couples access to marriage, the Court found a violation of Article 8 of the Convention in that the Italian State had overstepped its margin of appreciation when it failed to ensure that the applicants had available a specific legal framework providing for the recognition and protection of their same-sex unions. In *Chapin and Charpentier v. France*, 2016, the Court reiterated that neither Article 12, nor Article 14 in conjunction with Article 8, which was more general in purpose and scope, could be interpreted as imposing an obligation on the Contracting States to open marriage to same-sex couples. In finding no violation of the latter, it noted that it had been open to the applicants to enter into a civil union in France (PACS).

32. In *Orlandi and Others v. Italy*, 2017, the applicants had contracted same-sex marriage abroad and requested its registration in Italy. The Court identified no consensus in Europe on registration of same-sex marriages contracted abroad and observed that the refusal to register the applicants'

marriages had not deprived them of any rights previously recognised in Italy and further that they could still benefit from any rights and obligations acquired through marriage in the State where they had contracted it. At the same time, the Court held that the decisions refusing to register their marriage under any form in Italy had left the applicants in a legal vacuum and that the State had thereby failed to strike a fair balance under Article 8 between any competing interests in so far as it failed to provide a specific legal framework for the recognition and protection of their same-sex unions. The Court found it unnecessary to examine separately the complaint under Article 14 in conjunction with Article 12 of the Convention.

### c. Prisoners<sup>1</sup>

33. Detention, as such, does not prevent the exercise of the right to marry (*Hamer v. the United Kingdom*, Commission decision, 1977). Although imprisonment deprives a person of his liberty and also – unavoidably or by implication – of some civil rights and privileges, personal liberty is not a necessary pre-condition for the exercise of the right to marry. However, Article 12 does not require the States to introduce separate laws or specific rules on marriage of prisoners (*Frasik v. Poland*, 2010, § 99; *Jaremowicz v. Poland*, 2010, § 63).

34. It was conceivable that in cases involving serious types of offences, a restriction on the right to marry be justified on the basis of public interest considerations, regardless of the type or the length of the sentence imposed on the perpetrator. However, a general restriction on all life sentence prisoners could not be so justified (*Draper v. the United Kingdom*, Commission report, 1980, § 62).

35. In *Hamer v. the United Kingdom*, Commission decision, 1977, the applicant was prevented from marrying due to a combination of factors: he was in prison and national law did not allow him to marry there, while the Home Secretary would not allow him temporary release in order to marry elsewhere. The ensuing delay amounted to a denial to the applicant of the possibility of marrying during his sentence and to a violation of the substance of his right to marry.

36. In *Frasik v. Poland*, 2010, the applicant complained about the allegedly arbitrary refusal by a court to grant him leave to marry in prison, issued in order to prevent the alleged victim from marrying the applicant so that she could exercise her spousal privilege not to testify against him. The Court saw no reason for the national court to assess – as it did – whether the quality of the parties’ relationship was of such a nature as to justify their decision to get married, or to analyse and decide which time and venue were suitable for their marriage ceremony. The authorities were not allowed to interfere with a detainee’s decision to establish a marital relationship with a person of his choice, especially on the grounds that the relationship was not acceptable to them or may offend public opinion (*Frasik v. Poland*, 2010, §§ 94-95). The Court found a violation of Article 12 on the basis of the lack of restraint displayed by the national court in exercising its discretion and its failure to strike a fair balance between the various public and individual interests at stake in a manner compatible with the Convention, rather on the basis of the absence of detailed rules on marriage in detention.

37. Similarly, in *Jaremowicz v. Poland*, 2010, the applicant’s complaint concerned the allegedly arbitrary refusal to grant him leave to marry in prison. The Court noted that refusal had been justified by reference to grounds which had no link to prison security or the prevention of disorder but the assessment had been limited to the nature and the quality of the applicant’s relationship with his fiancé. The refusal had therefore been arbitrary and had produced identical consequences as an effective legal bar on the exercise of his right guaranteed by Article 12 (*Jaremowicz v. Poland*, 2010, §§ 54, 56 and 60).

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<sup>1</sup> See [Guide on the case-law of the European Court of Human Rights – Prisoner’s rights](#).

#### d. Foreign nationals

38. The Court has affirmed that Contracting States may properly impose reasonable conditions on the right of foreign nationals to marry in order to ascertain whether the proposed marriage is one of convenience and, if necessary, to prevent it. Consequently, Contracting States will not necessarily be acting in violation of Article 12 if they subject marriages involving foreign nationals to scrutiny in order to establish whether or not they are marriages of convenience (*O'Donoghue and Others v. the United Kingdom*, 2010, § 87).

