



## Oliari and Others v. Italy

Applications nos. 18766/11 and 36030/11

**Country:** Italy

**Region:**

**Year:** 2015

**Court:** European Court of Human Rights

**Human Rights:** Freedom from discrimination

### Facts

Six Italian Nationals brought a claim of discrimination to the European Court of Human Rights. They claim that the Italian courts refused to grant them the right to get married, based on the fact that they were same sex couples. They brought the case to the European Court on the basis of breach of the European Convention on Human Rights (no gender discrimination).

Before reaching the European Court, the cases were brought before different forums:

Two applicants brought a discrimination claim to the Trent Tribunal but it was rejected on 2/24/2009. They then brought their case to the Trent Court of Appeal, which referred the case to the Italian Constitutional Court. The Constitutional Court declared the constitutional challenge inadmissible on 4/15/2010. In consequence, the Court of Appeal rejected the claim in full on 9/21/2010.

Two other applicants wrote to the Italian President about their difficulties to have their union recognised and to solicit legislation to grant marriage for homosexuals. On 4/9/2011 their request for publication of marriage bans was rejected -2 other applicants requested publication of their marriage bans. Their request was rejected on 11/5/2009. They challenged the decision before the Milan Tribunal, which rejected their claim in 6/9/2010.

Excerpts from the Italian courts decisions:

The Trent Court of Appeal noted that the Constitution did not establish the requirements to contract marriage, but the Civil Code did and it precisely provided that one such requirement was that spouses should be of the opposite sex. Thus, a marriage between persons of the same sex lacked one of the most essential requirements to render it a valid legal act, namely a difference in sex between the parties. In any event there was no fundamental right to marry, neither could the limited law provisions constitute discrimination, since the limitations suffered by the applicants were the same as those applied to everyone.

Italian Constitution Court: ?Lastly, the court considered that, in respect of Article 3 of the Constitution regarding the principle of equality, the relevant legislation did not create 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.

European Recommendation:

The Committee of Ministers recommended that member States:

Examine existing legislative and other measures, keep them under review, and collect and analyse relevant data, in order to monitor and redress any direct or indirect discrimination on grounds of sexual orientation or gender identity;

Ensure that legislative and other measures are adopted and effectively implemented to combat discrimination on grounds of sexual orientation or gender identity, to ensure respect for the human rights of lesbian, gay, bisexual and transgender persons and to promote tolerance towards them;

Where national legislation confers rights and obligations on unmarried couples, member states should

ensure that it applies in a non-discriminatory way to both same-sex and different-sex couples, including with respect to survivor's pension benefits and tenancy rights;

Where national legislation recognises registered same-sex partnerships, member states should seek to ensure that their legal status and their rights and obligations are equivalent to those of heterosexual couples in a comparable situation; and

Where national legislation does not recognise nor confer rights or obligations on registered same-sex partnerships and unmarried couples, member states are invited to consider the possibility of providing, without discrimination of any kind, including against different-sex couples, same-sex couples with legal or other means to address the practical problems related to the social reality in which they live.

Legal Provisions:

Articles 7, Charter of Fundamental Rights of the European Union: Everyone has the right to respect for his or her private and family life, home and communications.

Article 9, Charter of Fundamental Rights of the European Union: The right to marry and to found a family shall be guaranteed in accordance with the national laws governing the exercise of these rights.

Article 21, Charter of Fundamental Rights of the European Union: Any discrimination based on any ground such as sex, race, colour, ethnic or social origin, genetic features, language, religion or belief, political or any other opinion, membership of a national minority, property, birth, disability, age or sexual orientation shall be prohibited.

Article 8, European Convention of Human Rights: Everyone has the right to respect for his private and family life, his home and his correspondence. 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 14, European Convention of Human Rights: 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.

