



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

FIRST SECTION

**CASE OF ORLANDI AND OTHERS v. ITALY**

*(Applications nos. 26431/12; 26742/12; 44057/12 and 60088/12)*

JUDGMENT

STRASBOURG

14 December 2017

**FINAL**

**14/03/2018**

*This judgment has become final under Article 44 § 2 of the Convention. It may be subject to editorial revision.*



**In the case of Orlandi and Others v. Italy,**

The European Court of Human Rights (First Section), sitting as a Chamber composed of:

Kristina Pardalos, *President*,

Guido Raimondi,

Aleš Pejchal,

Krzysztof Wojtyczek,

Ksenija Turković,

Pauliine Koskelo,

Jovan Ilievski, *judges*,

and Abel Campos, *Section Registrar*,

Having deliberated in private on 12 September and 14 November 2017,

Delivers the following judgment, which was adopted on the last-mentioned date:

**PROCEDURE**

1. The case originated in four applications (nos. 26431/12, 26742/12, 44057/12 and 60088/12) against the Italian Republic lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by eleven Italian nationals and one Canadian national, namely Ms Francesca Orlandi and Ms Elisabetta Mortagna, Mr D.P. and Mr G.P., Mr Mario Isita and Mr Grant Bray, Mr Gianfranco Goretti and Mr Tommaso Giartosio, Mr Fabrizio Rampinelli and Mr Alessandro Dal Molin, and Mr Antonio Garullo and Mr Mario Ottocento (“the applicants”), on 20 April 2012, 6 July 2012, and 11 September 2012 respectively (see Annex for details).

2. The applicants in application no. 60088/12 were represented by Mr Francesco Bilotta, Mr Antonio Rotelli, Ms Maria Federica Moscati and Mr Raffaele Torino; the remaining applicants were represented by Ms Maria Elisa D’Amico, Mr Massimo Clara, Mr Cesare Pitea, and Ms Chiara Ragni, all lawyers practising in Italy. The Italian Government (“the Government”) were represented by their Agent, Ms Ersiliagrazia Spatafora.

3. The applicants alleged that the authorities’ refusal to register their marriages contracted abroad, and more generally the impossibility of obtaining legal recognition of their relationship, in so far as the Italian legal framework did not allow for marriage between persons of the same sex nor did it provide for any other type of union which could give them legal recognition, breached their rights under Articles 8, 12 and 14.

4. On 3 December 2013 the Chamber to which the case was allocated decided that the complaints under Article 8 alone and Article 14 in conjunction with Articles 8 and 12 were to be communicated to the Government. It further decided to join the cases. On the same day it decided

to grant anonymity to two of the applicants in application no. 26431/12 under Rule 47 § 3 of the Rules of Court.

5. Written observations were also received from FIDH, AIRE Centre, ILGA-Europe, ECSOL, UFTDU and UDU jointly, as well as from the Associazione Radicale Certi Diritti, the Helsinki Foundation for Human Rights, Alliance Defending Freedom, and ECLJ (European Centre for Law and Justice), which had been given leave to intervene by the Vice-President of the Chamber (Article 36 § 2 of the Convention). Mr Pavel Parfentev on behalf of seven Russian NGOS (Family and Demography Foundation, For Family Rights, Moscow City Parents Committee, Saint-Petersburg City Parents Committee, Parents Committee of Volgodonsk City, Regional Charity Social Organization Parent's Culture Centre "Svetlitsa", and social organization "Peterburgskie mnogodetki") and three Ukrainian NGOS (the Parental Committee of Ukraine, the Orthodox Parental Committee, and the social organisation Health Nation), had also been given leave to intervene by the Vice-President of the Chamber. However, no submissions have been received by the Court.

6. On 15 December 2016 the President of the Section to which the case was allocated requested the applicants, under Rule 54 § 2 (a) of the Rules of Court, to submit factual information.

7. By letters of 29 December 2016, 30 January 2017 and 7 April 2017, the applicants in applications nos. 26431/12, 26742/12, 44057/12 submitted their reply, which was sent to the Government for information.

8. The letter of request sent to the applicants' legal representative in application no. 60088/12, as well as a subsequent letter, returned to the Court undelivered.

9. By a letter of 24 June 2017 the Government submitted a factual update which was transmitted to the applicants for information.

## THE FACTS

### I. THE CIRCUMSTANCES OF THE CASE

10. The applicants' details can be found in the Annex.

#### **A. The background to the case**

##### *1. Ms Francesca Orlandi and Ms Elisabetta Mortagna*

11. These two applicants met in February 2007, and in 2009 they entered into a stable and committed relationship with each other.

12. On 11 October 2009 Ms Mortagna moved to Toronto, Ontario, Canada for work purposes. A month later the two applicants decided to get married and on 27 August 2010 they married in Toronto.

13. In the meantime, on 2 April 2010, Ms Mortagna's employment came to an end and as a result she was no longer entitled to a residence permit. She therefore returned to Italy and since then has been cohabiting with Ms Orlandi.

14. On 18 April 2011 their physical cohabitation was registered and since then they have been considered as a family unit for statistical purposes.

15. On 9 September 2011 the two applicants asked the Italian Consulate in Toronto to transmit to the Civil Status Office in Italy the relevant documents for the purposes of registration of their marriage.

16. On 8 November 2011 the relevant documents were transferred.

17. On 13 December 2011 the Commune of Ferrara informed the two applicants that it was not possible to register their marriage. The decision noted that the Italian legal order did not allow marriage between same-sex couples, and that although the law did not specify that couples had to be of the opposite sex, doctrine and jurisprudence had established that Article 29 of the Constitution referred to the traditional concept of marriage, understood as being a marriage between persons of the opposite sex. Thus, the spouses being of different sex was an essential element to qualify for marriage. Moreover, according to Circular no. 2 of 26 March 2001 of the Ministry of Internal Affairs, a marriage contracted abroad between persons of the same sex, one of whom was Italian, could not be registered in so far as it was contrary to the norms of public order.

## 2. *Mr D.P. and Mr G.P.*

18. These two applicants, who live in Italy, met in 2007 and entered into a stable and committed relationship with each other.

19. On 9 January 2008 they started cohabiting in G.P.'s apartment, although D.P. maintained formal residence in his own apartment. In 2009 G.P. purchased a second property which, in the absence of any legal recognition, for practical and fiscal reasons remained in his name only. In 2010 G.P. purchased, through a mandate in the name of D.P. (for the purposes of purchasing such property), a garage. In June 2011 the couple moved into D.P.'s apartment and established their home there. They have since been considered as a family unit for statistical purposes.

20. On 16 August 2011 the two applicants got married in Toronto, Ontario, Canada. On 10 October 2011 they opened a joint bank account. On 12 January 2012, before a notary, the two applicants appointed each other reciprocally as guardians in the event of incapacitation (*amministratore di sostegno*).

21. Following the applicants' request, on 7 January 2012, the Italian Consulate in Toronto transmitted to the Civil Status Office in Italy the relevant documents for the purposes of registration of their marriage.

22. On 20 January 2012, the Commune of Peschiera Borromeo informed the two applicants that it was not possible to register their marriage. The decision noted that the Italian legal order did not allow marriage between same-sex couples. Moreover, according to Circular no. 2 of 26 March 2001 of the Ministry of Internal Affairs, a marriage contracted abroad between persons of the same sex, one of whom was Italian, could not be registered in so far as it was contrary to the norms of public order.

23. Following the entry into force of the new law (see paragraph 97 below), on 12 September 2016 the two applicants requested that their marriage be transcribed as a civil union. According to the applicants' submissions of 30 January 2017 their request was still pending and no reply had yet been received.

24. According to documents dated 31 March 2017 submitted to this Court in June 2017, by the Government, the applicants' marriage was transcribed as a civil union on 21 November 2016. A certification of this registration, submitted by the Government, is dated 16 May 2017.

### *3. Mr Mario Isita and Mr Grant Bray*

25. The two applicants met in Italy in 2002 and entered into a stable and committed relationship with each other. Mr Bray, who is Canadian, did not have a residence permit in Italy at the time, Mr Isita therefore travelled repeatedly to Canada.

26. On 18 July 2005 the couple married in Vancouver, Canada. In the same year Mr Isita designated Mr Bray as his heir. In 2007 Mr Isita retired and moved to Canada permanently, although he maintained formal residence in Italy.

27. In 2004 the two applicants had purchased some land together; in 2007 the couple purchased a further piece of land, and in 2008 they purchased a house and in 2009 a commercial property with an annexed cottage. In 2009 they also opened a joint bank account.

28. On 10 October 2011 they asked the Civil Status Office to register their marriage contracted in Canada.

29. On 25 November 2011 the Commune of Naples informed the two applicants that no such registration was possible. The decision noted that the Italian legal order did not allow marriage between same-sex couples as reiterated in Circular no. 55 of 2007 issued by the Ministry of Internal Affairs.

30. Following guidance from the Mayor of Naples, directing the Civil Status Office of the commune to register such marriages (see below), Mr Mario Isita and Mr Grant Bray re-submitted an application to have their marriage registered. According to information sent to the applicants by

email, their request was granted on 6 August 2014. However, further to the circular issued on 7 October 2014 by the Ministry of Internal Affairs (see paragraph 89 below) the registration was cancelled on an unspecified date.

31. On an unspecified date, following the entry into force of the new law, the two applicants requested that their marriage be transcribed as a civil union. According to the applicants' submissions of 30 January 2017 their request was still pending and no reply had yet been received.

32. According to undated documents submitted to this Court in June 2017, by the Government, the applicants' marriage was transcribed as a civil union on 27 October 2016. A certification of this registration, submitted by the Government, is dated 29 March 2017.

#### 4. *Mr Gianfranco Goretti and Mr Tommaso Giartosio*

33. These two applicants met in October 1995, and a month later entered into a stable and committed relationship with each other.

34. In 1996 Mr Giartosio purchased a house in Rome, Italy and in spring 1998 the two applicants started to cohabit there. There they established their common residence.

35. In 1998 the two applicants symbolically celebrated their union before their friends and family. In 2001 Mr Giartosio allowed limited access to his bank account in favour of Mr Goretti. In 2005 the two applicants drafted wills nominating each other as each other's heirs.

36. On 9 September 2008 the two applicants got married in Berkeley, California.

37. In 2009 the applicants purchased property together and opened a joint bank account.

38. Following their request of the same day, on 29 September 2011 the Commune of Rome informed the applicants that the registration of their marriage was not possible, as it was contrary to the norms of public order.

39. On 1 October 2011 the couple filed a declaration with the Rome "Registry of civil unions" to the effect that they were entering into a civil union and constituting a *de facto* couple. The declaration is acknowledged by the relevant authorities, but has only symbolic value (see relevant domestic law and practice below).

40. Following guidance from the Mayor of Rome directing the Civil Status Office of the commune to register such marriages (see below), on 15 October 2014 Mr Gianfranco Goretti and Mr Tommaso Giartosio re-submitted an application to have their marriage registered. Their request was also granted and the marriage was registered. However, further to the circular issued on 7 October 2014 by the Ministry of Internal Affairs (see paragraph 89 below) by a decision of the Prefect of Rome of 31 October 2014 the above-mentioned registration was cancelled.

41. On 23 November 2016, following the entry into force of the new law and their request to that effect, the applicants' marriage was transcribed as a civil union.

*5. Mr Fabrizio Rampinelli and Mr Alessandro Dal Molin*

42. These two applicants met in July 1993 and immediately entered into a committed and stable relationship with each other. A few weeks later Mr Dal Molin moved in with Mr Rampinelli in La Spezia, Italy.

43. In 1997 the couple moved to Milan, Italy.

44. In 1998 Mr Rampinelli moved to Germany for employment purposes, maintaining a long-distance relationship with Mr Dal Molin; however they met every week.

45. In 1998 Mr Dal Molin purchased a property in Milan with financial assistance from Mr Rampinelli.

46. In 2000 Mr Rampinelli returned to Italy; the couple moved to Mediglia and continued cohabiting.

47. In 2007 Mr Rampinelli moved to the Netherlands, again for work purposes, maintaining however, a long-distance relationship with regular weekly visits to Italy.

48. After being in a relationship for fifteen years, on 12 July 2008 the couple got married in Amsterdam, the Netherlands. In November 2008 the couple opened a joint bank account.

49. In 2009 Mr Dal Molin left his job in Italy and moved to the Netherlands. As he was unemployed, he was totally dependent on his spouse. Mr Rampinelli also supported financially Mr Dal Molin's mother, a victim of Alzheimer's disease. They are under a system of separation of estates; however, their accounts are in joint names and their wills indicate each other as heirs.

50. On 28 October 2011 the applicants requested the General Consulate in Amsterdam to transmit to the respective Civil Status Offices in Italy the relevant documents for the purposes of registration of their marriage.

51. On 29 November 2011 the Commune of Mediglia informed the applicants that the registration of their marriage was not possible, as it was contrary to the norms of public order. No reply was received from the Commune of Milan.

52. Following the guiding decision by the Mayor of Milan, mentioned above, the applicants also re-submitted an application to have their marriage registered. According to the information provided by the applicants on 30 January 2017, their marriage was never registered.

53. However, on 4 October 2016, following the entry into force of the new law and their request to that effect, the applicants' marriage was transcribed as a civil union.



6. *Mr Antonio Garullo and Mr Mario Ottocento*

54. The two applicants married in The Hague on 1 June 2002.

55. On 12 March 2004, the applicants being resident in Latina, Italy, they requested the Civil Status Office to register their marriage contracted abroad.

56. On 11 August 2004 their request was rejected in accordance with the advice of the Ministry of Internal Affairs of 28 February 2004. The decision noted that the Italian legal order did not provide for the possibility of two Italian nationals of the same sex contracting marriage; this was a matter contrary to internal public order.

57. On 19 April 2005 the applicants lodged proceedings before the competent Tribunal of Latina, requesting the registration of their marriage in the light of DPR 396/2000 (see relevant domestic law below).

58. By a decision of 10 June 2005 the Latina Tribunal rejected the applicants' claim. It noted that the registration of the marriage was not possible, because if such a marriage had been contracted in Italy it would not have been considered valid according to the current state of the law, as it failed to fulfil the most basic requirement, that of having a female and a male. In any event, the marriage contracted by the applicants had no consequence in the Italian legal order in so far as a marriage between two persons of the same sex, although validly contracted abroad, ran counter to international public order. Indeed same-sex marriage was in contrast with Italy's history, tradition and culture, and the fact that so few European Union (EU) countries had provided such legislation went to show that it was not in line with the common principles of international law.

59. An appeal by the applicants was rejected by a decision of the Rome Court of Appeal, filed in the relevant registry on 13 July 2006. The Court of Appeal noted that such registration could not take place, given that their marriage lacked one of the essential requisites to amount to the institution of marriage in the domestic order, namely the spouses being of different sexes.

60. On 17 July 2007 the two applicants appealed to the Court of Cassation. In particular they highlighted, *inter alia*, that public order referred to in Article 18 of Law no. 218/95, had to be interpreted as international public order not national public order, and thus it had to be established whether same-sex marriage was against that order, in the light of international instruments.

61. By a judgment of 15 March 2012 (no. 4184/12) the Court of Cassation rejected the appeal and confirmed the previous judgment. Noting the Court's case-law in *Schalk and Kopf v. Austria*, (no. 30141/04, ECHR 2010) it acknowledged that a marriage contracted abroad by two persons of the same sex was indeed existent and valid, however, it could not be registered in Italy in so far as it could not give rise to any legal consequence.

62. The Court of Cassation referred to its case-law, to the effect that civil marriages contracted abroad by Italian nationals had immediate validity in the Italian legal order as a result of the Civil Code and international private law. This would be so in so far as the marriage had been contracted in accordance with the laws of the foreign state in which it had been contracted, and that the relevant substantive requirements concerning civil status and the capacity to marry (according to Italian law) subsisted, irrespective of any non-observance of Italian regulations regarding the issuing of the banns or the subsequent registration. The former were subject solely to administrative sanctions and the latter were not conducive of any legal effects – since registration had the mere significance of giving publicity to a deed or act which was already valid on the basis of the *locus regit actum* principle. Thus, had the marriage been contracted by persons of the opposite sex, in the absence of any other fundamental requirements it would have been valid and conducive of legal effects in the Italian legal order. In that case the Civil Status Officer would have no option but to register the marriage. However, the case-law had shown that the opposite sex of the spouses was the most indispensable requirement for the “existence” of a marriage as a legally relevant act, irrespective of the fact that this was not stated anywhere explicitly in the relevant laws. Thus, the absence of such a requirement placed in question not only the validity of the marriage, but its actual existence, meaning that it would not be conducive to any legal effects (as opposed to a nullity). It followed that according to the ordinary law of the land, two same-sex spouses had no right to have their marriage contracted abroad registered.