39. A mere obligation on the applicants to submit a statement according to national law was not found to be contrary to Article 12 of the Convention (*Klip and Kurger v. the Netherlands*, Commission decision, 1977). In *O'Donoghue and Others v. the United Kingdom*, 2010, the Court found that imposing fees at a level that a needy applicant could not afford could impair the essence of the right to marry and that the fee of GBP 295 was sufficiently high to do so.

40. Furthermore, it is not contrary to Article 12 to deal with a foreigner's marriage under their national law, even if that law did not allow them to marry because a previous marriage was not deemed to have been dissolved, the State of origin not recognising full divorce (*X. v. Switzerland*, Commission decision, 1981).

#### 4. Consequences of marriage

41. Article 12 does not apply to the marriage and relationship between spouses beyond the right to marry. Some aspects of marriage, including the right to choose a family name, may and have been examined under Article 8 alone or in conjunction with Article 14 of the Convention (*Burghartz v. Switzerland*; *Ünal Tekeli v. Turkey*).

42. Article 12 does not therefore impose a positive duty on a State to provide the material conditions to make the right to marry effective or to guarantee that married couples would be in a better position than cohabitants in similar situations. In *Marckx v. Belgium*, 1979, the Court concluded that the question whether parents of an "illegitimate" child enjoyed the same rights as a married couple and whether Article 12 required that all the legal effects attaching to marriage should apply equally to situations that were in certain respects comparable to marriage, fell outside of scope of Article 12 of the Convention.

43. In *F.P.J.M. Kleine Staarman v. Netherlands*, Commission decision, 1985, the applicant complained that the provision resulting in a woman losing her disability benefits upon marriage, was contrary to Article 12 of the Convention, since it amounted to a sanction on her marriage. However, the Court concluded that the applicant's ability to exercise her right to marry was not in any way interfered with by the withdrawal of her disability benefits.

44. Equally, Article 12 does not oblige the States to facilitate spouses living together: this aspect of family life falls to be examined under Article 8 of the Convention (*Gribenko v. Latvia* (dec.), 2003; *Abdulaziz, Cabales and Balkandali v. the United Kingdom*, 1985, §§ 62, 68). It follows that Article 12 does not require States to allow an alien married to one of its nationals to remain on its territory to establish or live in the marital home and found a family there. The Court considered it reasonable for States to impose certain formalities on non-nationals in order to secure the effectiveness of their immigration policies (*Savoia and Bounegru v. Italy* (dec), 2006).

#### 5. Divorce

45. The Court has confirmed, on a number of occasions, that the ordinary meaning of the words "right to marry" covered only the formation of marital relationships but not their dissolution (*Johnston and Others v. Ireland*, 1986). Such an interpretation was consistent with the object and

purpose of Article 12 as revealed by the *travaux préparatoires*, which disclosed no intention to include in Article 12 any guarantee of a right to have the ties of marriage dissolved by divorce.

46. Moreover, the right to divorce has also not been included in Protocol No. 7 to the Convention, which was opened for signature in 1984. The opportunity was not taken to deal with this question in Article 5 of the Protocol, which guarantees certain additional rights to spouses, notably in the event of dissolution of marriage. Indeed, paragraph 39 of the Explanatory report to the said Protocol states that the words “in the event of its dissolution” found in Article 5 “do not imply any obligation on a State to provide for dissolution of marriage or to provide any special forms of dissolution”.

47. *A fortiori*, Article 12 can also not be interpreted as guaranteeing a favourable outcome in divorce proceedings instituted under the provision of a law allowing for divorce (*Ivanov and Petrova v. Bulgaria*, 2011; *Piotrowski v. Poland* (dec.), 2016). In *Piotrowski v. Poland* (dec.), 2016, the domestic courts had examined the facts in detail and in the context of domestic law, comprehensive evidence was taken and the applicant had an opportunity to present his position and put questions to the witnesses. The reasoning of the domestic court judgment contained a detailed explanation of the various interests taken into account, how the evidence was assessed and what the grounds were for its decision to dismiss the applicant’s petition for divorce. Therefore, the Court considered that there had been no appearance of violation of the applicant’s right to marry and that, in the circumstances of the case, the positive obligations arising under Article 8 of the Convention did not impose on the Polish authorities a duty to accept the applicant’s petition for divorce.