## Decision and Reasoning

Preliminary Objections:

The Italian Government claimed that the European Court should reject the case because:

the claimants had not used the full remedies (up to the Constitution court) in Italy before lodging a claim to the European Court,

the claimants had not asked for another recognition of their civil union, just the access to marriage, and the six-month time limit to submit the case to the European court was not respected. The ECHR rejected all arguments considering that:

no Italian court could have ruled differently, since the constitution court ruled that same sex marriage was not possible in Italy and such situation was not unconstitutional;

the recognition of legal union in Italy is so closely connected to marriage that it would have been difficult for the applicants to do it without seeking marriage; and

applications are not out of time because the situation of the claimants is a continuous one. The ECHR considered that Italian courts were given the opportunity to respond to the claimants and therefore accepts to examine the case. Alleged violation of the Article 8 of the Convention

The claimants complained that they were discriminated against in Italy because they could not enter into a civil union.

The ECHR examined all the merits of the discrimination claim. On the violation of article 8 of the Human Rights Convention, the Court stated that:

Article 8 may impose on member states of the European Union some obligations to ensure that individual rights are protected. Such measures may include family life topics;

The notion of respect in the Article 8 is diversely defined depending on the countries. The ECHR considered that the positive obligations to apply such a notion of respect were a consequence of the discordance of the social reality and the law, and the coherence of the legal system;

Member States do have a margin of appreciation when applying Article 8, which is to be restricted when an important aspect of the individuals private life is impacted;

In Italy, the ECHR had to examine whether Italy failed to comply with the positive obligation to ensure respect of the individuals' private life, more particularly by providing them some form of recognition and protection of their relationship;

Same-sex couples need to, as much as different sex couples, get protection and recognition of their relationship. This right has been recognised by the European Parliament 15 years ago;

The Court noted that the applicants have not been able to marry, but also could not find in Italy any type of recognition of their status;

It is, in theory, possible in Italy to register same sex union on civil registers, but in reality this is symbolic, as it happens in a very limited number of cases;

Private agreements entered into by the applicants do not provide them the equivalent legal protection as would civil unions (including inheritance rights);

The Court also noted that there was no proof that Courts in Italy could issue a statement for a formal recognition, and the Italian Government has not detailed what such statement would imply;

The Courts in Italy look at this issue on a case by case basis, which creates uncertainty, and applicants have to go through a lot of claims to see their rights recognised;

Protection is lacking in content, and is unstable, as the courts decisions may vary (there is no judicial precedent case law in Italy);

Coherence in the administration and legal system of a country is a key consideration to rule on the existence of a breach of Article 8;

The administrative and legal burden in Italy needs to be corrected, which would solve an important social need, considering the number of homosexuals in Italy;

The Court considered that in the absence of marriage, homosexuals in Italy have an interest in obtaining the choice to enter into a civil union or partnership, especially in the absence of marriage;

The Italian government and the legislators, according to the Court, appear not to have taken into consideration the national community need, even if the cases went to the Constitutional Court, and even if they reflect the opinion of the majority of the Italian population. The European Court ruled that there has been a violation of the Article 8 of the European Convention on Human Rights.

#### Alleged violation of the Articles 12 and 14 of the Convention

On the violation of Article 12 and Article 14: the claimants argued that they had suffered discrimination as a result of the prohibition to get married. The Court found that:

A lot of European countries have allowed same-sex couples to get married;

Keeping the legislation as it is will keep marginalise gay people in Italy; and

Most Italian citizens are in favour of gay union recognition;

However, there is no obligation imposed by neither the Court nor the European legislation, on member states, to allow for marriage for gay couples. The European Court denied that there was a violation of the Article 8 of the European Convention on Human Rights.

#### Decision Excerpts

Para 185: In conclusion, in the absence of a prevailing community interest being put forward by the Italian Government, against which to balance the applicants' momentous interests as identified above, and in the light of domestic courts' conclusions on the matter which remained unheeded, the Court finds that the Italian Government have overstepped their margin of appreciation and failed to fulfil their positive obligation to ensure that the applicants have available a specific legal framework providing for the recognition and protection of their same-sex unions.

Para 186: To find otherwise today, the Court would have to be unwilling to take note of the changing conditions in Italy and be reluctant to apply the Convention in a way which is practical and effective.