63. The Court of Cassation considered that the said refusal could not be based on the ground that such a marriage ran counter to public order (as dictated by the relevant circulars), but that the refusal was simply a consequence of the fact that it could not be recognised as a marriage in the Italian legal order.

64. The Court of Cassation went on to note that the social reality had changed, yet the Italian order had not granted same-sex couples the right to marry as concluded in the Court of Cassation judgment no. 358/10 (which it cited extensively). Indeed the question whether or not to allow same-sex marriage, or the registration thereof, was not a matter of EU law, it being left to regulation by Parliament. However, the Italian legal order was also made up of Article 12 of the Convention as interpreted by the European Court of Human Rights in *Schalk and Kopf* (cited above); in that case the Court considered that the difference of sex of spouses was irrelevant, legally, for the purposes of marriage. It followed that, irrespective of the fact that it was a matter to be dealt with by the national authorities, it could no longer be a prerequisite for the “existence” of marriage. Moreover, the Court of Cassation noted that persons of the same sex living together in a stable relationship had the right to respect for their private and family life

under Article 8 of the Convention; therefore, even if they did not have the right to marry or to register a validly contracted marriage abroad, in the exercise of the right to freely live with the inviolable status of a couple, they could bring actions before the relevant courts to claim, in specific situations related to their fundamental rights, treatment which was uniform with that afforded by law to married couples.

65. In conclusion, the Court of Cassation found that the claimants had no right to register their marriage. However, this was so not because the marriage did not “exist” or was “invalid” but because of its inability to produce (as a marriage deed) any legal effect in the Italian order.

## II. DOMESTIC LAW AND PRACTICE

### A. Private international law

66. Law no. 218 of 31 May 1995 regarding the reform of the Italian system of private international law, in so far as relevant, reads as follows:

#### Article 16

“i) Foreign law shall not be applied if its effects are contrary to public order.

ii) In such cases, another law shall apply, in accordance with other connecting criteria provided in relation to the same subject matter. In the absence of any such connecting criteria, Italian law shall apply.”

#### Article 17

“The following provisions are without prejudice to the prevalence of Italian laws which in view of their object and scope shall be applied notwithstanding reference to the foreign law.”

#### Article 18

“Legal certificates released abroad shall not be registered in Italy if they are against public order.”

#### Article 27

“Capacity to enter into marriage and other conditions required to enter into marriage are regulated by the national law of each spouse at the time of the marriage, this without prejudice to the unmarried status (*stato libero*) of any of the spouses, obtained as a result of an Italian judgment or one which has been recognised in Italy.”

#### Article 28

“A marriage is valid, in relation to form, if it is considered as such by the law of the country where it is celebrated or by the national law of at least one of the spouses at the time of the marriage or by the law of the common state of residence at the time of the marriage.”

**Article 29**

“i) Personal relations between spouses are regulated by the national law common to both parties.

ii) Personal relations between spouses who have different nationalities or several nationalities common to both are regulated by the law of the state where their matrimonial life is mostly spent.”

**Article 65**

“Foreign documents concerning the status of individuals and the existence of family relations are recognised under Italian law if released by public authority of the State whose law is recognised by the present law ... unless those documents violate the public order...”

**B. The Civil Code**

67. Title VI of the First Book of the Civil Code deals with marriage, and is divided into six chapters (which are again divided into sections). Chapter III deals with the celebration of a civil marriage. Its Articles 115 and 130, in so far as relevant, read as follows:

**Article 115**

“A citizen is subject to the provisions of section one [conditions to contract marriage] of this Chapter even when contracting marriage in a foreign state according to the form applicable in such foreign state ...”

**Article 130**

“Nobody is entitled to claim the title of spouse and the legal consequences of marriage unless a certified copy of the celebration as recorded in the family registers is presented.”

**Article 131**

“A factual reality reflecting the recognition by society of a civil status, which is in conformity with the marriage deed, sanctions any defect of form present in the marriage deed.”

68. Other pertinent provisions of the Civil Code read, in so far as relevant, as follows:

**Article 167**

“Each or both spouses may by public deed, or a natural third person may by means of a will, create a patrimonial fund for the needs of the family, assigning selected property, real estates or other goods which are recorded in the official Italian registers, or bonds.”

**Article 230 bis**

“1. In the absence of contractual relationships, family members who work permanently for the family business are entitled to maintenance, to the financial

increments of the business, and to a share in the business, according to the type and standard of work done.

3. The notion of family member includes: the spouse, relatives within the third degree, and in-laws within the second degree. A family business is a business in which the spouse, relatives within the third degree, and in-laws within the second degree, work.”

#### **Article 408**

“... A guardian in the event of incapacity may be chosen by the interested person, by means of a public deed or an authenticated private deed.”

#### **Article 540**

“The surviving spouse is entitled to half of the entire estate of the deceased, subject to the provisions of Article 542 if there are surviving children.

Irrespective of whether there are any siblings or parents of the deceased, the surviving spouse is entitled to live in the family house and to use its furniture, whether it is their common possession or solely belongs to the deceased.”

#### **Article 1321**

“A contract is an agreement between two or more parties with the intent to establish, regulate or extinguish a patrimonial relationship between them.”

#### **Article 1372**

“Obligations arising from contracts have the force of law between the contracting parties ... They have no effects on third parties unless so provided by law.”

### **C. Decree no. 396/2000**

69. Registration of civil status acquired abroad is provided for by the Decree of the President of the Republic no. 396 of 3 November 2000 entitled “Regulation of the revision and simplification of the legal order of civil status pursuant to Article 2 (12) of Law no. 127 of 15 May 1997” (DPR 396/2000). Its Article 16, regarding marriages contracted abroad, reads as follows:

“When both spouses are Italian nationals or one is an Italian national and the other a foreigner, a marriage abroad may be contracted before the competent diplomatic or consular authorities or before the local authorities according to the law of the place. In the latter case a copy of the marriage deed shall be deposited with the diplomatic and consular authority.”

70. Article 17 relates to the transmission of the deed, and according to Article 18 deeds contracted abroad may not be registered if they are contrary to public order.

71. For the purposes of guidance on the application of DPR 396/2000 the Ministry of Internal Affairs issued various circulars. Circular no. 2 of 26 March 2001 of the Ministry of Internal Affairs expressly provided that a

marriage between two persons of the same sex, contracted abroad, cannot be registered in the Civil Status Registry in so far as it is contrary to the norms of public order. Similarly, Circular no. 55 of 18 October 2007 provided that the Italian legal order does not allow homosexual marriage, and a request for registration of such a marriage contracted abroad must be refused, it being considered contrary to the internal public order. These circulars are binding on the Officer for Civil Status, who is competent to ascertain that the requisites of law are fulfilled for the purposes of registration.

72. In the Italian legal order marriage registration does not produce any ulterior legal effects (*non ha natura costitutiva*); it serves the purpose of acknowledgment in the public domain (*significato certificativo, efficacia dichiarativa*) in so far as it gives publicity to a deed or act which is already valid on the basis of the *locus regit actum* principle (the rule providing that, when a legal transaction which complies with the formalities required by the law of the country where it is carried out is also valid in the country where it is to be given effect).

#### **D. Domestic jurisprudence**

##### *1. Marriage (and civil unions)*

73. Extracts from relevant judgments read as follows:

##### **Decision of 3 April 2009 of the Venice Tribunal**

“The difference of sex constitutes an indispensable prerequisite, fundamental to marriage, to such an extent that the opposite hypothesis, namely that of persons of the same sex, is legally inexistent and certainly extraneous to the definition of marriage, at least in the light of the current legal framework.”

##### **Rome Court of Appeal decision of 13 July 2006 and Treviso Tribunal decision of 19 May 2010**

“[Marriage between two persons of the same sex] may not be registered in the Italian Civil Status Registry because it does not fulfil one of the essential requisites necessary for marriage in the internal order, namely the difference of sex of the spouses.”

##### **Constitutional Court judgment no. 138/2010**

74. The Italian Constitutional Court in its judgment no. 138 of 15 April 2010 declared inadmissible the constitutional challenge (submitted by persons in a similar situation to those of the applicants) to Articles 93, 96, 98, 107, 108, 143, 143 *bis* and 231 of the Italian Civil Code, as it was directed to the obtainment of additional norms not provided for by the Constitution (*diretta ad ottenere una pronnuncia additiva non costituzionalmente obbligata*). The case had been referred to it by the ordinary courts in the ambit of a procedure challenging the refusal of the authorities to issue marriage banns for the claimants' same-sex marriage.

75. The Constitutional Court considered Article 2 of the Italian Constitution, which provided that the Republic recognises and guarantees the inviolable rights of the person, as an individual and in social groups where personality is expressed, as well as the duties of political, economic and social solidarity against which there was no derogation. It noted that by social group one had to understand any form of community, simple or complex, intended to enable and encourage the free development of any individual by means of relationships. Such a notion included homosexual unions, understood as a stable cohabitation of two people of the same sex, who have a fundamental right to freely express their personality in a couple, obtaining – in time and by the means and limits to be set by law – a juridical recognition of the relevant rights and duties. However, this recognition, which necessarily requires general legal regulation, aimed at setting out the rights and duties of the partners in a couple, could be achieved in other ways apart from the institution of marriage between homosexuals. As shown by the different systems in Europe, the question of the type of recognition was left to regulation by Parliament, in the exercise of its full discretion. Nevertheless, the Constitutional Court clarified that without prejudice to Parliament’s discretion, it could however intervene according to the principle of equality in specific situations related to a homosexual couple’s fundamental rights, where the same treatment between married couples and homosexual couples was called for. The court would in such cases assess the reasonableness of the measures.

76. It went on to consider that it was true that the concepts of family and marriage could not be considered “crystallised” in reference to the moment when the Constitution came into effect, given that constitutional principles must be interpreted bearing in mind the changes in the legal order and the evolution of society and its customs. Nevertheless, such an interpretation could not be extended to the point where it affects the very essence of legal norms, modifying them in such a way as to include phenomena and problems which had not been considered in any way when it was enacted. In fact it appeared from the preparatory work to the Constitution that the question of homosexual unions had not at all been debated by the assembly, despite the fact that homosexuality was not unknown. In drafting Article 29 of the Constitution, the assembly had discussed an institution with a precise form and an articulate discipline provided for by the Civil Code. Thus, in the absence of any such reference, it was inevitable to conclude that what had been considered was the notion of marriage as defined in the Civil Code, which came into effect in 1942 and which at the time, and still today, established that spouses had to be of the opposite sex. Therefore, the meaning of this constitutional precept could not be altered by a creative interpretation. In consequence, the constitutional norm did not extend to homosexual unions, and was intended to refer to marriage in its traditional sense.

77. Lastly, the court considered that, in respect of Article 3 of the Constitution regarding the principle of equality, the relevant legislation did not create an unreasonable discrimination, given that homosexual unions could not be considered equivalent to marriage. Even Article 12 of the European Convention on Human Rights and Article 9 of the Charter of Fundamental Rights did not require full equality between homosexual unions and marriages between a man and a woman, as this was a matter of Parliamentary discretion to be regulated by national law, as evidenced by the different approaches existing in Europe.

78. Similarly, the Italian Constitutional Court, in its judgments nos. 276/2010 of 7 July 2010 filed in the registry on 22 July 2010, and 4/2011 of 16 December 2010 filed in the registry on 5 January 2011, declared manifestly ill-founded claims that the above-mentioned articles of the Civil Code (in so far as they did not allow marriage between persons of the same sex) were not in conformity with Article 2 of the Constitution. The Constitutional Court reiterated that juridical recognition of homosexual unions did not require a union equal to marriage, as shown by the different approaches undertaken in different countries, and that under Article 2 of the Constitution it was for the Parliament, in the exercise of its discretion, to regulate and supply guarantees and recognition to such unions.

79. Generally, domestic jurisprudence until 2012 seemed to indicate that the impossibility of registering a homosexual marriage contracted abroad was a result of the fact that it could not be considered a marriage. However, this line of jurisprudence was put aside in the Court of Cassation judgment no. 4184/12 (in the case of the applicants) concerning the refusal of registration of same-sex marriages contracted abroad, and a further development occurred in 2014, as follows:

**Court of Cassation judgment no. 4184/2012**

80. See paragraphs 61-65 above

**Judgment of the Tribunal of Grosseto of 3 April 2014**

81. In the mentioned judgment, delivered by a court of first instance, it was held that the refusal to register a foreign marriage was unlawful. The court thus ordered the competent public authority to proceed with its registration. While the order was being executed, the case was appealed against by the State. By a judgment of 19 September 2014 the Court of Appeal of Florence, having detected a procedural error, quashed the first-instance decision and remitted the case to the Tribunal of Grosseto. By a first-instance decision of 2 February 2015 the Tribunal of Grosseto again ordered the competent public authority to proceed with its registration.



**Proceedings leading to the Court of Cassation judgment no. 2487/2017**

82. On an unspecified date a certain GLD and RLH (a same-sex couple, one of whom was an Italian national) had requested their marriage contracted in France to be registered in the Civil Status Office of the relevant commune. However, the relevant mayor had refused their request. The couple instituted proceedings against such a decision, but were unsuccessful before the first-instance Tribunal of Avellino.

83. By decree no. 1156, filed in the relevant registry on 8 July 2015, the Milan Court of Appeal found in favour of the claimants. Referring to the judgments of the Court of Cassation nos. 4148 of 2012 and 8097 of 2015, the Court of Appeal considered that since the marriage had been validly contracted in France, it could not be weakened because of a move to Italy, which would be discriminatory and would entail a breach of Article 12 of the Convention, as well as a breach of the right to free movement under European Union law. The Court of Appeal noted that the matter was regulated by Article 19 of legislative decree no. 396/2000 concerning registration of marriages contracted abroad, given that Article 28 of Law no. 218/1995 provided that a marriage was valid in respect of form if it is so considered in accordance with the laws of the country where it was contracted. It reiterated the principle that the same sex of the couple does not go against (*non costituisce un limite*) public order, be it national or international.

84. The judgment became final on 15 July 2016 given that the Court of Cassation in its judgment no. 2487/2017 of 31 January 2017 found that the appeals had not been lodged according to the relevant procedures.

**2. Other relevant case-law****Judgment of the Tribunal of Reggio Emilia of 13 February 2012**

85. In a case before the Tribunal of Reggio Emilia [at first-instance], the claimants (a same-sex couple) had not requested the tribunal to recognise their marriage entered into in Spain, but to recognise their right to family life in Italy, on the basis that they were related. The Tribunal of Reggio Emilia, by means of an ordinance of 13 February 2012, in the light of the EU directives and their transposition into Italian law, as well as the EU Charter of Fundamental Rights, considered that such a marriage was valid for the purposes of obtaining a residence permit in Italy.

**Constitutional Court judgment no. 170/14 of 11 June 2014**

86. Judgment no. 170/14 of the Constitutional Court found a breach of the Constitution, as a result of the legally obligatory termination of a marriage, and the impossibility of the partners in that case (who had become same-sex partners following gender reassignment of one of the partners) to obtain an alternative recognition of their union. In that case the

Constitutional Court also left to the legislature the task of urgently enacting another form of registered cohabitation, one which would protect the couple's rights and obligations.

**Court of Cassation judgment no. 8097/2015**

87. In the light of the findings of the Constitutional Court judgment no. 170/14 of 11 June 2014, the Court of Cassation held that it was necessary to maintain in force the rights and obligations pertaining to the marriage (after one of the spouses had changed sex) until the legislator provided for an alternative means of recognition.

**Judgment of the Court of Cassation no. 2400/15**

88. In a case concerning the refusal to issue marriage bans to a same-sex couple who had so requested, the Court of Cassation, in its judgment of 9 February 2015, rejected the claimants' request. Having considered recent domestic and international case-law, it concluded that - while same-sex couples had to be protected under Article 2 of the Italian Constitution and that it was for the legislator to take action to ensure recognition of the union between such couples - the absence of same sex-marriage was not incompatible with the applicable domestic and international system of human rights. Accordingly, the lack of same sex-marriage could not amount to discriminatory treatment, as the problem in the current legal system revolved around the fact that there was no other available union apart from marriage, be it for heterosexual or homosexual couples. However, it noted that the court could not establish through jurisprudence matters which went beyond its competence.