48. Similarly in *Babiarz v. Poland*, 2017, the Court found no violation of Article 12 on account of the refusal of the applicant’s petition for divorce. The domestic courts had examined the facts in detail, gathered comprehensive evidence, the first-instance judgment had been subjected to review by the appellate court and the reasoning of that judgment had contained a detailed explanation of the interests that were taken into account, how the evidence was assessed and of the grounds for its decision to dismiss the applicant’s petition for divorce. The Court was aware of the fact that the applicant had a daughter with his new partner, that he was apparently in a stable relationship and that the domestic courts had acknowledged a complete and irretrievable breakdown of his marriage. This, however, did not detract from the limited scope of Article 12 outlined earlier in the judgment. To contemplate otherwise would have meant that a request for a divorce would have to be allowed regardless of the procedural and substantive rules of domestic divorce law, by a person simply deciding to leave his or her spouse and have a child with a new partner.

49. However, if national legislation allows for divorce, which is not a requirement under the Convention, Article 12 secures for divorced persons the right to remarry without unreasonable restrictions (*F. v. Switzerland*, 1987).

50. In *F. v. Switzerland*, 1987, the Court found that the prohibition period imposed on the party at fault in the event of a divorce granted on the ground of adultery, which may range from one to three years, affected the very essence of the right to marry and was disproportionate to the legitimate aim pursued. On the other hand, in *K.M. v. the United Kingdom*, Commission decision, 1997, a limitation requiring compliance with the domestic law requirement that there should be a valid dissolution of a prior marriage did not amount to an unreasonable restriction on the right to re-marry.

51. In *Chernetskiy v. Ukraine*, 2016, a prisoner was prevented from marrying his new partner, from February 2005 to October 2008, because the authorities could not finalise the registration of his divorce and provide him with a divorce certificate in prison. Given the delay and the lack of an effective remedy in that respect, the Court found that the restriction had been unjustified and had impaired the very essence of the applicant’s right to marry and found a family with his new partner.

52. The failure to conduct divorce proceedings within a reasonable time could also, in certain circumstances, raise an issue under Article 12 of the Convention (*Aresti Charalambous v. Cyprus*, 2007). In *V.K. v. Croatia*, 2012, the domestic courts either dismissed without giving any reasons or

ignored the applicant's request for a partial judgment for more than five years, during which the divorce proceedings were pending before the first-instance court. Furthermore, at least on two occasions when complaining about the length of the proceedings, the applicant informed the domestic courts that he was planning to remarry and that the lengthy divorce proceedings were preventing him from doing so. The failure of the domestic authorities to conduct the divorce proceedings efficiently and, in the particular circumstances of the cases, leaving the applicant in a state of prolonged uncertainty amounted to an unreasonable restriction of his right to marry contrary to Article 12 of the Convention.

## II. Right to found a family

53. The right to found a family secured in Article 12 of the Convention exists only within marriage. The existence of a couple is fundamental in this sense (*X. v. Belgium and Netherland*, Commission decision, 1975) so Article 12 does not guarantee the right to have children born out of wedlock.

54. However, the ability to found a family is not a condition for marriage. In other words, the inability of a couple to conceive or parent a child could not be regarded as removing their right to enjoy the right to marry (*Christine Goodwin v. the United Kingdom* [GC], 2002, § 98).

### A. Procreation

55. The Court has confirmed that the right to found a family does not as such create a right to procreate or to have grandchildren (*Šijakova and Others v. the Former Yugoslav Republic of Macedonia* (dec.), 2003). Although the right to found a family is absolute, the Commission has held that it could not be interpreted to mean that a person must at all times be given the actual possibility to procreate (*X. v. the United Kingdom*, Commission decision, 1968).

56. In *Boso v. Italy* (dec.), 2002, the applicant argued that his right to respect for family life was violated because his wife had terminated her pregnancy despite his opposition. The Court reiterated that an interference with family life which is justified under Article 8 § 2 could not at the same time constitute a violation of Article 12 (see also, in the context of conjugal visits, *X. and Y. v. Switzerland*, Commission decision, 1879). Since the termination of pregnancy had been carried out in accordance with Italian legislation, and thus pursued the aim of protecting the mother's health, both the applicant's complaint under Article 8 and under Article 12 were declared manifestly ill-founded.

