



Italy should introduce possibility of legal recognition for same-sex couples

In today's **Chamber** judgment¹ in the case of [Oliari and Others v. Italy](#) (application no. 18766/11 and 36030/11) the European Court of Human Rights held, unanimously, that there had been:

a violation of Article 8 (right to respect for private and family life) of the European Convention on Human Rights.

The case concerned the complaint by three homosexual couples that under Italian legislation they do not have the possibility to get married or enter into any other type of civil union.

The Court considered that the legal protection currently available to same-sex couples in Italy – as was shown by the applicants' situation – did not only fail to provide for the core needs relevant to a couple in a stable committed relationship, but it was also not sufficiently reliable. A civil union or registered partnership would be the most appropriate way for same-sex couples like the applicants to have their relationship legally recognised. The Court pointed out, in particular, that there was a trend among Council of Europe member States towards legal recognition of same-sex couples – 24 out of the 47 member States having legislated in favour of such recognition – and that the Italian Constitutional Court had repeatedly called for such protection and recognition. Furthermore, according to recent surveys, a majority of the Italian population supported legal recognition of homosexual couples.

Principal facts

The applicants are three homosexual couples: six Italian men who were born between 1959 and 1976 and live in Italy.

Mr Oliari and Mr A., who were in a committed stable relationship with each other, requested the Trent Commune Civil Status Office to issue their marriage banns in July 2008. Following the rejection of their request they challenged that decision before the Trent Tribunal, arguing that Italian law did not explicitly prohibit marriage between persons of the same sex and that even if that was the case, such a position would be unconstitutional. The Tribunal rejected their claim, noting that under the Civil Code one requirement for contracting marriage was that spouses be of the opposite sex. Following the applicants' appeal, the appeal court made a referral to the Constitutional Court with a view to their claims of unconstitutionality of the law in force. In April 2010, the Constitutional Court declared their constitutional challenge inadmissible, concluding that the right to marriage, as guaranteed by the Italian Constitution, did not extend to homosexual unions and was intended to refer to marriage in its traditional sense. At the same time, the court pointed out that it was for Parliament to regulate, in time and by the means and limits set by law, the juridical recognition of the rights and duties pertaining to same-sex couples. As a consequence of the Constitutional Court's judgment, the court of appeal rejected the applicants' claim in September 2010.

Mr Felicetti and Mr Zappa, who had been living together as a couple for more than five years, requested in February 2011 that their marriage banns be issued. In April 2011 their request was

1. Under Articles 43 and 44 of the Convention, this Chamber judgment is not final. During the three-month period following its delivery, any party may request that the case be referred to the Grand Chamber of the Court. If such a request is made, a panel of five judges considers whether the case deserves further examination. In that event, the Grand Chamber will hear the case and deliver a final judgment. If the referral request is refused, the Chamber judgment will become final on that day. Once a judgment becomes final, it is transmitted to the Committee of Ministers of the Council of Europe for supervision of its execution. Further information about the execution process can be found here: www.coe.int/t/dghl/monitoring/execution.

rejected. They did not pursue any legal remedies, considering that they would not be effective, having regard to the Constitutional Court's judgment of April 2010 in the case of Mr Oliari and Mr A.

Mr Cippo and Mr Zaccheo, who also had been living together as a couple for a number of years, requested their marriage bans to be issued in November 2009. Their request being rejected, they challenged that decision before the Milan Tribunal, which rejected their claim in June 2010. They did not appeal further, considering that it would not be effective, having regard to the Constitutional Court's judgment of April 2010.

Complaints, procedure and composition of the Court

All applicants complained that under Italian legislation they do not have the possibility to get married or enter into any other type of civil union, and that they are being discriminated against on the basis of their sexual orientation. They alleged violations of Article 8 (right to respect for private and family life) alone and Article 14 (prohibition of discrimination) in conjunction with Article 8, and of Article 12 (right to marry) alone and Article 14 (prohibition of discrimination) in conjunction with Article 12.

The applications were lodged with the European Court of Human Rights on 21 March and 10 June 2011 respectively.

The following organisations were given leave to intervene as third parties and submitted written observations (in accordance with Article 36 of the Convention): FIDH (*Fédération Internationale des ligues de Droit de l'Homme*), AIRE Centre (Advice on Individual Rights in Europe), ILGA-Europe (European Region of the International Lesbian, Gay, Bisexual, Trans and Intersex Association), ECSOL (European Commission on Sexual Orientation Law), UFTDU (*Unione forense per la tutela dei diritti umani*) and LIDU (*Lega Italiana dei Diritti dell'Uomo*), jointly; Associazione Radicale Certi Diritti; and ECLJ (European Centre for Law and Justice).

Judgment was given by a Chamber of seven judges, composed as follows:

Päivi **Hirvelä** (Finland), *President*,
Guido **Raimondi** (Italy),
Ledi **Bianku** (Albania),
Nona **Tsotsoria** (Georgia),
Paul **Mahoney** (the United Kingdom),
Faris **Vehabović** (Bosnia and Herzegovina),
Yonko **Grozev** (Bulgaria),

and also Françoise **Elens-Passos**, *Section Registrar*.