**E. The recent progress of marriage registrations**

89. Following decisions of some mayors (including the mayors of Bologna, Naples, Rome and Milan) to register same-sex marriages validly contracted abroad, by a circular issued on 7 October 2014 by the Ministry of Internal Affairs, addressed to the Prefects of the Republic, the Government Commissioners of the Provinces of Bolzano and Trento, and the President of the Regional Government of Val D'Aosta, the following instruction was issued:

“Where mayors have issued directives concerning the registration of same-sex marriages issued abroad, and in the event that these directives have been enforced, you are requested to formally invite such mayors to withdraw such directives and cancel any such registrations which have already taken effect. At the same time you should warn them that in the absence of any action on their part the acts illegitimately affected will be annulled *ex officio* in accordance with the provisions of Article 21 *nonies* of Law no. 241 of 1990 and Article 54 (3) and (11) of legislative decree 267/2001.”

90. By a first-instance judgment no. 3907 of 12 February 2015 filed in the relevant registry on 9 March 2015, the Administrative Tribunal of Rome, Lazio, reiterating that there existed no right to have registered same-sex marriages contracted abroad (and therefore confirming the legitimacy of the content of the circular of 7 October 2014), nevertheless declared the above order of 7 October 2004 null and void. Having examined the relevant legal framework, it considered that the Central Administrative Authority and Prefects were not competent to order the annulment of any such registrations, such competence being reserved solely to the judicial authorities.

91. This decision was overturned on appeal by the Supreme Administrative Court in its judgment of 8 October 2015, filed in the relevant registry on 26 October 2015.

92. The court noted that Article 27 and 28 of Law no. 218 of 31 May 1995 provided that the subjective conditions for the validity of a marriage are to be regulated by the national law of each spouse to be, and that a marriage is valid, in respect of its form, if it is considered to be valid according to the law of the place where it has been celebrated or the national law of at least one of the spouses. Furthermore, Article 115 of the Civil Code explicitly subjected Italian nationals to the relevant civil laws in relation to the conditions necessary to contract marriage, even if the marriage is contracted abroad. A combined reading of those provisions demands the identification of the mandatory substantive requirements (particularly, the status and capacity of the spouses-to-be) which would allow such a marriage to produce its ordinary legal effects in the national legal order. The difference in sex of the spouses to be was the first condition for the validity of a marriage according to the relevant articles of the civil code, and in line with the long cultural and legal tradition of the institution of marriage. It followed that same-sex marriage was devoid of one of the essential elements enabling it to produce any legal effect in the Italian legal order.

In consequence, a State official whose duty it is to ensure (before registering a marriage) that all the formal and substantive requirements have been fulfilled, would be unable to register a same-sex marriage contracted abroad in so far as it does not fulfil the requirement of having a “husband and wife” as required by law (section 64 of Law no. 396/2000). For this reason such a marriage could not be registered, even assuming it were not against public order.

Quite apart from this inability arising from the ordinary Italian legal order, relying on the relevant constitutional court judgments (nos. 138 of 2010 and no. 170 of 2014) the court found that neither could any obligation be derived from the constitution or international instruments to which Italy was a party. Nor could the recent ECtHR judgment in *Oliari and Others v. Italy* (nos. 18766/11 and 36030/11, 21 July 2015) supersede

the obstacles created by Article 29 of the Constitution as interpreted by the domestic courts. Indeed that judgment had solely found for the need to introduce a relevant legal framework for the protection of same-sex unions, and reiterated that the introduction of same-sex marriage was a matter to be left to the State. The same conclusions had to be reached even in connection with the rights to freedom of movement and residence as understood in the relevant EU legislation, in so far as the recognition of same sex-marriages celebrated abroad fell outside the scope of EU legislation. It followed that in the absence of a right to same-sex marriage, the latter could not be compared to heterosexual marriage. Indeed, admitting the registration of same-sex marriages obtained abroad, irrespective of the absence of legislation to that effect, would mean superseding the choice of the national parliament.

In relation to the nullity of the order of 7 October 2014, it noted that the mayor was subordinate to the Minister and, in line with the relevant norms, in circumstances such as the present one the Prefect had the power *ex officio* to quash any illegitimate measures taken by the mayor. Indeed the power of the ordinary judge to delete such registrations risked creating uncertainty on such a delicate matter, because of the independence of such a body and the possibility of conflicting decisions. It followed that the appeal was upheld and the first-instance decision quashed.

93. In more or less the same time, similar proceedings were on-going in connection with the Mayor of Milan's decision of 9 October 2014 to register a same-sex marriage obtained abroad and the circular of 7 October 2014 (inviting the mayors to cancel such registrations), and the subsequent cancellation, *ex officio*, of such registrations by means of a decree of 4 November 2014 as well as further annotations made on 11 February 2015 resulting from the latter decree.

94. By a first-instance judgment no. 20137 of 2015, the Administrative Tribunal of Lombardia, found in favour of the mayor and annulled the subsequent impugned acts (but not the circular of 7 October 2014). It considered that in his supervisory powers a Prefect can issue orders or directives in the ambit of the functioning of the Civil Status Office. However, the Prefect cannot issue an act of annulment in the context of registrations of same-sex marriages obtained abroad, given that the applicable laws give the power to rectify or annul erroneously-registered marriages only to the ordinary judicial authorities.

95. By means of a judgment no. 05048/16 of the Supreme Administrative Court, published on 1 December 2016, the first-instance decision to annul the impugned acts was confirmed on the basis of a different reasoning. Having analysed all the relevant laws and jurisprudence, the Supreme Administrative Court found that no law had attributed to the Minister for Internal affairs (or the Prefect) the power of annulling acts performed by mayors in order to register marriages. Indeed

such power was attributed to the Government in its collegial composition. Further, it was not for the court to determine during such proceedings whether the decisions of the mayors to register such marriages were legitimate or not.

96. A set of similar proceedings concerning the registrations made by the Mayor of Udine was also on-going at the same time, and was decided in favour of the mayor in a first-instance judgment no. 228 of 2015 of the Administrative Tribunal of Friuli Venezia Giulia, which annulled the impugned acts. The judgment was confirmed on appeal by means of a judgment no. 05047/16 of the Supreme Administrative Court published on 1 December 2016 on the basis of the reasoning referred to in the previous paragraph.

## F. Civil unions

97. By Law no. 76 of 20 May 2016, hereinafter “Law no. 76/2016”, entitled “Regulation of civil unions between people of the same sex and the rules relating to cohabitation”, the Italian legislator provided for civil unions in Italy. The latter legislation came into force on 5 June 2016.

98. The same legislation, in particular its Article 28 (a) and (b), provided that within six months from its entry into force, the Italian Government was delegated to adopt legislative decrees providing for the modification of relevant laws concerning private international law, in order to provide for the applicability of same-sex civil unions as provided in Italian law, to persons who have contracted marriage, civil union or any other corresponding union abroad.

99. By decree no. 144 of the President of the Council of Ministers of 23 July 2016, which came into force on 29 July 2016, transitory provisions were adopted pending the relevant legislative decrees mentioned above (under Article 28). In particular, it was provided that marriages or civil unions contracted abroad are to be registered through the consular offices.

100. On 19 January 2017 three legislative decrees (nos. 5, 6 and 7 of 19 January 2017) were adopted in line with the above requirements and on 27 February 2017 the relative decrees allowing for the entry into force of such measures as well as legislative changes to other relevant laws were adopted by the Ministry for the Interior.

101. Until then Italian domestic law did not provide for any alternative union to marriage, either for homosexual couples or for heterosexual ones. The former had thus no means of recognition (see also *Oliari and Others*, cited above, § 43, concerning a report of 2013 prepared by Professor F. Gallo (then President of the Constitutional Court)).

102. Nevertheless, some cities had established registers of “civil unions” between unmarried persons of the same sex or of different sexes: among others are the cities of Empoli, Pisa, Milan, Florence and Naples. However,

the registration of “*civil unions*” of unmarried couples in such registers has a merely symbolic value.

### **G. Cohabitation agreements prior to Law no. 76/2016**

103. Before the adoption of Law no. 76/2016, cohabitation agreements were not specifically provided for in Italian law.

104. Protection of cohabiting couples *more uxorio* had been derived from Article 2 of the Italian Constitution, as interpreted in various court judgments over the years (post 1988). In more recent years (2012 onwards) domestic judgments had also considered cohabiting same-sex couples as deserving such protection.

105. In order to fill the lacuna in the written law, with effect from 2 December 2013 it had been possible to enter into “cohabitation agreements”, namely a private deed, which did not have a specified form provided by law, and which may be entered into by cohabiting persons, be they in a parental relationship, partners, friends, simple flatmates or carers, but not by married couples. Such contracts mainly regulated the financial aspects of living together, cessation of the cohabitation, and assistance in the event of illness or incapacity<sup>1</sup>.

## **III. INTERNATIONAL LAW AND PRACTICE**

106. The relevant Council of Europe materials can be found in *Oliari and Others* (cited above, §§ 56-61).

## **IV. EUROPEAN UNION LAW**

107. The relevant European Union law can be found in *Oliari and Others* (cited above, §§ 62-64).

108. Of particular interest is Directive 2004/38/EC of the European Parliament and of the Council of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States. Its Article 2 contains the following definition:

“ ‘Family member’ means:

(a) the spouse

(b) the partner with whom the Union citizen has contracted a registered partnership, on the basis of the legislation of a Member State, if the legislation of the host Member State treats registered partnerships as equivalent to marriage in accordance with the conditions laid down in the relevant legislation of the host Member State.

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1. <http://contrattoconvivenza.com/> last accessed June 2016

(c) the direct descendants who are under the age of 21 or are dependants and those of the spouse or partner as defined in point (b)

(d) the dependent direct relative in the ascending line and those of the spouse or partner as defined in point (b);”

109. According to the European Commission «Communication from the Commission to the European Parliament and the Council on guidance for better transposition and application of Directive 2004/38/EC on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States» COM(2009) 313 final (pg. 4):

“Marriages validly contracted anywhere in the world must be in principle recognized for the purpose of the application of the Directive.

Forced marriages, in which one or both parties is married without his or her consent or against his or her will, are not protected by international or Community law. ...

Member States are not obliged to recognise polygamous marriages, contracted lawfully in a third country, which may be in conflict with their own legal order. ...

The Directive must be applied in accordance with the non-discrimination principle enshrined in particular in Article 21 of the EU Charter.”

## V. COMPARATIVE LAW

### A. Council of Europe member States

110. The comparative law material available to the Court on the introduction of official forms of non-marital partnership within the legal systems of Council of Europe (CoE) member States shows that fifteen countries (Belgium, Denmark, Finland, France, Germany, Iceland, Ireland, Luxembourg, Malta, the Netherlands, Norway, Portugal, Spain, Sweden and the United Kingdom) recognise same-sex marriage.

111. Nineteen member States (Andorra, Austria, Belgium, Cyprus, Croatia, the Czech Republic, Estonia, France, Greece, Hungary, Italy (as from 2016), Liechtenstein, Luxembourg, Malta, the Netherlands, Slovenia, Spain, Switzerland and the United Kingdom) authorise some form of civil partnership for same-sex couples (by itself or besides marriage). In certain cases such a union may confer the full set of rights and duties applicable to the institute of marriage, and thus be equal to marriage in everything but name, as for example in Malta. Portugal does not have an official form of civil union. Nevertheless, the law recognises *de facto* civil unions<sup>2</sup>, which have automatic effect and do not require the couple to take any formal steps for recognition. Denmark, Finland, Germany, Norway, Sweden, Ireland and

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2. Article 1 § 2 of Law no. 7/2001, as amended by Law no. 23/2010 of 30 August 2010 – “A free union is the juridical situation between two persons, who irrespective of their sex, have been living in conditions analogous to those of married couples for more than two years”

Iceland used to provide for registered partnership in the case of same-sex unions, this was however abolished in favour of same-sex marriage.

112. It follows that to date (2017) twenty-seven countries out of the forty-seven CoE member states have already enacted legislation permitting same-sex couples to have their relationship recognised as a legal marriage or as a form of civil union or registered partnership.

113. According to information available to the Court (dated July 2015), concerning the practice of twenty-seven member States which did not at the time provide for same sex-marriage (Andorra, Armenia, Austria, Azerbaijan, Bosnia and Herzegovina, Bulgaria, Croatia, the Czech Republic, Estonia, Finland, Germany, Greece, Ireland, Lithuania, the former Yugoslav Republic of Macedonia, Malta, Moldova, Monaco, Montenegro, Poland, Romania, Russia, Serbia, Slovenia, Switzerland, Turkey and Ukraine), concerning the registration of same-sex marriages contracted abroad, the following situation emerges: all of these member States, with the exception of Andorra, Malta, as well as Estonia (following a court ruling of 2016), refuse to allow same-sex couples to register domestically a same-sex marriage validly contracted abroad. The reasons for refusal vary; some member States base their position on the legal definition of marriage as a union between a man and a woman only, and some States go further and rely on grounds of public order, tradition and procreation.

114. The twenty-five member States which did not at the time allow same-sex marriage registration can be divided into two groups: those that allowed for married same-sex couples to register their relationship as a same-sex partnership (nine member States - Austria, Croatia, Czech Republic, Estonia (until 2016), Finland, Germany, Ireland, Slovenia and Switzerland) and those that did not (the remaining sixteen member States). Of the EU member States surveyed none reported a distinction in their legislation between marriages obtained within the EU or elsewhere.

## **B. The United States**

115. On 26 June 2015, in the case of *Obergefell et al. v. Hodges, Director, Ohio Department of Health et al.*, the Supreme Court of the United States held that same-sex couples may exercise the fundamental right to marry in all States, and that there was no lawful basis for a State to refuse to recognise a lawful same-sex marriage performed in another State on the ground of its same-sex character (see for details, *Oliari and Others*, cited above, § 65).



## THE LAW

### I. PRELIMINARY ISSUES

#### A. Victim Status

116. As to the issue of some of the applicants having had their marriage registered (as a marriage), the applicants whose marriage was so registered considered that they remained victims of the alleged violations. In their original observations (prior to recent developments) the applicants noted firstly, that registration did not amount to a union giving recognition to their couple. Secondly, as to the complaint linked specifically to registration, they noted that in the light of the circular issued on 7 October 2014 such registration was bound to be withdrawn or annulled. In consequence their situation had not been remedied, nor had the violation been recognised.

117. The Court notes that the Government have not raised any objection in this respect. However, as recently reiterated in *Buzadji v. the Republic of Moldova* [GC], (no. 23755/07, §§ 68-70, 5 July 2016), victim status concerns a matter which goes to the Court's jurisdiction and which it is not prevented from examining of its own motion. In the circumstances of the present case, the Court considers it appropriate to examine whether the applicants whose marriage was registered have lost their victim status.

118. The Court refers to the circular issued on 7 October 2014 by the Ministry of Internal Affairs (paragraph 89 above) according to which mayors were requested to cancel any registrations which had already been made, and informed that in the absence of such cancellations the registrations would be annulled *ex officio*. The applicants whose marriage was registered have confirmed that shortly after the circular was issued the registration in their respect was cancelled (see paragraphs 30 and 40 above). In these circumstances, the Court considers that the temporary registration of their marriage cannot therefore detract from their victim status.

119. Accordingly, the Court concludes that all the individuals in the present applications should be considered "victims" of the alleged violation concerning the authorities' refusal to register their marriage (as a marriage) within the meaning of Article 34 of the Convention.

#### B. Exhaustion of domestic remedies

120. The Government submitted that applications nos. 26431/12, 26742/12, and 44057/12 were inadmissible, as the applicants had failed to exhaust domestic remedies. In their view it could not be said that available remedies were not adequate. Domestic jurisprudence showed that the authorities gave particular attention to the issues raised and proposed novel

solutions. They referred in particular to Constitutional Court judgment no. 138/10.

121. In relation to their complaint concerning the failed registration, the applicants submitted that it was for the Government to prove that there existed an effective domestic remedy at the time they lodged their applications with the Court; however, they had failed or were unable to do so. They further noted that rightly the Government did not rely on the judgment of the Tribunal of Grosseto of 3 April 2014, which was only a sporadic first-instance judgment, delivered after the introduction of the applications with the Court (they referred in this connection to *Costa and Pavan v. Italy*, no. 54270/10, § 38, 28 August 2012, and *Sürmeli v. Germany* [GC], no. 75529/01, § 110-112, ECHR 2006-VII).