57. In *Dickson v. the United Kingdom* [GC], 2007, a prisoner and his wife were refused the use of facilities for artificial insemination. The Court examined the general policy, by which the Secretary of State could grant access to such facilities only in "exceptional circumstances" and concluded that the policy as structured effectively excluded any real weighing of the competing individual and public interests and prevented the required assessment of the proportionality of a restriction in any individual case. In other words, it had set the threshold so high that it did not allow a balancing of the competing interests or an assessment of the proportionality of the restriction in question. The absence of such an assessment had to be seen as falling outside any acceptable margin of appreciation and the Court thus found a violation of Article 8, without a separate examination of Article 12 of the Convention.

### B. Adoption

58. Article 12 does not as such guarantee the right to adopt or otherwise integrate into a family a child which is not the natural child of the couple concerned (*X. and Y. v. the United Kingdom*, Commission decision, 1977). However, the adoption of a child by a couple might, in certain

circumstances, be said to constitute the foundation of a family. Furthermore, a family can be ‘founded’ by the adoption of a child in accordance with provisions of national law governing adoption (*X. v. the Netherlands*, Commission decision, 1981).

59. The Court has held that the right to found a family implies the existence of a couple and as such does not include adoption by an unmarried person (*X. v. Belgium and Netherland*, Commission decision, 1975; *Di Lazzaro v. Italy*, Commission decision, 1997). In *Emonet and Others v. Switzerland*, 2007, the Court reiterated that the applicants, as an unmarried couple could not, under any circumstances, derive a right to adoption under Article 12 in a form for which there was no provision in law.

60. On the other hand, in *E.B. v. France* [GC], 2008, the Court examined under Article 14 of the Convention taken in conjunction with Article 8, a refusal to grant authorisation for adoption to a single, homosexual, person. It pointed out that, when domestic law allowed single persons to adopt a child, thereby opening up the possibility of adoption by a single homosexual, in rejecting the applicant’s application for authorisation to adopt, the domestic authorities made a distinction based on considerations regarding her sexual orientation, a distinction which was considered not acceptable under the Convention.

## C. Conjugal visits

61. There are specific obstacles to founding a family for persons deprived of their liberty. The Court has observed that more than half of the Contracting States allowed for conjugal visits for persons in places of detention, subject to a variety of different restrictions. However, while expressing its approval for the evolution towards conjugal visits in several European countries, the Court has, to date, not interpreted the Convention as requiring Contracting States to make provision for such visits. Accordingly, this is an area in which the Contracting States enjoy a wide margin of appreciation in determining the steps to be taken to ensure compliance with the Convention with due regard to the needs and resources of the community and of individuals (*Dickson v. the United Kingdom* [GC], 2007, §81).<sup>2</sup>

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<sup>2</sup> See [Guide on the case-law of the European Court of Human Rights – Prisoner’s rights](#).

## List of cited cases

The case-law cited in this Guide refers to judgments or decisions delivered by the Court and to decisions or reports of the European Commission of Human Rights (“the Commission”).

Unless otherwise indicated, all references are to a judgment on the merits delivered by a Chamber of the Court. The abbreviation “(dec.)” indicates that the citation is of a decision of the Court and “[GC]” that the case was heard by the Grand Chamber.

Chamber judgments that are not final within the meaning of Article 44 of the Convention are marked with an asterisk in the list below. Article 44 § 2 of the Convention provides: “The judgment of a Chamber shall become final (a) when the parties declare that they will not request that the case be referred to the Grand Chamber; or (b) three months after the date of the judgment, if reference of the case to the Grand Chamber has not been requested; or (c) when the panel of the Grand Chamber rejects the request to refer under Article 43”. In cases where a request for referral is accepted by the Grand Chamber panel, the Chamber judgment does not become final and thus has no legal effect; it is the subsequent Grand Chamber judgment that becomes final.

The hyperlinks to the cases cited in the electronic version of the Guide are directed to the HUDOC database (<http://hudoc.echr.coe.int>) which provides access to the case-law of the Court (Grand Chamber, Chamber and Committee judgments and decisions, communicated cases, advisory opinions and legal summaries from the Case-Law Information Note), and of the Commission (decisions and reports) and to the resolutions of the Committee of Ministers.

The Court delivers its judgments and decisions in English and/or French, its two official languages. HUDOC also contains translations of many important cases into more than thirty non-official languages, and links to around one hundred online case-law collections produced by third parties. All the language versions available for cited cases are accessible via the ‘Language versions’ tab in the HUDOC database, a tab which can be found after you click on the case hyperlink.

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