Decision of the Court

Article 8

In previous cases, the Court had already found that the relationship of a cohabiting same-sex couple living in a stable de facto partnership fell within the notion of "family life" within the meaning of Article 8. It had also acknowledged that same-sex couples were in need of legal recognition and protection of their relationship.² That need had moreover been underlined in recommendations by the Parliamentary Assembly and the Committee of Ministers of the Council of Europe, inviting member States to consider providing same-sex couples with some form of legal recognition.

² *Schalk and Kopf v. Austria* (30141/04), Chamber judgment of 24 June 2010 and *Vallianatos and Others v. Greece* (29381/09), Grand Chamber judgment of 7 November 2013

The Court considered that the legal protection currently available in Italy to same-sex couples – as was shown by the applicants’ situation – not only failed to provide for the core needs relevant to a couple in a stable committed relationship, but it was also not sufficiently reliable. Where registration of same-sex unions with the local authorities was possible – only in a small share of municipalities in Italy – this had merely symbolic value, as it did not confer any rights on same-sex couples.

As regards the possibility, since December 2013, to enter into “cohabitation agreements”, such contracts were limited in scope. They failed to provide for some basic needs which were fundamental to the regulation of a relationship between a couple in a stable and committed relationship, such as mutual material support, maintenance obligations and inheritance rights. The fact that cohabitation agreements were open to any set of people who were cohabiting, such as friends, flatmates or carers, showed that those agreements did not primarily aim to protect couples. Furthermore, such a contract required the couple concerned to be cohabiting, whereas the Court had already accepted that the existence of a stable union between partners was independent of cohabitation, given that many couples – whether married or in a registered partnership – experienced periods during which they conducted their relationship at long distance, for example for professional reasons.

Furthermore, the Italian Government had not proven that the national courts could issue a statement of recognition of a partnership. Since the law explicitly provided for the recognition of a same-sex partner only in very limited circumstances, even the most basic issues arising in a relationship had to be determined judicially. The Court considered that the necessity to repeatedly refer to the courts in these matters, especially in an overburdened justice system such as the one in Italy, amounted to a significant hindrance to the applicants’ efforts to obtain respect for their private and family life.

It followed from this situation that there was a conflict between the social reality of the applicants, who for the most part lived their relationship openly in Italy, and the law, which gave them no official recognition. In the Court’s view, an obligation to provide for the recognition and protection of same-sex unions would not amount to any particular burden on the Italian State. In the absence of marriage, the option of a civil union or registered partnership would be the most appropriate way for same-sex couples like the applicants to have their relationship legally recognised.

The Court noted that there was a trend among Council of Europe member States towards legal recognition of same-sex couples, 24 out of the 47 member States having legislated in favour of such recognition.

The highest courts in Italy – notably the Constitutional Court in its April 2010 judgment in the case of Mr Oliari and Mr A. – had repeatedly pointed out the need for legislation to recognise and protect same-sex relationships. However, the Italian legislature had for a long time failed to take account of those pronouncements. The Court observed that such calls by the Italian courts moreover reflected the sentiments of a majority of the Italian population who, according to recent surveys, supported legal recognition of homosexual couples. The Italian Government had not denied the need for legal protection of such couples and had failed to point to any community interests justifying the current situation.

Concluding that there was no prevailing community interest against which to balance the applicants’ interest to have their relationships legally recognised, the Court found that Italy had failed to fulfil its obligation to ensure that the applicants had available a specific legal framework providing for the recognition and protection of their union. To find otherwise, the Court would have had to be unwilling to take note of the changing conditions in Italy and be reluctant to apply the Convention in a way which was practical and effective.

There had accordingly been a violation of Article 8.

Having regard to that finding, the Court considered it unnecessary to examine whether there had also been a violation of Article 14 in conjunction with Article 8.

Other articles

As regards the complaint under Article 12 (right to marry) alone and in conjunction with Article 14, the Court had found, in previous cases, that Article 12 did not impose an obligation on States to grant a same-sex couple like the applicants access to marriage. It considered that despite the gradual evolution of States on the matter – today there were eleven member States of the Council of Europe to have recognised same-sex marriage – the findings reached in those previous cases remained pertinent. The Court accordingly declared the complaint under Article 12 alone and in conjunction with Article 14 inadmissible.

Just satisfaction (Article 41)

The Court held that Italy was to pay each of the applicants 5,000 euros (EUR) in respect of non-pecuniary damage; it was to pay to Mr Oliari and Mr A. jointly EUR 4,000, and to Mr Felicetti, Mr Zappa, Mr Cippo and Mr Zaccheo jointly EUR 10,000 in respect of costs and expenses.

Separate opinion

Judge Mahoney, joined by Judges Tsotsoria and Vehabović, expressed a concurring opinion, which is annexed to the judgment.

The judgment is available only in English.

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The European Court of Human Rights was set up in Strasbourg by the Council of Europe Member States in 1959 to deal with alleged violations of the 1950 European Convention on Human Rights.