122. Furthermore, in relation to their complaint regarding any means of legal recognition, the applicants submitted that the Government had also not proved, by means of examples, that the domestic courts could provide any legal recognition of their unions. Indeed, given that the flaw related to the law (or lack thereof) ordinary domestic courts were prevented from taking any remedial action. Within the domestic system the appropriate remedy would have been a challenge before the Constitutional Court, which the Court has already stated is not a remedy to be used, it not being directly accessible to the individual (see *Scoppola v. Italy (no. 2)* [GC], no. 10249/03, § 70, 17 September 2009). Moreover, in the present case such a challenge would not have been successful, given the precedent which lay in judgment no. 138/10, subsequently confirmed by other decisions.

123. The Court observes that at the time when all the applicants introduced their applications before the Court (April-September 2012) the case-law concerning the impossibility of registering such marriages was consolidated. The slightly different reasoning adopted in a judgment of 15 March 2012 (no. 4184/12) of the Court of Cassation in two of the applicants' cases did not alter the unfavourable outcome. Moreover, by that time the Constitutional Court had already given its judgment no. 138/10, the findings of which were subsequently reiterated in two further Constitutional Court judgments (filed in the relevant registry on 22 July 2010 and 5 January 2011, see paragraph 78 above), also delivered before the applicants had introduced their applications with the Court. Thus, at the time when the applicants wished to complain about the alleged violations, namely shortly after the refusals by the Civil Status Offices to register their marriages, there was consolidated jurisprudence of the highest courts of the land indicating that their claims had no prospect of success. The Court further notes that the judgment of the Tribunal of Grosseto was delivered after the applicants had lodged their applications with the Court, and that it is only a first-instance judgment, it follows that it has no relevance for the Court's finding under this head.

124. Bearing in mind the above, the Court considers that there is no evidence enabling it to hold that at the date when the applications were lodged with the Court the remedies available in the Italian domestic system would have had any prospects of success concerning any of their complaints. It follows that the applicants in applications nos. 26431/12, 26742/12, and 44057/12 cannot be blamed for not pursuing a remedy which was ineffective. Thus, the Court accepts that there were special circumstances which absolved these applicants from their normal obligation to exhaust domestic remedies (see *Vilnes and Others v. Norway*, nos. 52806/09 and 22703/10, § 178, 5 December 2013).

125. It follows that in these circumstances the Government's objection must be dismissed.

### **C. Other**

#### *1. The Government*

126. On the specific circumstances of the case, the Government submitted that Ms Francesca Orlandi and Ms Elisabetta Mortagna, as well as Mr D.P. and Mr G.P., got married in Toronto, Canada, without being domiciled there, as they were domiciled in Italy. They referred to the recently amended (2013) Canadian law on the matter.

127. In respect of Mr Gianfranco Goretti and Mr Tommaso Giartosio, who got married in California, the Government noted that the law on homosexual marriage was abrogated by a referendum in 2008. The Government submitted that although this did not invalidate their marriage, the applicants failed to submit relevant documents proving the validity of their marriage entered into on 9 September 2008, at a time when the law on homosexual marriage was being assessed by the domestic courts.

128. As to Mr Antonio Garullo and Mr Mario Ottocento, the Government submitted that the two applicants, who married in the Netherlands, had not presented their marriage certificates, nor had they submitted the relevant marriage law, which provided for same sex-marriage since 2001. They noted that the said law provided for exceptions including in relation to the recognition of marriages abroad, and that it also explicitly stated that in order to contract marriage one of the partners must have Dutch nationality or residence in the Netherlands, and if the other partner is a non-national or a non-permanent resident, he or she must provide documentation in relation to his juridical position in connection with his residence permit for the purpose of marriage.

129. In conclusion the Government submitted that the marriages contracted abroad by the applicants had not fulfilled the requirements of the places where the marriages took place. Indeed the applicants had not proved to this Court that they had fulfilled the said requirements, and neither had

they made available the relevant documents proving their juridical statuses. All this would have in fact been necessary for the registration of such marriages in a foreign country. Following recent developments (during these proceedings), the Government nonetheless submitted that those marriages which were registered by the Offices of Civil Status, in application of Italian law on the subject matter, were so registered even though they had not been in conformity with the applicable foreign laws. They thus asked the Court to assess the legitimacy and validity of the marriage acts at issue for the purposes of the admissibility of the relevant applications.

## *2. The applicants*

### **(a) Applications nos. 26431/12; 26742/12; 44057/12**

130. The applicants submitted that both before the domestic courts and before the Court they had produced certified copies of their marriage certificates released by the competent authorities of the place of the celebration of their marriages. It followed that they had submitted sufficient proof as to the validity of their marriages. Furthermore, the refusal of the Italian authorities had solely been based on the fact that they were same-sex couples, and not because of any doubt as to the validity of the marriages contracted.

### **(b) Application no. 60088/12**

131. The applicants submitted that the three Italian courts that had examined their request had not questioned the existence of the requirements necessary for the celebration of their marriage in the Netherlands. The Court of Cassation itself in its judgment (no. 4184/12) had stated that the registration was impossible because of the rules of public order and not because the marriage was null and void. Furthermore, the Government had not during those proceedings objected to the validity of their marriage, and by virtue of Article 115 (1) of the Italian Code of Civil Procedure (if the defendant does not contest the facts alleged by the claimant, those facts are considered proved) it had been established that their marriage was valid. As stated by the Government in a different context, the Court was not a fourth-instance court, and thus it was not for it to assess the validity of such marriages, because such validity depended on the law of the State where it was celebrated, while the present case concerned discriminatory treatment at the hands of the Italian authorities.

## *3. The Court's assessment*

132. The Court notes, firstly, that it is not for it to assess the validity, according to the laws of the contracting State, of the marriages contracted by the applicants - a matter which has not been determined by the domestic

authorities whose responsibility it is to make such assessments (see paragraph 92 above).

133. It further notes that whether the applicants' marriages were valid or not, according to the laws of the contracting State, is beyond the scope of the applicants' complaints, as the refusals of which they complained were not based on that ground (see, *mutatis mutandis*, *Pajić v. Croatia*, no. 68453/13, § 75, 23 February 2016) - the veracity of which remains, thus, hypothetical.

134. Indeed, the basis of the applicants' complaints is that the authorities refused to register their marriages contracted abroad on the ground that they had been marriages between persons of the same sex. The Court observes that from the documents submitted to it there is no doubt that the applicants have contracted marriages (in different countries) and that the refusal of the registration of such marriages was based on the fact that the applicants were same-sex couples and on nothing else.

135. The Court notes that its assessment is confined to the specific case before it, and therefore, in the present case, to the determination of whether the authorities' refusal to register the applicants' marriage solely on the ground that they were same-sex spouses constituted a breach of the invoked provisions. The Court's assessment is, thus, without prejudice to any other reasons for refusal which could have been detected by the domestic authorities or which may still be raised by the domestic authorities in future (if the applicants had to make other attempts to register their marriage).

136. In consequence, the objection raised by the Government has no relevance to the admissibility of the complaints, and is therefore dismissed.

## II. ALLEGED VIOLATION OF ARTICLE 8 OF THE CONVENTION AND ARTICLE 14 IN CONJUNCTION WITH ARTICLES 8 AND 12 OF THE CONVENTION

137. The applicants complained about the refusal to register their marriages, contracted abroad, and the fact that they could not marry or have any other legal recognition of their family union in Italy. They considered that the situation was discriminatory and based solely on their sexual orientation. They cited Article 8, 12 and 14. The provisions they cited read as follows:

### **Article 8**

“1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the

country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.”

#### Article 12

“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.”

#### Article 14

“The enjoyment of the rights and freedoms set forth in [the] Convention shall be secured without discrimination on any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status.”

138. The Court reiterates that it is the master of the characterisation to be given in law to the facts of the case (see, for example, *Gatt v. Malta*, no. 28221/08, § 19, ECHR 2010). In the present case the Court considers that the complaints raised by the applicants are to be examined solely under Article 8 alone and under Article 14 of the Convention read in conjunction with Articles 8 and 12.

### A. Admissibility

#### 1. Applicability of the provisions

139. The applicants submitted that the relationship of a same-sex couple living in a stable *de facto* relationship fell within the notion of family life, even more so if this was coupled with an act of marriage produced by foreign authorities. Thus, there was no doubt that Article 14 applied in conjunction with Article 8 in the present case.

140. As to the application of Article 14, in conjunction with Article 12, the applicants submitted that in *Schalk and Kopf v. Austria* (no. 30141/04, ECHR 2010) the Court held that it “would no longer consider that the right to marry enshrined in Article 12 must in all circumstances be limited to marriage between two persons of the opposite sex. Consequently, it cannot be said that Article 12 is inapplicable to the applicants’ complaint”. The applicants noted that in that case the applicants were a same-sex couple living in a stable relationship and wishing to get married. In their view, since the Court found that Article 12 applied in that case, it followed that Article 14 in conjunction with Article 12 also applied in the present case.

141. The Government did not contest expressly the applicability of the provisions.

142. As the Court has consistently held, Article 14 complements the other substantive provisions of the Convention and its Protocols. It has no independent existence since it has effect solely in relation to “the enjoyment of the rights and freedoms” safeguarded by those provisions. Although the application of Article 14 does not presuppose a breach of those provisions –

and to this extent it is autonomous – there can be no room for its application unless the facts at issue fall within the ambit of one or more of the latter (see, for instance, *E.B. v. France* [GC], no. 43546/02, § 47, 22 January 2008; *Karner v. Austria*, no. 40016/98, § 32, ECHR 2003-IX; and *Petrovic v. Austria*, 27 March 1998, § 22, *Reports of Judgments and Decisions* 1998-II).

143. The Court notes that it is undisputed that the relationship of a same-sex couple like the applicants falls within the notion of “private life” within the meaning of Article 8. Similarly, the Court has already held that the relationship of a cohabiting same-sex couple living in a stable *de facto* partnership falls within the notion of “family life” (see *Schalk and Kopf*, cited above, § 94). It follows that the facts of the present applications fall within the notion of “private life” as well as “family life” within the meaning of Article 8.

144. The Court also reiterates that there is no reason why a State’s acknowledgment of the real marital status of a person, be it, *inter alia*, married, single, divorced, widow or widower, should not form part of his or her personal and social identity, and indeed psychological integrity protected by Article 8. Therefore, registration of a marriage, being a recognition of an individual’s legal civil status, which undoubtedly concerns both private and family life, comes within the scope of Article 8 § 1 (see *Dadouch v. Malta*, no. 38816/07, § 48, 20 July 2010).

145. As to Article 12, the Court notes that in *Schalk and Kopf* it found that it would no longer consider that the right to marry must in all circumstances be limited to marriage between two persons of the opposite sex, and therefore that Article 12 was applicable to the applicants, a same-sex couple seeking to marry, but that Article 12 of the Convention did not impose an obligation on the respondent Government to grant a same-sex couple like the applicants access to marriage (§§ 61-63). The same was reiterated in *Hämäläinen v. Finland* [GC], (no. 37359/09, § 96, ECHR 2014), and in *Oliari and Others v. Italy* (nos. 18766/11 and 36030/11, §§ 191-192, 21 July 2015), where the Court held that while it is true that some Contracting States have extended marriage to same-sex partners, Article 12 cannot be construed as imposing an obligation on the Contracting States to grant access to marriage to same-sex couples. More recently, the Court, in *Chapin and Charpentier v. France*, (no. 40183/07, 9 June 2016) also considered that Article 12 applied to the applicants, a same-sex couple seeking to marry (§ 31). Since the Court has already held Article 12 to be applicable to a same sex-couple wishing to marry, the provision must also be applicable to same-sex couples who are already married under the domestic system of another State.

146. Consequently, the provisions to be examined by the Court, namely both Article 8 and Article 14 taken in conjunction with Articles 8 and 12 of the Convention, apply in the present case.

## 2. Conclusion

147. The Court notes that the complaints are not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that they are not inadmissible on any other grounds. They must therefore be declared admissible.

## B. Merits

### 1. The parties' submissions

#### (a) The applicants in applications nos. 26431/12, 26742/12 and 44057/12

148. The applicants submitted that the violations arose as a result of an administrative practice and a vacuum in the legal system which existed at the time, which amounted to a structural deficiency.

##### (i) Lack of marriage registration

149. The applicants submitted that as a same-sex couple married abroad they were undoubtedly in the same position as different-sex couples married abroad as regards their request for registration of their marriage. Yet they had suffered different, disadvantageous treatment, as they had been refused registration of their marriage. This refusal also amounted to an interference with their rights to family life and to marry, since the decisions of public authorities jeopardised a relationship of marriage that two adult and consenting persons had created to regulate their private and family life (they referred, *mutatis mutandis*, to *Negrepontis-Giannisis v. Greece* (no. 56759/08, § 57, 3 May 2011).

150. The applicants did not dispute that registration of the marriage did not imply recognition of the legal effects of the marriage deed. Nevertheless, through the registration of their foreign marriage they sought to obtain, *vis-à-vis* the public authorities and society at large, the publicity of their situation, namely that they had a common project of life, that they regarded themselves as a family, and that they reciprocally committed to this aim with the ensuing responsibilities.

151. The applicants submitted that as adduced by the competent authorities the only reason for the refusal was the same-sex nature of their marriage. Thus, the aim allegedly pursued by the refusal of registration was the protection of the “internal” public order (as per Circular no. 2 of 26 March 2001, mentioned above). This aim was rather general, as it allegedly included fundamental, ethical, economic, political and social principles of the legal order. However, the Government had failed to explain which specific fundamental principles had to be defended against the registration of same-sex marriages. Thus, it could only be deduced that the difference in treatment was aimed solely at protecting a concept of marriage



as a heterosexual legal institution and an abstract idea of traditional family. Nevertheless, the applicants noted that the Court of Cassation (judgment no. 4184/12) acknowledged that a foreign same-sex marriage may no longer be considered non-existent. It had found that the refusal of its registration was simply a consequence of the fact that it could not be recognised as a marriage in the Italian legal order (marriage being defined as a union between a man and a woman), irrespective of any considerations relating to the protection of public order. The applicants noted that in such a context the Civil Status Offices and the domestic courts were prevented from carrying out a proportionality assessment, namely whether giving publicity to a same-sex union would jeopardise internal public order. The situation was such that the lack of recognition of same-sex unions, despite a constitutional obligation on the legislature to fill this gap, also prevented domestic authorities from registering the marriage deed at least as a civil union, while reserving the institution of marriage to opposite-sex couples. It followed that the refusal was not genuinely aimed at protecting fundamental principles of legal order, which in fact do not oppose, but actually require, the recognition of same-sex unions.

152. The applicants submitted that even assuming that there existed an aim which was legitimate, given that no proportionality assessment was carried out by the authorities and that no such assessment was guaranteed by the legislature - which failed to give effect to the Constitutional Court's pronouncement - it could not be said that the refusal was necessary to achieve the aim at issue. No other reasons had been advanced to justify its necessity.

(ii) *Lack of civil unions*

153. The applicants made submissions on the lines of those made in the case of *Oliari and Others* (cited above, §§ 105-121).

154. The applicants further submitted that the unreasonable and unjustified treatment suffered by them affected not only their family life under Article 8 but also their rights under Article 12. They considered that in the absence of an alternative to marriage to obtain recognition of their union, the requirements of strict proportionality for the justification of the measure were not satisfied (they referred, *mutatis mutandis*, to *Parry v. the United Kingdom* (dec.), no. 42971/05, ECHR 2006-XV), and there was consequently a violation of Article 14 in conjunction with Article 12. In this connection they relied on the dissenting opinions in the judgment of *Schalk and Kopf*.

155. In conclusion the applicants reiterated that same-sex unions could not be considered as being against the internal public order, their legal recognition being required by Article 2 of the Italian Constitution as repeatedly held by the Italian Constitutional Court. Thus, the notion of marriage as a heterosexual institution could still be safeguarded if the

applicants' marriages were at least recognised (re-characterised) as same-sex unions for the purposes of registration. Given that compliance with domestic legislation was no justification for non-compliance with treaty obligations, the obligatory refusal of at least a civil union in the present case had failed to strike a fair balance between the applicants' right to respect for family life and the demand of society at large. At the same time the State was also violating the applicants' rights in so far as it had failed to comply with its positive obligation to give appropriate legal recognition to their unions, as also demanded repeatedly by the Italian Constitutional Court. It followed that their effective exercise of a fundamental right existing under domestic law was hindered by the failure of the legislature to act.

**(b) The applicants in application no. 60088/12**

*(i) Lack of marriage registration*

156. The applicants stressed that the fact that it was impossible for them to register their marriage obtained abroad amounted to discriminatory treatment. They considered that a) the marriage registered abroad was valid and produced all legal effects and consequences which are proper of a legal marriage recognised and regulated by the law of the State in which the marriage was registered or celebrated; b) it was a marriage that in all its characteristics and aspects is identical to marriage as legally recognised by Italian law; c) in addition, contrary to the submission by the Italian Court of Cassation and as explained below, the marriage registered abroad would produce full legal consequences within the Italian legal system. This did not, however, mean, *inter alia*, that the State had the duty to allow same-sex marriage in Italy, or to extend to same-sex couples the full legal protection given to heterosexual married couples.

157. The Government had ignored that they were European citizens, and that Article 9 of the European Charter did not distinguish between married same-sex or different-sex couples (for example, in application of Article 9 and Directive 2004/38/EC recognising the right of EU citizens to move and reside freely within the territory of member states, the decision of 13 February 2012 of the Tribunal of Reggio Emilia, paragraph 85 above) and that each European citizen who was married was entitled to free movement within the EU, regardless of who he or she was married to and where they married. It followed that the European norms concerning married couples also applied in Italy and must apply to the applicants, who were legally married in another EU state. Thus, contrary to that held by the Court of Cassation in judgment no. 4184/12, same-sex marriage celebrated abroad produced legal effects in the Italian system every time the marital status represented a pre-requisite for the application in Italy of EU norms (as explained in the Reggio Emilia Tribunal's judgment). In connection with

the last-mentioned judgment the applicants considered that since an Italian citizen's marriage to a non-EU same-sex partner was registered, the failure to register their marriage discriminated against them on the basis of their nationality (as they were both Italian).

158. In the light of the recent interpretation of Article 12 of the Convention and the explicit wording of Article 9 of the EU Charter marriage was no longer considered as the union of a man and a woman. Thus, all EU norms concerning marriage referred to both heterosexual and homosexual married couples. This interpretation had to be equally valid in Italy, it being bound by these European instruments. It followed, that since the applicants were legally married, it was those laws which should apply to them and not laws concerning unprotected persons or cohabitants. In this connection, registration represented an indirect recognition of the conjugal status of same-sex couples, which allowed them entitlement to those rights recognised under EU law (such as free movement) by virtue of their being EU citizens, in addition to all situations in which EU norms would have applied in Italy. The applicants noted that registration of their marital status had value for several legal purposes, including the payment of taxes, protection from foreign creditors, and avoiding bigamy. It followed that in a globalised era such registration was important for ensuring clarity in international relations between citizens in different countries.

159. The applicants submitted that it could no longer be said that same-sex marriage was against public order (as confirmed by the Court of Cassation judgment no. 4184/12). Indeed it was not the Italian public order that was at issue in the present case but the international public order, as the norms to be interpreted were norms of international private law. As the Court of Cassation had pointed out (decision of 26 April 2013, no. 10070, which quoted another two decisions of the Court of Cassation of 6 December 2002, no. 17349 and of 23 February 2006, no. 4040), it is the "international public order" which is included in the principles of international private law. Therefore the applicants argued that the international public order did not merely mirror Italian fundamental legal principles as provided by the Constitution or by other Italian legal statutes. Instead, it encapsulated the Italian fundamental principles that in turn derive from a plurality of sources of law and in particular from the interaction of the Italian system with the Charter and the Convention.

160. The applicants noted that, if, as the Court of Cassation had pointed out (judgment no. 4184/12), the notion of marriage under Italian law included same-sex marriage (in line with the Charter and the Convention), then it was contradictory to argue that a same-sex marriage celebrated abroad was against the international public order. Despite this judgment and the decision in *Schalk and Kopf*, the Italian authorities continued to apply the regulations issued by the Ministry of the Interior. Furthermore, the guidelines used by the registrars of civil status simply referred to public

order, without clarifying whether it was national or international; those guidelines also indicated that judgment no. 4184/12 was irrelevant in relation to registrations. The applicants disputed that Article 16 of Law no. 218/95 was applicable to the circumstances of the case, as that provision governed the application in Italy of foreign law, but the applicants were not asking the authorities to apply Dutch law (to give them the right and protection they would have obtained under Dutch law), but simply to register their marriage celebrated abroad and thus to obtain the limited effects of registration under Italian law, namely certification that the marriage was valid, which could be used every time conjugal status needed to be proved for the application of a specific law.

161. The applicants referred to other relevant domestic case-law (see paragraphs 86 and 88 above), in particular Constitutional Court judgment no. 170/14, which considered that the notion of marriage as defined in *Schalk and Kopf* was irrelevant for the purposes of Italian law and the definition of marriage.

(ii) *Lack of civil unions*

162. The applicants noted that to avoid a finding of a violation the Government argued that same-sex couples were in fact protected (by means of cohabitation agreements). The reality was that the public authorities were reluctant to advance the rights of same-sex couples, and the few rights which had been gained over the past decade were the result of litigation and court proceedings. Thus, such protection deriving from case-law and not legal statute constituted only an indirect protection. It was also left to the judge to decide when such protection was required after the same-sex couple had proved that i) they were cohabiting in a stable relationship, ii) that the right they were seeking to enjoy was a right enjoyed by heterosexuals, and that a different degree of protection was unreasonable. Such discretion created uncertainty and would often need direction by the Constitutional Court. Moreover, it burdened persons in the applicants' situation with having to go to court and prove cohabitation in order to obtain the relevant protections. In that connection the applicants noted the relevance of having their marriage registered (and thus having the validity of their marriage controlled and certified by the authorities) to enable them to fulfil the burden of proof concerning the stability of their relationship. They also noted that this approach to protection did not distinguish between cohabiting same-sex couples and married same-sex couples, despite the latter being granted recognition and protection in all jurisdictions in which same-sex marriage was regulated.

163. As to the "register of civil unions", and contracts of cohabitation the applicants made submissions in line with those made in *Oliari and Others* (cited above).

(c) **The Government's submissions**

164. The Government referred to the domestic jurisprudence on the matter which they considered relevant for their defence of the present case. They noted that the domestic courts had acknowledged the existence of same-sex couples and their right to protection in specific circumstances and to equal treatment, which could be guaranteed by the courts acting in line with their common sense (judgments no. 559/1989 and 404/1998 in relation to leases and state housing in respect of cohabitations *more uxorio*). This notion of family was further confirmed by the Court of Cassation in its judgment no. 4184/12, which prompted various communes and regions to create a register of civil unions, or a register of *de facto* unions, which served to register the existence of such couples, an action in fact taken by Mr Gianfranco Goretti and Mr Tommaso Giartosio. However, the existence of such measures of registration in various regions and communes did not oblige the State to recognise such unions as a marriage, but solely to consider their existence as a family within a regulatory framework in line with the internal order of the State – the only requirement of the Convention (as interpreted in jurisprudence) on the subject matter.

165. The Government submitted that same-sex couples wishing to give a legal framework to various aspects of their community life could enter into cohabitation agreements. Such agreements enabled same-sex couples to regulate aspects related to, for example: the manner of dealing with joint expenses and the opening of joint bank accounts; the criteria for the allocation of ownership of assets acquired during the cohabitation; the procedure for the distribution of assets in the event of termination of cohabitation; as well as acts of testamentary disposition in favour of the cohabiting partner (as for example the right to continue a lease following the decease of a partner, as established by judgment no. 404/1998). Furthermore, under Article 408 of the Civil Code it was possible to nominate a person living under the same roof as guardian in the event of incapacitation, as had in fact been done by Mr D.P. and Mr G.P. In the Government's view cohabitation agreements were the appropriate juridical instrument to give their union the status of family before the law, without any discrimination based on their sexual orientation.

166. As to marriage registration, the Government submitted that since the applicants' marriages were invalid according to the laws of the countries within which they were contracted they could not be registered, in the light of both international and domestic public order. In their view, the Court of Cassation judgment no. 4184/12 rejected claims (lodged by only two of the applicants) on the basis of Article 18 of Law no. 396/00 on the ground that such registration would have been contrary to domestic public order. That judgment had further held that such a marriage could not have produced any legal effect in Italy. Nevertheless, according to that judgment same-sex marriages contracted abroad remained valid in respect of form, for the

purposes of the law of the country within which they were contracted or of the national law of at least one of the spouses, but not for Italian law, which did not allow same-sex marriage. The Government submitted that marriage fell within the sphere of domestic public order, which included situations which, although not totally internal, were significantly linked to the Italian legal order. They noted that in the light of the conflict of laws and in the absence of any criteria of liaison between foreign and Italian law under Article 16 of Law no. 218/1995, the domestic courts applied national law. It followed that the interference had been in accordance with the law.

167. The Government submitted that the refusal in respect of Mr Garullo and Mr Ottocento was based on internal public order, which was composed of ethical, economic, political and social principles enabling the cohabitation of Italian society and other contracting states which had not provided for same-sex marriage.

168. The Government further submitted that some individuals had also been successful in registering their marriages. Indeed, the first-instance Tribunal of Grosseto, by a decision of 2 April 2014, ordered the Civil Status Office to register a same-sex marriage contracted in New York in 2012 (see paragraph 81 above).

169. The Government submitted that there were no discriminatory intentions behind the state of the law in force which did not allow them to register their marriage; it would have been otherwise had the Italian legislator provided for a law specifically prohibiting same-sex marriage, as still existed in certain states.

170. They observed that the Charter of Fundamental Rights of the European Union left it to States to decide on the matter. Similarly, in *Schalk and Kopf* the Court, in the absence of a European consensus, also left it to States to choose the extent of the rights to be afforded to same-sex couples. They further noted that in *Gas and Dubois v. France* (no. 25951/07, § 66, ECHR 2012) the Court held that a right to same-sex marriage cannot be derived from Article 14 taken in conjunction with Article 8, and that where a State chooses to provide same-sex couples with an alternative means of recognition it enjoys a certain margin of appreciation as regards the exact status conferred. As acknowledged by the Court and the Italian courts the national legislator was better placed than the Court to develop the institution of family and the relations between adults and children, as well as the notion of marriage. They noted that the delicate and complex questions of marriage as well as the civil rights of same-sex couples were subject to democratic debate in various countries, including Italy, in the light of the developing case-law of the Court as well as the non-binding acts of the Council of Europe. In this respect they noted that Italy developed an “LGBT national strategy 2013-15”, which it had submitted to the Council of Europe.

171. In conclusion they highlighted that the Convention did not provide homosexual couples with the right to marry, and such a reading of

Article 12 would require a consensus among States which could be provided in an additional protocol.

**(d) The third-party interveners**

(i) *Prof Robert Wintemute on behalf of the non-governmental organisations 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).*

(α) Positive obligation to provide some means of recognition

172. The intervention in connection with the provision of some means of recognition is summarised in *Oliari and Others* (cited above, §§ 134-139).

(β) Discrimination

173. The intervention in connection with the alleged discrimination is summarised in *Oliari and Others* (cited above, §§ 140-144).

174. Those intervening further noted that Articles 14 and 8 can also be interpreted in the present case as requiring that the foreign marriages of same-sex couples be recognised as equivalent to the civil union or other alternative to legal marriage that must be provided to same-sex couples. A model can be found in s. 215 of the United Kingdom's Civil Partnership Act 2004, prior to its amendment by the Marriage (Same Sex Couples) Act 2013:

“(1) Two people [of the same sex] are to be treated as having formed a civil partnership as a result of having registered an overseas relationship [which includes a marriage in any country in which same-sex couples may marry] if, under the relevant law, they (a) had capacity to enter into the relationship, and (b) met all requirements necessary to ensure the formal validity of the relationship.”

175. Finally, in this connection the interveners noted that the EU's European Parliament adopted, on 4 February 2014, a resolution on a roadmap against homophobia and discrimination on grounds of sexual orientation and gender identity calling on the European Commission to “make proposals for the mutual recognition of the effects of all civil status documents across the EU, in order to reduce discriminatory legal and administrative barriers for citizens and their families who exercise their right to free movement”,<sup>3</sup> which includes marriages registered in other EU member states.

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3. European Parliament resolution of 4 February 2014 on the EU Roadmap against homophobia and discrimination on grounds of sexual orientation and gender identity, Resolution no. A7-0009/2014, para. 4(H)(ii).

(ii) *Associazione Radicale Certi Diritti (ARCD)*

176. The intervention is summarised in *Oliari and Others* (cited above, §§ 144-148).

(iii) *The Helsinki Foundation for Human Rights*

177. The intervener shed light on Poland's situation. They noted that according to the Polish constitution marriage was defined as a union between a man and a woman which fell under the protection of the Polish State. The constitution did not define the notion of family. They explained that since 2003 proposals and draft laws made by NGOs or political parties in favour of same-sex partnerships had been repeatedly dismissed or discontinued. At the time of the submissions there were two draft laws on registered partnerships being analysed by Parliament. They noted that a lot of the debate, including amongst the public and scholars, concentrated on whether the constitution precluded forms of partnership which provided legal protection for same-sex couples. In the meantime figures from the Centre for Public Opinion Research (Poland) showed that in 2013 social support for same-sex partnership in Poland was on the increase.

178. On 28 November 2012 the Polish Supreme Court delivered a resolution (no. III CZP65/12), by which it formulated the obligation of connection with lease agreements following a homosexual partner's death.

179. However, in Poland the lack of legal recognition of same-sex unions showed the unequal position reserved to same-sex couples in various domains, as confirmed by jurisprudence.

180. Poland does not recognize same-sex partnerships concluded abroad, and they cannot be registered with the Civil Status Registry (nor added as an informal entry), as this would be contrary to the Civil Status Registry Act (judgment of the Polish Supreme Administrative Court of 19 June 2003 – no. II OSK 475/12). In that light the current practice was to deny legal recognition /registration of same-sex partnerships or marriages. However, in the view of the interveners, the legal framework including the Polish Constitution did not preclude registration of partnerships contracted abroad.

181. The Helsinki Foundation for Human Rights considered that there was no justification for the situation in Poland, which did not provide at least minimum legal recognition of same-sex couples.

(iv) *Alliance Defending Freedom*

182. The intervener referred to the Court's case-law concerning the invoked provisions as well as that related to the margin of appreciation of States, particularly on sensitive issues.

183. According to their analysis of international jurisprudence, eleven of the thirteen countries that considered marriage to include same-sex couples had done so without the involvement of judicial bodies. In particular, they



referred to the restraint concerning marriage redefinition shown by the judicial authorities of France, Germany and Italy. Thus, like the Court, the practice of judicial bodies was to show restraint by either deferring to the legislature or rejecting the claims altogether. The European Court of Justice had also considered that the Convention solely protected traditional marriage between two persons of opposite biological sex (*K.B. v National Health Service Pensions Agency and Secretary of State for Health*, case no. C-117/01 (2003) § 55).

184. Despite an emerging consensus towards same-sex unions, there existed a strong counter-trend towards recognising marriage solely between a man and a woman. As of 2010 thirty-five nations had legal provisions specifying that marriage was exclusively between a man and a woman, and since then more countries had followed in that direction, such as Hungary and Croatia, which had amended their constitutions to that effect, and Slovenia, which had voted against a redefinition of marriage.

185. They considered that legal protection of same-sex partners could be established through private contract law, however, legal recognition of marriage centred on the family and it was for the State legislature to redefine marriage. In any event, they considered that legalising same-sex “marriage” led to various social harms, including consequences for freedom of religion and expression.

(v) *European Centre for Law and Justice (ECLJ)*

(α) Positive obligation to provide some means of recognition

186. The intervention in connection with the provision of some means of recognition is summarised in *Oliari and Others* (cited above, §§ 149-158).

(β) Marriage registration

187. The interveners noted the Court’s earlier case-law, which held that “the right to marry guaranteed by Article 12 refers to the traditional marriage between persons of opposite biological sex. This appeared also from the wording of the Article which made it clear that Article 12 was mainly concerned to protect marriage as the basis of the family” (*Sheffield and Horsham v. the United Kingdom*, 30 July 1998, § 66, *Reports* 1998-V). They considered that the right to marry was not an individual right, but merely an accessory right to the right to found a family, which was the reason why in various texts it was referred to as “the right to marry and found a family”.

188. The ECLJ submitted that the absence of a right to marry for same-sex persons within the Convention was not disputable. Indeed, same-sex marriage did not form part of the European public order, and Italy could not be forced to give effect (through registration) to same-sex marriages celebrated abroad, which were against its own public order. It

was therefore legitimate for the national judge to put aside the rules of private international law by invoking the notion of public order, the content of which was to be defined freely by States. It was not for other States, who may have opted to permit their non-nationals to marry, or to permit their nationals to marry non-nationals (despite contrasting laws), to impose their new definition of marriage on other States.

189. They noted that apart from national public order there existed a European public order. Indeed the Luxembourg court held that “while it is not for the Court to define the content of the public policy of a Contracting State, it is nonetheless required to review the limits within which the courts of a Contracting State may have recourse to that concept for the purpose of refusing recognition of a judgment emanating from another Contracting State”<sup>4</sup>. In the interveners’ view the principal instrument of public order was the European Convention on Human Rights, which did not provide homosexuals with the right to marry as also confirmed in the more recent *Schalk and Kopf* judgment. It followed that even subject to supervision Italy had been in conformity with the European public order.

190. They considered that the Italian State could not be obliged to recognise the applicants’ situations just because they were presented with a *fait accompli* following what could in certain circumstances be considered matrimonial shopping (crossing a border for a short period of time in order to be able to marry). In the ECLJ’s view, to impose on a State the recognition of marriages obtained abroad would be against the spirit of the Convention, and beyond the Court’s competence. While it was true that Italy recognised different-sex marriages obtained abroad, it should not be the same for same-sex marriages.

## 2. *The Court’s assessment*

### (a) **Article 8**

191. The applicant’s complaints under this provision mainly relate to the fact that on their return to Italy they were refused registration of their marriage, either as a marriage or under any other form, depriving them of any legal protection or associated rights.

192. The Court reiterates that States are still free, under Article 12 of the Convention as well as under Article 14 taken in conjunction with Article 8, to restrict access to marriage to different-sex couples (see *Schalk and Kopf*, cited above, § 108 and *Chapin and Charpentier*, cited above, § 39). The same holds for Article 14 taken in conjunction with Article 12 (see *Oliari and Others*, cited above, § 193). Nevertheless, the Court has acknowledged that same-sex couples are in need of legal recognition and protection of their

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4. Case C-38/98. Judgment of the Court (Fifth Chamber) of 11 May 2000, *Régie nationale des usines Renault SA v Maxicar SpA and Orazio Formento*

relationship (see *Oliari and Others*, cited above, § 165 and the case-law cited therein). Indeed, in *Oliari and Others* the Court concluded that in the absence of a prevailing community interest being put forward by the Italian Government, against which to balance the applicants' momentous interests, and in the light of domestic courts' conclusions on the matter which remained unheeded, the Italian Government had overstepped their margin of appreciation and failed to fulfil their positive obligation to ensure that the applicants had available a specific legal framework providing for the recognition and protection of their same-sex unions (§ 185). There had thus been a breach of Article 8 (§ 187).

193. The Court notes that, following the judgment in *Oliari and Others* (cited above), by means of Law no. 76/2016, the Italian legislator provided for civil unions in Italy. By subsequent decrees it was provided that persons who had contracted marriage, civil union or any other corresponding union abroad could register their union as a civil union in terms of Italian law (see paragraphs 97 to 100 above). The latter legislation came into being in 2017 (see paragraph 100 above) and most of the applicants have recently benefited from it.

194. The Court has already held, in respect of various domestic legislations, that civil unions provide an opportunity to obtain a legal status equal or similar to marriage in many respects (see for example, *Schalk and Kopf*, § 109, concerning Austria, *Hämäläinen*, § 83, in connection with the Finnish system, and *Chapin and Charpentier*, §§ 49 and 51, concerning France, all cited above). The Court considers that, in principle, such a system would prima facie suffice to satisfy Convention standards. The applicants also acknowledged either explicitly or implicitly that it would have sufficed, to safeguard everyone's interests, had the authorities registered their marriage at least as a civil union (see paragraphs 151, 155 and 156 above) in so far as the applicants would have had the ability to have their relationships recognised in some form in the domestic system.

195. The Court notes that the new Italian legislation providing for civil unions (and registration of marriages contracted abroad as civil unions), also appears to give more or less the same protection as marriage with respect to the core needs of a couple in a stable and committed relationship, and the Court is not called upon in the present case to examine any differences in the detail of these, a matter which is beyond the scope of this case.

196. The Court reiterates in this connection that in proceedings originating in an individual application it has to confine itself, as far as possible, to an examination of the concrete case before it (see *Schalk and Kopf*, cited above, § 103). Given that at present it is open to the applicants to enter into a civil union, or have their marriage registered as a civil union, the Court must solely determine whether the refusals to register the applicants' marriage in any form with the result that they were left in a legal

vacuum and devoid of any protection, prior to 2016-17, violated their rights under Article 8.

197. While the essential object of Article 8 is to protect the individual against arbitrary action by the public authorities, there may in addition be positive obligations inherent in effective ‘respect’ for family life. However, the boundaries between the State’s positive and negative obligations under this provision do not lend themselves to precise definition. The applicable principles are, nonetheless, similar. In both contexts regard must be had to the fair balance that has to be struck between the competing interests of the individual and of the community as a whole; and in both contexts the State enjoys a certain margin of appreciation (see *Jeunesse v. the Netherlands* [GC], no. 12738/10, § 106, 3 October 2014 and *Wagner and J.M.W.L. v. Luxembourg*, no. 76240/01, § 118, 28 June 2007).

198. The Court does not consider it necessary to decide whether it would be more appropriate to analyse the case as one concerning a positive or a negative obligation since it is of the view that the core issue in the present case is precisely whether a fair balance was struck between the competing interests involved (see, *mutatis mutandis*, *Dickson v. the United Kingdom*, no. 44362/04, § 71, 18 April 2006).

199. As to the lack of civil unions, the Court notes that the Government’s observations in this respect are in line with those made in the case of *Oliari and Others*, relating to the same period of time – 2015 being the crucial time on which the *Oliari and Others* judgment is based (see *Oliari and Others*, cited above, § 164). As in that case, in the present case, the Government did not put forward a prevailing community interest against which to balance the applicants’ momentous interests which persisted until the legislation concerning civil unions came into force and until which time the applicants in the present case continued to suffer the consequences of being unable to benefit from a specific legal framework providing for the recognition and protection of their same-sex unions.

200. Similarly, as to the failure to register the marriages, the Government failed to indicate any legitimate aim for such refusal, save for a general phrase concerning “internal public order” (see paragraph 167 above), which however, the Court observes, is not in line with domestic jurisprudence (Court of Cassation judgment no. 4184/12, see paragraphs 61-65 above, whose findings were reiterated thereafter). In that connection, the Court notes that, unlike other provisions of the Convention, Article 8 does not enlist the notion of “public order” as one of the legitimate aims in the interests of which a State may interfere with an individual’s rights. However, bearing in mind that it is primarily for the national legislation to lay down the rules regarding validity of marriages and to draw the legal consequences (see *Green and Farhat v. Malta*, (dec.), no. 38797/07, 6 July 2010), the Court has previously accepted that national regulation of the registration of marriage may serve the legitimate aim of the prevention of

disorder (see *ibid.* and *Dadouch*, cited above, § 54). Thus, the Court can accept for the purposes of the present case that the impugned measures were taken for the prevention of disorder, in so far as the applicants' position was not provided for in domestic law.

201. Indeed, the crux of the case at hand is precisely that the applicants' position was not provided for in domestic law, specifically the fact that the applicants could not have their relationship - be it a *de facto* union or a *de jure* union recognised under the law of a foreign state - recognised and protected in Italy under any form.

202. The Court notes the Government's submission that, in the area in question, the Contracting States enjoyed a substantial margin of appreciation.

203. It reiterates that the scope of the States' margin of appreciation will vary according to the circumstances, the subject matter and the context; in this respect one of the relevant factors may be the existence or non-existence of common ground between the laws of the Contracting States (see, for example, *Wagner and J.M.W.L.* and *Negrepontis-Giannisis*, both cited above, § 128 and § 69 respectively). Accordingly, on the one hand, where there is no consensus within the member States of the Council of Europe, either as to the relative importance of the interest at stake or as to the best means of protecting it, particularly where the case raises sensitive moral or ethical issues, the margin will be wide. On the other hand, where a particularly important facet of an individual's existence or identity is at stake, the margin allowed to the State will normally be restricted (see *Van der Heijden v. the Netherlands* [GC], no. 42857/05, § 60, 3 April 2012, *Mennesson v. France*, no. 65192/11, § 77, ECHR 2014 (extracts); and *Paradiso and Campanelli v. Italy* [GC], no. 25358/12, § 182, ECHR 2017).

204. As to legal recognition of same-sex couples, the Court notes the movement that has continued to develop rapidly in Europe since the Court's judgment in *Schalk and Kopf* and continues to do so. Indeed at the time of the *Oliari and Others* judgment, there was already a thin majority of CoE States (twenty-four out of forty-seven) that had already legislated in favour of such recognition and the relevant protection. The same rapid development had been identified globally, with particular reference to countries in the Americas and Australasia, showing the continuing international movement towards legal recognition (see *Oliari and Others*, cited above, § 178). To date, twenty-seven countries out of the forty-seven CoE member states have already enacted legislation permitting same-sex couples to have their relationship recognised (either as a marriage or as a form of civil union or registered partnership) (see paragraph 112 above).

205. The same cannot be said about registration of same-sex marriages contracted abroad in respect of which there is no consensus in Europe. Apart from the member States of the Council of Europe where same-sex marriage is permitted, the comparative law information available to the

Court (limited to twenty-seven countries where same-sex marriage was not, at the time, permitted) showed that only three of those twenty-seven other member States allowed such marriages to be registered, despite the absence (to date or at the relevant time) in their domestic law of same-sex marriage (see paragraph 113 above). Thus, this lack of consensus confirms that the States must in principle be afforded a wide margin of appreciation, regarding the decision as to whether to register, as marriages, such marriages contracted abroad.

206. Apart from the above, in determining the margin of appreciation, the Court must also take account of the fact that the issues in the present case concern facets of an individual's existence and identity (see, for example, *Oliari and Others*, cited above, § 177).

207. As to the interests of the State and the community at large, in respect of the failure to register such marriages, the Court can accept that to prevent disorder Italy may wish to deter its nationals from having recourse in other States to particular institutions which are not accepted domestically (such as same-sex marriage) and which the State is not obliged to recognise from a Convention perspective. Indeed the refusals in the present case are the result of the legislator's choice not to allow same-sex marriage - a choice not condemnable under the Convention. Thus, the Court considers that there is also a State's legitimate interest in ensuring that its legislative prerogatives are respected and therefore that the choices of democratically elected governments do not go circumvented.

208. The Court notes that the refusal to register the applicants' marriage did not deprive them of any rights previously recognised in Italy (had there been any), and that the applicants could still benefit, in the State where they contracted marriage, from any rights and obligations acquired through such marriage.

209. However, the decisions refusing to register their marriage under any form, thus leaving the applicants in a legal vacuum (prior to the new laws), failed to take account of the social reality of the situation. Indeed, as the law stood before the introduction of Law no. 76/2016 and subsequent decrees, the authorities could not formally acknowledge the legal existence of the applicants' union (be it *de facto* or *de jure* as it was recognised under the law of a foreign state). The applicants thus encountered obstacles in their daily life and their relationship was not afforded any legal protection. No prevailing community interests have been put forward to justify the situation where the applicants' relationship was devoid of any recognition and protection.

210. The Court considers that, in the present case, the Italian State could not reasonably disregard the situation of the applicants which corresponded to a family life within the meaning of Article 8 of the Convention, without offering the applicants a means to safeguard their relationship. However, until recently, the national authorities failed to recognise that situation or

provide any form of protection to the applicants' union, as a result of the legal vacuum which existed in Italian law (in so far as it did not provide for any union capable of safeguarding the applicants' relationship before 2016). It follows that the State failed to strike a fair balance between any competing interests in so far as they failed to ensure that the applicants had available a specific legal framework providing for the recognition and protection of their same-sex unions.

211. In the light of the foregoing, the Court considers that there has been a violation of Article 8 of the Convention in that respect.

**(b) Article 14**

212. Having regard to its finding under Article 8, the Court considers that it is not necessary to examine whether, in this case, there has also been a violation of Article 14 in conjunction with Article 8 or 12.

#### IV. APPLICATION OF ARTICLE 41 OF THE CONVENTION

213. Article 41 of the Convention provides:

“If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party.”

##### **A. Damage**

214. The applicants in applications nos. 26431/12, 26742/12, and 44057/12 claimed 10,000 euros (EUR) each, namely EUR 3,000 for the failure to register their marriage and EUR 7,000 for the lack of legal recognition of their relationship, in respect of non-pecuniary damage, as well as interest and tax on those amounts. They also request the Court to indicate measures under Article 46 for the purposes of redressing the structural problem in the law. The applicants in application no. 60088/12 claimed EUR 15,000 jointly in non-pecuniary damage.

215. The Government made no comment in respect of the applicants' claims.

216. The Court notes that the situation in Italy has changed pending proceedings before this Court; thus there is no room for indicating any measures under Article 46. It, however, awards the applicants EUR 5,000 each in respect of non-pecuniary damage.

##### **B. Costs and expenses**

217. The applicants in applications nos. 26431/12, 26742/12, and 44057/12 also claimed EUR 13,862 (as per itemised bill of costs according

to the relevant Italian law) plus interests for the costs and expenses incurred before the Court. The applicants in application no. 60088/12 claimed EUR 12,586.50 for professional fees calculated in line with the relevant Italian law in connection with proceedings before this Court, as well as an estimated EUR 2,500 for travel expenses.

218. The Government made no comment in respect of the applicants' claims.

219. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum. In the present case, regard being had to the documents in its possession and the above criteria, the Court considers it reasonable to award to the applicants in application no. 60088/12 the sum of EUR 9,000, jointly, and the applicants in applications nos. 26431/12, 26742/12, and 44057/12 the sum of EUR 10,000, jointly, for the proceedings before the Court.

### **C. Default interest**

220. The Court considers it appropriate that the default interest rate should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

## **FOR THESE REASONS, THE COURT**

1. *Declares*, by a majority, the applications admissible;
2. *Holds*, by 5 votes to 2, that there has been a violation of Article 8 of the Convention;
3. *Holds*, unanimously, that there is no need to examine the complaint under Article 14 in connection with Articles 8 and 12 of the Convention;
4. *Holds*, by 5 votes to 2,
  - (a) that the respondent State is to pay the applicants, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts:
    - (i) EUR 5,000 (five thousand euros) each, plus any tax that may be chargeable, in respect of non-pecuniary damage;
    - (ii) EUR 9,000 (nine thousand euros), jointly, plus any tax that may be chargeable to the applicants in application no. 60088/12, in respect of costs and expenses;



(iii) EUR 10,000 (ten thousand euros), jointly, plus any tax that may be chargeable to the applicants in applications nos. 26431/12, 26742/12, and 44057/12 in respect of costs and expenses;

(b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points.

5. *Dismisses*, unanimously, the remainder of the applicants' claim for just satisfaction.

Done in English, and notified in writing on 14 December 2017, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Abel Campos  
Registrar

Kristina Pardalos  
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the following separate opinions are annexed to this judgment:

- (a) concurring opinion of Judge Koskelo;
- (b) dissenting opinion of Judges Pejchal and Wojtyczek.

K.P.  
A.C.

## APPENDIX

No	Application No	Lodged on	Applicant Date of birth Place of residence Nationality
1.	26431/12	20/04/2012	<p><b>Francesca ORLANDI</b> 11/10/1980 Ferrara Italian</p> <p><b>Elisabetta MORTAGNA</b> 27/04/1981 Ferrara Italian</p> <p><b>D.P.</b> 1974 Peschiera Borromeo Italian</p> <p><b>G.P</b> 1970 Peschiera Borromeo Italian</p>
2.	26742/12	20/04/2012	<p><b>Mario ISITA</b> 11/03/1948 Saskatchewan Italian</p> <p><b>Grant Harold BRAY</b> 13/11/1968 Saskatchewan Canadian</p>
3.	44057/12	06/07/2012	<p><b>Gianfranco GORETTI</b> 02/03/1965 Rome Italian</p> <p><b>Tommaso GIARTOSIO</b> 23/10/1963 Rome Italian</p> <p><b>Fabrizio RAMPINELLI</b> 12/05/1960 Utrecht Italian</p> <p><b>Alessandro DAL MOLIN</b> 17/02/1964 Utrecht Italian</p>
4.	60088/12	11/09/2012	<p><b>Antonio GARULLO</b> 05/01/1965 Latina Italian</p>

No	Application No	Lodged on	Applicant Date of birth Place of residence Nationality
			<b>Mario OTTOCENTO</b> 29/05/1972 Latina Italian

## CONCURRING OPINION OF JUDGE KOSKELO

1. Like the majority, I have voted in favour of finding a violation of Article 8 in this case. Regrettably, however, I am unable to subscribe to the reasoning adopted by the majority.

2. The present case raises two issues (see paragraph 3 of the judgment). The first issue is whether there has been a violation of Article 8 because of the refusal by the Italian authorities to register the applicants' same-sex marriages contracted abroad (foreign same-sex marriages) as marriages for the purposes of Italian law.

3. The second issue is whether there has been a violation of Article 8 because until 5 June 2016, that is, the entry into force of Law no. 76/2016, the Italian legal order did not provide for a specific legal framework concerning civil unions/registered partnerships between persons of the same sex. Because of this lack of a legal framework, the applicants were also unable to have their foreign same-sex marriages registered as civil unions/registered partnerships.

4. As the Court's case-law stands, the conclusions to be drawn on both issues are, in my opinion, quite straightforward.

### *The first issue: refusal to register foreign same-sex marriages as marriages*

5. The registration of civil status, in the present context the registration of a marriage contracted abroad, is an act of recognition of that status for the purposes of the domestic legal order. In its judgment of 15 March 2012 (see paragraphs 61-62 of the present judgment), the Italian Court of Cassation found that foreign same-sex marriages could not be registered as marriages. In that judgment, the Court of Cassation carried out what appears to be a normal exercise in the application of private international law.

6. When a domestic legal order is faced with a question of recognition of a foreign status, the first step of the analysis is qualification. The qualification is about determining whether a foreign marriage is capable of being qualified as a marriage, that is, whether it falls within the scope of the domestic norms regulating the recognition of foreign marriages. Under the established principles of private international law, that qualification is subject to *lex fori*, which therefore determines whether a foreign marriage can be qualified as a marriage. In the present case, the Italian Court of Cassation has concluded that under Italian law a foreign same-sex marriage cannot be qualified as a marriage for the purposes of the norms of Italian law governing the recognition of foreign marriages. This means that, according to the domestic court, a foreign same-sex marriage could not be registered as marriage because such a marriage is incapable of producing the legal effects attaching to a marriage under the Italian legal order.

7. As far as the Convention is concerned, the established position under the Court's case-law is that the Convention does not impose on the Contracting States any obligation to grant same-sex couples access to marriage. In *Schalk and Kopf v. Austria* (no. 30141/04, ECHR 2010), this conclusion was reached both in application of Article 12 and in application of Article 14 taken in conjunction with Article 8.

8. On this basis, given that there is no Convention obligation incumbent on the Contracting Parties to allow same-sex marriage, it seems clear that the Convention cannot additionally impose on those Contracting States which do not provide for such marriages any obligation to recognize foreign same-sex marriages as marriages for the purposes of their own legal order. Consequently, the refusal by the Italian authorities to register the applicants' same-sex marriages as marriages does not give rise to a violation of Article 8 of the Convention.

9. Although the Convention does not oblige a State such as Italy to register foreign same-sex marriages as marriages, with the consequence that such foreign marriages would be subject to all the legal effects attaching to marriage under Italian law, it cannot be excluded that there may be situations where the State's obligations under Article 8 to respect private and family life, either alone or in conjunction with Article 14, may become engaged on the grounds of a failure to acknowledge the manifested stable and committed relationship between a couple, based, as the case may be on a foreign same-sex marriage. This, however, is a separate matter. It appears that the Constitutional Court of Italy has, as a matter of domestic constitutional law, expressed a similar position (see paragraph 75 of the present judgment). However, no particular circumstances or grievances of this nature are at issue before this Court on the basis of the present applications.

*The second issue: refusal to provide any other kind of legal framework for same-sex unions*

10. This issue was the subject of the Court's judgment in the case of *Oliari and Others v. Italy* (nos. 18766/11 and 36030/11, 21 July 2015), where the Court addressed the situation prevailing under Italian law until 5 June 2016, namely that same-sex couples, who are unable to marry, were unable to have access to a specific legal framework (such as that for civil unions or registered partnerships) capable of providing them with the recognition of their status and guaranteeing to them certain rights relevant to a couple in a stable and committed relationship (see *Oliari and Others*, § 167). The Court found that Italy was in violation of Article 8 in that it had failed to ensure that the applicants had available a specific legal framework providing for recognition and protection for their same-sex unions, it being

understood that it was not necessary for this to be in the form of allowing same-sex marriage (*ibid.*, § 185).

11. Given the Court's conclusion in *Oliari and Others*, it is clear that the applicants in the present case were, until the entry into force of the recent legislative amendments, victims of the same underlying failure by the Italian state as the applicants in *Oliari and Others*. This is so because, as far as the present applicants are concerned, the absence of a specific legal framework governing "civil unions" or "registered partnerships" between same-sex couples also had the effect that their foreign same-sex marriages could not be recognised in Italy in any form, that is, neither as marriages nor as "civil unions" or "registered partnerships".

### *Conclusion*

12. On the basis of the above, I conclude that there has been no violation of Article 8 of the Convention on account of the Italian authorities' refusal to register the applicants' foreign same-sex marriages as marriages for the purposes of Italian law.

13. By contrast, there has been a violation of Article 8 because, until the entry into force of Law no. 76/2016 and the associated legislative amendments, no specific legal framework was available in Italy providing for recognition and protection for same-sex unions and, as a result, the applicants' foreign same-sex marriages could not be given recognition in Italy in any form.

### *The majority reasoning*

14. The majority develop a reasoning which focuses on the refusal of *registration* to the same-sex couples and which, in my view, unnecessarily confuses the issues arising in the present case.

15. Initially, in the context of the question of admissibility, the judgment (by reference to *Dadouch v. Malta*, no. 38816/07, § 48, 20 July 2010) acknowledges that the registration of a marriage constitutes a recognition of *legal* civil status (see paragraph 144 of the present judgment). When addressing the merits of the case, however, the majority set out on a line of argument which blurs rather than clarifies the analysis.

16. In the majority judgment, the assessment of the complaints is opened by suggesting that the "refused registration of the applicants' marriages, either as marriage or under any other form", was a measure "depriving them of any legal protection or associated rights" (see paragraph 191). This is where the confusion begins. It is reiterated in paragraph 196, where the majority consider that what the Court must determine is whether the applicants' rights under Article 8 were violated by "the refusals to register

the applicants' marriages in any form, with the result that they were left in a legal vacuum and devoid of any protection".

17. It must be reiterated that the refusal to register the applicants' marriages as marriages was due to the position under substantive Italian law, enshrined at the level of the Constitution, according to which marriage is restricted to persons of the opposite sex. As a corollary of this legal position, a foreign same-sex marriage is not capable of producing the same legal effects as a marriage under substantive Italian law. This in turn is the reason why the applicants' foreign same-sex marriages were not recognized, and thus not registered, as marriages for the purposes of the Italian legal order.

18. Similarly, the refusal to register the applicants' marriages "under any other form" was due to the position prevailing (until 2016) under substantive Italian law, according to which there was no specific legal framework for the recognition and protection of same-sex couples in the form of "civil unions" or "registered partnerships".

19. Thus, it is not correct to suggest that what deprived the applicants, as couples living in stable same-sex unions, of "any legal protection" was the absence of registration. What deprived them of specific legal protection as couples was the absence of substantive legislation providing for a legal framework governing the union of same-sex couples, either as marriages or under another kind of status. In other words, the absence of registration was not the cause but the consequence of the substantive legal situation prevailing in Italy until the adoption of Law no. 76/2016 and related legislative measures.

20. It is worth adding that, as a matter of domestic constitutional law, the Italian Constitutional Court had already stated, prior to the enactment of Law no. 76/2016, that without prejudice to Parliament's discretion, it could however intervene according to the principle of equality in specific situations related to a homosexual couple's fundamental rights, where the same treatment between married couples and homosexual couples was called for. That court would in such cases assess the reasonableness of the measures (see paragraph 75 of the present judgment). Apparently the Constitutional Court did not consider that such contextual protection (prior to the new legislative framework) could or should have been dependent on any prior registration of the same-sex couples concerned. Even from this point of view, therefore, it is not correct to suggest that it is the absence of registration that has deprived the applicants of any protection to which they would otherwise be entitled under domestic law.

21. It is also important to note that as a matter of data protection law, State authorities are not allowed to proceed to the registration of personal data, such as those relating to the private or family relationships of individuals, unless there is a clear legal basis, with a pre-defined purpose, for such measures. These requirements are accentuated under EU law, to

which Italy as Member State is subject, including requirements on data processing based on consent (Directive 95/46/EC; to be replaced as from 25 May 2018 by the General Data Protection Regulation (EU)2016/679). It would seem contradictory to envisage a positive obligation incumbent on the State to register people's intimate relationships in the absence of specific legislation based on clearly defined and justified purposes.

22. For the applicant couples, what matters are the legal effects rather than any act of registration, irrespective of its legal significance. The suggestion that the State should be under a positive obligation derived from Article 8 to provide publicity to the applicants' common project of life (see paragraph 150) – independently from an obligation to provide legal protection for their status as partners in a couple – appears rather bizarre. This is even more so in the light of current conditions, where individuals dispose of ample and easy possibilities to make public, without State assistance, any aspect of their private lives that they wish to share with others.

23. In the present judgment, the majority take, in my view, a superfluous and misguided detour around the issue of registration, before finally arriving at the conclusion that – indeed – the failure imputable to the respondent State consists, not in the refusal of registration, but in the failure to “ensure that the applicants had available a specific framework providing for the recognition and protection of their same-sex unions” (see paragraph 210 of the present judgment). In other words, the violation of Article 8 is basically the same as that found in the case of *Oliari and Others v. Italy*. Under this approach, the absence of registration as such does not raise a distinct issue in the present context.

24. With the legislative changes that have been introduced in Italy through Law no. 76/2016, these aspects of the matter will no longer be of any special importance in the respondent State. Similar issues will, however, arise in those Contracting States where the legislative situation remains similar to that previously prevailing in Italy. Therefore, I think it would have been helpful if the majority could have been persuaded to produce a judgment with a clearer and more analytically coherent reasoning.



## DISSENTING OPINION OF JUDGES PEJCHAL AND WOJTYCZEK

1. We respectfully disagree with the view of our colleagues that there has been a violation of the Convention in the instant case. Our objections concern the methodology of treaty interpretation, the methodology for ascertaining whether Convention rights have been upheld and also the application of the relevant principles and rules of law in the instant case.

2. The Convention is an international treaty which must be expounded according to the rules of treaty interpretation established in international law and codified in the Vienna Convention on the Law of Treaties.

We note in this context that the Preamble to the Convention presents the Convention as *one of the first steps* for the collective enforcement of *certain of the rights* stated in the Universal Declaration. The Preamble refers also to further realisation of rights as one of the methods for the achievement of greater unity between the member States of the Council of Europe. It follows that the role of the Convention is the protection of a limited number of rights, defined therein. Further realisation of human rights must serve the purpose of achieving greater unity between the members of the Council of Europe and is to be undertaken by way of international treaties.

The mandate of the European Court of Human Rights is defined in Article 19 of the Convention in the following terms: *to ensure the observance of the engagements undertaken by the High Contracting Parties in the Convention and the Protocols thereto*. While the Court must interpret and clarify the provisions of the Convention in the context of the new cases that are brought before it, it is not mandated to change the scope of the engagements undertaken by the High Contracting Parties and in particular to adapt the Convention to societal changes. The Court should be the servant, not the master, of the Convention.

Moreover, the Preamble to the Convention refers to two tools for the maintenance of fundamental freedoms: *effective political democracy* and *a common understanding* and observance of human rights. Effective political democracy requires the existence and functioning of legislatures elected according to the standards set forth in Article 3 of Protocol No 1. In this context, the task of adapting the Convention to the evolution of the societies in European States belongs to the High Contracting Parties, and necessarily presupposes the participation of democratically elected legislatures. In our view, even identical societal developments in all the States Parties to the Convention cannot alter the scope of their engagements under the Convention. This applies *a fortiori* to societal changes which occur in only some European States. Changes which occur in some States can never affect the scope of the other States' engagements.

3. The European Convention on Human Rights should not be read in a legal vacuum but placed in the context of the most important international

human-rights instruments. The Preamble of the Convention refers to the Universal Declaration of Human Rights, which *aims at securing the universal and effective recognition and observance of the Rights therein declared*. The Universal Declaration of Human Rights sets out the following rights in Article 16:

“(1) Men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. They are entitled to equal rights as to marriage, during marriage and at its dissolution.

(2) Marriage shall be entered into only with the free and full consent of the intending spouses.

(3) The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.”

The minimum universally binding human rights standards have been set forth in the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights. Article 23 of the International Covenant on Civil and Political Rights has the following wording:

“1. The family is the natural and fundamental group unit of society and is entitled to protection by society and the State.

2. The right of men and women of marriageable age to marry and to found a family shall be recognized.

3. No marriage shall be entered into without the free and full consent of the intending spouses.

4. States Parties to the present Covenant shall take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution. In the case of dissolution, provision shall be made for the necessary protection of any children.”

In both the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights marriage is understood as a union between a man and a woman. Moreover, in both instruments the family – based upon marriage between a man and a woman – was declared *the natural and fundamental group unit of society* and as being *entitled to protection by society and the State*. Marriage is the only “legal framework” for family life mentioned in those documents.

The Human Rights Committee has expressed the following view concerning the meaning of Article 23 of the Covenant:

“Given the existence of a specific provision in the Covenant on the right to marriage, any claim that this right has been violated must be considered in the light of this provision. Article 23, paragraph 2, of the Covenant is the only substantive provision in the Covenant which defines a right by using the term “men and women”, rather than “every human being”, “everyone” and “all persons”. Use of the term “men and women”, rather than the general terms used elsewhere in Part III of the Covenant, has been consistently and uniformly understood as indicating that the treaty obligation of States parties stemming from article 23, paragraph 2, of the Covenant is to

recognize as marriage only the union between a man and a woman wishing to marry each other.” (Communication No. 902/1999, *Ms. Juliet Joslin et al. v. New Zealand*, CCPR/C/75/D/902/1999, views adopted on 17 July 2002).

It follows that the two above-mentioned instruments differentiate the legal status of heterosexual and homosexual couples. There is no doubt that between heterosexual and homosexual couples there are certain similarities and certain differences. However, from the axiological perspective of the two international instruments, the differences prevail over the similarities. It follows that their situations are not comparable for the purpose of assessing the permissibility of legal differentiations in the field of family law.

4. Article 8 § 1 of the Convention states that “*everyone has the right to respect for his private and family life, his home and his correspondence*”. Under Article 12 of the Convention, “*men and women have the right to marry and to found a family, according to national laws governing the exercise of this right*”. It transpires from those provisions that the family unit is founded primarily by a man and a woman through marriage.

The right to respect for one’s private and family life, home and correspondence presupposes an obligation on the State to refrain from interfering with the freedom of the right-holder. Positive action is required from the State primarily to ensure protection from interference by private parties and to impose sanctions for undue interference by public authorities or by private parties.

Much broader positive obligations on the State stem from Article 12, which imposes the obligation to recognise marriage as social and legal institution. Moreover, Article 5 of Protocol No. 7 requires that family law ensures equality between spouses. This last provision emphasises not only the rights but also the *responsibilities* of the spouses. Contracting a marriage entails not only rights and protection but also responsibilities and duties *vis-à-vis* the other spouse, children and society. Moreover, the Court’s case-law stresses the obligation to protect the best interests of children. Legislation on family law should therefore protect the best interests of children and, especially, ensure a stable family environment, free from State interference.

Article 8 of the Convention, as interpreted according to the applicable rules of treaty interpretation, does not impose upon the High Contracting Parties an obligation to provide for other legal institutions (such as civil unions) for the development of family life. In particular, there is no obligation to ensure that persons have *available specific legal frameworks providing for the recognition and protection of their unions*, be they from different sexes or same-sex. This matter belongs to the exclusive domestic jurisdiction of the High Contracting Parties.

The reasoning of the majority refers to the need for protection and recognition (see paragraph 192 of the judgment). There is no doubt that the State authorities in the exercise of their sovereign powers must take into consideration social realities and societal changes as well as the legitimate

needs of their citizens. However, needs do not entail *per se* Convention rights. It is not clear which legitimate needs should entail positive obligations under Article 8 of the Convention. Under the approach proposed by the majority it would be necessary to establish objective criteria for identifying the needs entailing positive obligations for the States.

We agree with the view that under Articles 8 and 12 the States enjoy a broad margin of appreciation. In our view, however, it is not correct to state that they have a broad margin of appreciation when setting up legal frameworks for recognition of interpersonal unions other than marriage (within the meaning of Article 12). In reality, they preserve their complete freedom of action in this respect, since the issue falls outside Convention regulation.

5. Article 12 has been interpreted in many judgments and decisions of the European Court of Human Rights. The Court has expressed, in particular, the following views in this respect:

“In the Court’s opinion, the right to marry guaranteed by Article 12 ... refers to the traditional marriage between persons of opposite biological sex. This appears also from the wording of the Article which makes it clear that Article 12 ... is mainly concerned to protect marriage as the basis of the family” (*Rees v. the United Kingdom*, 17 October 1986, § 49, Series A no. 106).

“The Court recalls that the right to marry guaranteed by Article 12 refers to the traditional marriage between persons of opposite biological sex. This appears also from the wording of the Article which makes it clear that Article 12 is mainly concerned to protect marriage as the basis of the family. Furthermore, Article 12 lays down that the exercise of this right shall be subject to the national laws of the Contracting States. The limitations thereby introduced 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. However, the legal impediment in the United Kingdom on the marriage of persons who are not of the opposite biological sex cannot be said to have an effect of this kind (see the above-mentioned *Rees* judgment, p. 19, §§ 49 and 50)” (*Sheffield and Horsham v. the United Kingdom*, 30 July 1998, § 66, *Reports of Judgments and Decisions* 1998-V)”

“... the Court observes that marriage has deep-rooted social and cultural connotations which may differ largely from one society to another. The Court reiterates that it must not rush to substitute its own judgment in place of that of the national authorities, who are best placed to assess and respond to the needs of society (see *B. and L. v. the United Kingdom*, cited above, § 36).” (*Schalk and Kopf v. Austria*, no. 30141/04, § 62, ECHR 2010).”

“The Court has accepted that the protection of the family in the traditional sense is, in principle, a weighty and legitimate reason which might justify a difference in treatment (see *Karner*, cited above, § 40, and *Kozak*, cited above, § 98)” (*X and Others v. Austria* [GC], no. 19010/07, § 138, ECHR 2013).”

More recently:

“The Court reiterates that Article 12 of the Convention is a *lex specialis* for the right to marry. It secures the fundamental right of a man and woman to marry and to found a family. Article 12 expressly provides for regulation of marriage by national law. It enshrines the traditional concept of marriage as being between a man and a woman

(see *Rees v. the United Kingdom*, cited above, § 49). While it is true that some Contracting States have extended marriage to same-sex partners, Article 12 cannot be construed as imposing an obligation on the Contracting States to grant access to marriage to same-sex couples (see *Schalk and Kopf v. Austria*, cited above, § 63)” (*Hämäläinen v. Finland* [GC], no. 37359/09, § 96, ECHR 2014).”

We agree with those views, which have their basis in the Convention as expounded under the applicable rules of treaty interpretation. They are in harmony with the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights. We note furthermore that the Preamble to the Convention contains a reference to *a common understanding of human rights* and to *a common heritage of political traditions, ideals, freedom and the rule of law*. The understanding of marriage as a stable union of a man and a woman underlying family life is part of the common legal heritage.

6. In a number of cases the Court has also addressed the issue of the possible “extension” of marriage. In the instant case the majority expresses the following view in this respect: “The Court reiterates that States are still free, under Article 12 of the Convention as well as under Article 14 taken in conjunction with Article 8, to restrict access to marriage to different-sex couples (see *Schalk and Kopf*, cited above, § 108, and *Chapin and Charpentier*, cited above, § 108)” (see paragraph 192 of the principal judgment).

In this context we note firstly that that the terms “to marry” and “marriage” have become polysemes. Marriage in its initial meaning presupposes the community of lives between a man and a woman. We note in this context the following definitions of marriage: “*Nuptiae sunt coniunctio maris et feminae et consortium omnis vitae, divini et humani iuriscommunicatio*” (Modestinus, *Digesta Iustiniani* 23.2.1); “*Nuptiae autem sive matrimonium est viri et mulieris coniunctio, individuum consuetudinem vitae continens*” (*Institutiones Iustiniani*, 1.10). The complementariness of the biological sexes of the two spouses is a constitutive element of marriage. Moreover, marriage in this meaning is - by definition - a social institution open to procreation. The fact that certain married couples may suffer from infertility does not affect its social function.

Marriage in its second meaning designates a union of two persons living together. The term “marriage” in this second sense has a different connotation and a different denotation to the term “marriage” as used in the first meaning. This second meaning has developed only recently.

Granting access to marriage within the meaning of Article 12 to same-sex couples is conceptually impossible. “Extending” the scope of the right to marry to homosexual couples presupposes that the term “marriage” is used in a different meaning (that is, the second meaning explained above). Thus, Article 12 cannot be applicable to same-sex couples wishing to marry

or to same-sex couples who are already married under the domestic system of another State (see paragraph 145 *in fine*). The “extension” of the scope of marriage to homosexual couples not only affects the denotation but also substantially changes the connotation of the term “marriage”.

Secondly, the majority states that “States are **still** free...” (emphasis added). This suggests the Court intends to revise this view in the future. We strongly disagree with such an approach, which presupposes that the scope of treaty obligations may be adapted by the Court on the basis of societal changes and - what is more - that those societal changes can and will develop in only one direction. The Court has no mandate to favour or inhibit societal changes. The States remain free to decide on different issues under the Convention until such time as this treaty has been modified by the masters of the treaty.

7. The majority notes a rapid development towards legal “recognition” of same-sex couples (see paragraph 204 of the judgment) as well as the lack of consensus regarding the registration of same-sex marriages contracted abroad (see paragraph 205 of the judgment). We note that marriage is constitutionally defined as a union between a man and a woman in a growing number of European States: Bulgaria, Croatia, Hungary, Latvia, Lithuania, Macedonia, Moldova, Montenegro, Poland, Serbia, Slovakia and Ukraine.

8. The majority considers that *the facts of the present application* fall within the notion of private life as well as family life within the meaning of Article 8 (see paragraph 143 of the judgment) and draws the conclusion that these Articles apply in the present case. In our view this assertion is based upon a fundamental methodological error.

That certain facts of a case fall within the meaning of private or family life does not in itself mean that Articles 8 or 12 are applicable. A Convention provision protecting a human right is applicable in certain circumstances if it offers at least *a prima facie* protection against the alleged interference with this right. What matters here are not the factual circumstances presented by an applicant, but the grievances raised in the application. This may be illustrated by the following fictitious example. A couple who wish to marry travel by plane to the place of the marriage ceremony, but their flight is delayed. Such facts may *prima facie* fall within the scope of private and family life for the purpose of Article 8. This does not, however, mean that Articles 8 or 12 are applicable if the grievance raised concerns the compensation claims in respect of the delay, since Articles 8 and 12 do not protect couples who wish to marry from such inconveniences.

The majority has expressed the following view in paragraph 145: “Since the Court has already held Article 12 to be applicable to a same sex-couple wishing to marry, the provision must also be applicable to same-sex couples who are already married under the domestic system of another State”.

We note in this respect that the premise referred to in this sentence is false: it is not correct to state that in *Chapin and Charpentier v. France*, (no. 40183/07, 9 June 2016) the Court also considered that Article 12 applied to the applicants, a same-sex couple seeking to marry (see § 31 of that judgment). In that case, the Court considered that Article 12 applied to the specific *grievance* raised by the applicants for the purpose of assessing that grievance from the viewpoint of that provision. Whether Article 12 is applicable to couples who are already married under the domestic system of another State depends upon the grievance they raise. If, for instance, a married couple complains that their home has been unlawfully expropriated, Article 12 does not apply, in that it does not protect against expropriation.

The methodological fallacy identified above may lead to the application of a provision to grievances that fall beyond the scope of negative or positive *prima facie* obligations under that provision. It also gives the false impression that State obligations that might arise in a new case have already been established in a previous case. In order to answer the question whether a provision protecting a human right applies it is necessary to have previously established, with sufficient precision, the scope of the State obligations stemming from the relevant provision.

9. The majority expresses the following views in the present judgment:

“197. While the essential object of Article 8 is to protect the individual against arbitrary action by the public authorities, there may in addition be positive obligations inherent in effective ‘respect’ for family life. However, the boundaries between the State’s positive and negative obligations under this provision do not lend themselves to precise definition. The applicable principles are, nonetheless, similar. In both contexts regard must be had to the fair balance that has to be struck between the competing interests of the individual and of the community as a whole; and in both contexts the State enjoys a certain margin of appreciation (see *Jeunesse v. the Netherlands* [GC], no. 12738/10, § 106, 3 October 2014, and *Wagner and J.M.W.L. v. Luxembourg*, no. 76240/01, § 118, 28 June 2007).

198. The Court does not consider it necessary to decide whether it would be more appropriate to analyse the case as one concerning a positive or a negative obligation since it is of the view that the core issue in the present case is precisely whether a fair balance was struck between the competing interests involved (see, *mutatis mutandis*, *Dickson v. the United Kingdom*, no. 44362/04, § 71, 18 April 2006).”

We do not agree with the view that the boundaries between the State’s positive and negative obligations under Article 8 do not lend themselves to precise definition. Although in many cases numerous State actions and omissions of different types are entangled, there is, in our view, a clear distinction between the obligation to act and the obligation to refrain from acting. The methodology to be followed in respect of the two types of obligations is different. If the State acts in a domain protected from State interference, it must demonstrate that this interference serves a legitimate aim and is really necessary to achieve this aim. It must also show that the interference has a basis in domestic law. If a State refrains from acting or

acts without due diligence, the question whether the interference has a basis in domestic law does not arise, but it is necessary to verify whether there is an obligation to act at all and to establish the meaning and scope of any such obligation. It must also be shown that an obligation to act may be inferred from specific provisions of the Convention under the applicable rules of treaty interpretation. The meaning of the obligation imposed upon the States has to be established with the necessary precision. The Court may establish a violation of a positive obligation to act only if it previously identifies the scope and meaning of this obligation and shows that it stems from the provisions of the Convention. It may also verify whether domestic legislation contains the necessary provisions empowering public authorities to act as required under the Convention,

The present case clearly concerns the existence and scope of an obligation on State authorities to act. However, the majority has not established with sufficient precision the meaning and the scope of the legal rule which has been allegedly infringed by the domestic authorities. The scope of State obligations to act under Article 8 remains completely unclear.

10. The majority also expresses the following views in the present judgment:

“201. Indeed, the crux of the case at hand is precisely that the applicants’ position was not provided for in domestic law, specifically the fact that the applicants could not have their relationship - be it a *de facto* union or a *de jure* union recognised under the law of a foreign state – recognised and protected in Italy under any form.”

“201. The Court considers that, in the present case, the Italian State could not reasonably disregard the situation of the applicants which corresponded to a family life within the meaning of Article 8 of the Convention, without offering the applicants a means to safeguard their relationship. However, until recently, the national authorities failed to recognise that situation or provide any form of protection to the applicants’ union, as a result of the legal vacuum which existed in Italian law (in so far as it did not provide for any union capable of safeguarding the applicants’ relationship before 2016). It follows that the State failed to strike a fair balance between any competing interests in so far as they failed to ensure that the applicants had available a specific legal framework providing for the recognition and protection of their same-sex unions”.

We observe in this respect that any couple, be they heterosexual or homosexual, have the means to preserve their relationship without any assistance from the State. The ability to live a happy life as a couple does not depend on any positive action by the State authorities but on the absence of State interference. We note - *en passant* - that in Italy as in other European States a growing number of heterosexual couples decide freely neither to marry nor to enter into a civil union and find their situation fully satisfactory. They assert their right to live their family lives outside any legal framework provided by legislation. Whatever the available legal frameworks, there will necessarily be substantial groups of persons who consider that those frameworks do not fit their needs.



We note, furthermore, that the terms “recognition” and “protection” are vague and ambiguous. It is not clear which concrete measures are required to ensure recognition and protection, nor is it easy to identify the inconveniences against which protection is required. In any event, a marriage or a civil union are not the only possible forms of recognition or protection. The States authorities can recognise cohabiting couples by taking their needs into consideration and can ensure them protection by refraining from undue interference and by granting certain positive rights. In this context, we note that it is not correct to state that the national authorities failed to recognise or to protect same-sex couples. All cohabiting couples were recognised in many Italian laws and could benefit from various rights. For instance, all cohabiting couples are recognised in tax law and the tax regime applicable to cohabiting couples is aligned with the tax regime applicable to married couples (as a result of Constitutional Court judgment no. 179/1976). Similarly, housing legislation protects a partner in the event of the other partner’s death or where a couple separate (as a result of Constitutional Court judgment no. 559/1989). It has not been shown in the instant case that the protection afforded to the applicant couples has been insufficient.

11. The present judgment relies on the judgment in the case of *Oliari and Others v. Italy* (nos. 18766/11 and 36030/11, 21 July 2015). In that case, the Court held that “in Italy the need to recognise and protect such relationships has been given a high profile by the highest judicial authorities, including the Constitutional Court and the Court of Cassation. ... In such cases, the Constitutional Court, notably and repeatedly called for a juridical recognition of the relevant rights and duties of homosexual unions ..., a measure which could only be put in place by Parliament” (*Oliari*, § 180).

The Court also considered that “this repetitive failure of legislators to take account of Constitutional Court pronouncements or the recommendations therein relating to consistency with the Constitution over a significant period of time, potentially undermines the responsibilities of the judiciary...” (*Oliari*, § 184).

Furthermore, Judge Mahoney in his concurring opinion to that judgment, joined by Judges Tsotsoria and Vehabović, considered it decisive the fact that the Italian State had chosen, through its highest courts, notably the Constitutional Court, to declare that two people of the same sex living in stable cohabitation are invested by the Italian Constitution with a fundamental right to obtain juridical recognition of the relevant rights and duties attaching to their union.

In our assessment the approach adopted in the *Oliari v. Italy* judgment, and in the concurring opinion thereto, is mistaken. The Italian Constitutional Court expressed its views in the reasoning, not in the operative part of its decisions. The *dicta* cannot be considered binding upon

the Italian Parliament. Such a situation cannot be compared to the failure to execute an obligation imposed by a judgment of a constitutional court in its operative part, which is binding upon the State authorities.

12. We note the following inconsistency in the judgment. In paragraph 200 the majority identifies the prevention of disorder as the value underlying the authorities' attitude. On other hand, the majority do not see any prevailing interest put forward to justify the situation created by the authorities' attitude (see paragraph 209 of the judgment). The weight of the conflicting values at stake has not been assessed.

13. For the reasons explained above, the applications should have been declared inadmissible as manifestly ill-founded. Moreover, in our view the applicants can no longer claim to have victim status, in that their unions have been finally registered as civil unions under Italian law or can be registered as such if they so request. Furthermore, certain applicants (the authors of applications nos. 3 and 5) do not reside in Italy. In principle, positive obligations on the States do not apply to persons residing abroad. It is not clear how their civil status under Italian law can affect the quality of their life abroad. The question whether these applicants remain within the jurisdiction of Italy within the meaning of Article 1 has not been addressed.

14. To sum up: in our view the majority have departed from the applicable rules of Convention interpretation and have imposed positive obligations which do not stem from this treaty. Such an adaptation of the Convention comes within the exclusive powers of the High Contracting Parties. We can only agree with the principle: "no social transformation without representation".