

# Strasbourg Observers

## Oliari and Others v. Italy: a stepping stone towards full legal recognition of same-sex relationships in Europe

📅 September 16, 2015    👤 Guest Blogger    🏳️‍🌈 LGBT Rights, Oliari and others v. Italy, Prohibition of Discrimination, Right to Respect for Family Life

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Last 21 July, the European Court of Human Rights (ECtHR) in *Oliari and others v. Italy* (<http://hudoc.echr.coe.int/eng?i=001-156265>) had once again the opportunity to analyze the status of same-sex couples wishing to marry or enter into a legally recognized partnership. This resulted in a groundbreaking judgment, with the Court asserting that the absence of a legal framework recognizing homosexual relationships violates the right to respect for private and family life, as provided by the European Convention of Human Rights (ECHR) in article 8.

Its relevance is twofold, as the Court poignantly plunges into the current legal situation of Italy, and at the same time builds up on the outcomes of its previous cases, *Shalk and Kopf v. Austria* (<http://hudoc.echr.coe.int/eng?i=001-99605>) and *Vallianatos and others v. Greece* (<http://hudoc.echr.coe.int/eng?i=001-128294>), to slightly, yet significantly, extend the interpretation of the ECHR principles concerning same-sex individuals who enter stable intimate relationships.

### Facts

The dispute at stake originated from two applications submitted by six Italian nationals in 2011. The applicants asserted that the absence of any legal provision allowing them to marry or access any form of civil union was a form of discrimination on the ground of sexual orientation, in violation of articles 8, 12 (right to marry) and 14 (non-discrimination) ECHR.

Although in about 155 municipalities Italian same-sex couples may register in local registries of civil unions, these are of “merely symbolic value” and do not attribute any official status to the subjects concerned, and may conclude cohabitation agreements, which are designed to regulate certain financial aspects of their life together.

Both the applicants and the government also referred to the main decisions delivered in the most recent years by domestic higher courts on this issue, which basically admitted that same-sex unions must be protected as form of social community under article 2 of Italian Constitution on a case by case basis, yet it is upon the legislature to introduce a form of legal partnership accessible to homosexual couples, and not to the judiciary. Such legal format should not however be marriage, as its constitutional definition must be interpreted in the traditional sense, as the union between a man and a woman.

## Judgment

The reasoning of the Court focused on the analysis of Article 8 ECHR and specifically on the meaning that the notion of “respect” entails in the present case. This led the Chamber to focus on the discrepancy between social reality and the law, as well as to determine if the State positive obligation to ensure such right is “narrow and precise or broad and indeterminate” (§161).

Respect for private and family life is not guaranteed in a State like Italy, where still today same-sex couples have no opportunity “to enter into a civil union or registered partnership (in the absence of marriage)” (§164). In a very insightful passage, the Court emphasized the conflict between the social reality of the applicants, who already live their lives as homosexuals committed in a relationship in Italy, and the silence of the law.

Instruments presented by the Government as adequate solutions are, according to the ECtHR, insufficient. The same Constitutional Court could not but invite the legislature to take action, while ordinary courts hardly have the competence to act more effectively than the higher court in assessing the rights of same-sex couples. Even if they could, the Chamber observed that judicial recognition without a proper legal framework would probably not have lasting legal effects in practice.

Indeed, the higher courts interpretation generated a state of uncertainty, not only as the suggested case by case approach proved to be successful for certain categories of rights more than others, but also in light of the government constant objection to the applicants’ claims.

Consequently, the Court found that the Government “has overstepped their margin of appreciation” (§ 185) and concluded that “the absence of a legal framework allowing for recognition and protection of [applicants] relationship violates their rights under Article 8 of the Convention”, also in light of the “movement towards legal recognition”, “which has continued to develop rapidly in Europe since the Court’s judgment in *Shalk and Kopf*” (§178).

Nonetheless, the judges remain overly cautious on the right to marry, as they reaffirm that States enjoy a wider margin of appreciation, thus reiterating the same conclusions held in *Shalk and Kopf*, to finally declare the claim under article 12 ECHR inadmissible.

## Comments

*Oliari and others v. Italy* surely represents a cutting-edge judgment in the ECtHR case-law on rights of sexual minorities, as it recognizes a positive obligation upon the States to implement a general legal framework regulating same-sex relationships, regardless of the timing when such

institution should be enacted or if civil unions already exist for different-sex couples. In so doing, *Oliari* moves forward with the line of reasoning previously explained in *Shalk and Kopf v. Austria* and *Vallianatos and others v. Greece* respectively.

Nonetheless, the methodology applied by the Court to reach this positive outcome is debatable. The Chamber decided to analyze a possible violation of article 8 alone, although most applicants claimed a violation of article 8 in conjunction with article 14. In this way, the judges overlooked a scrutiny based on the investigation of the respect for the right of private and family life in light of the non-discrimination principle.

By ignoring an evaluation of the case under article 14 ECHR, the Court's reasoning results flattened to a reflection about the meaning of the term "respect" in the Italian context; it thus misses the opportunity to verify in detail whether Italy satisfied the proportionality test under article 14, by examining if the Government treated subjects in comparable situations differently, merely on the basis of their sexual orientation, and, if so, whether the State had particularly convincing and weighty reasons to prove such treatment to be reasonably justified and legitimate.

What would the Court outcome consist of in a similar case against States where public opinion is not as positive towards homosexuality as the Italian one was reported to be, or where domestic courts are hesitant or silent in urging the legislator to act? The concurring opinion already attempted to circumscribe the effects of the decision to the Italian situation only.

Furthermore, once determined the general need for legal recognition and core protection of applicants' rights (§ 177), the judgment does not foresee what indispensable rights and obligations should be attached to a form of civil union other than marriage. By leaving these elements to the appreciation of the States, the Court upholds an approach that may facilitate a non-homogeneous, possibly discriminatory scenario.

Finally, the Court's (non) analysis of the right to marry argument is disappointing, and fails to make progress from previous cases like *Shalk and Kopf* or *Hämäläinen v. Finland* (<http://hudoc.echr.coe.int/eng?i=001-145768>). Vice-versa, it even goes "backwards", considering that in *Oliari* the Chamber declared the claim under article 12 inadmissible, whereas in *Shalk and Kopf* deemed it admissible, for then finding no violation ([Johnson \(echrso.blogspot.nl/2015-07/ground-breaking-judgment-of-european\)](http://johnson.echrso.blogspot.nl/2015-07/ground-breaking-judgment-of-european)).

## Conclusion

With *Oliari and Others v. Italy*, the ECtHR, after having underlined "the importance of granting legal recognition to *de facto* family life" (*X v. Austria*); having included same-sex unions as stable committed relationships in the notion of family life (*Shalk and Kopf v. Austria*); and clarified that whether a State enacts through legislation a form of registered partnership, such format must be accessible to all couples regardless to their sexual orientation (*Vallianatos and others v. Greece*), now establishes the positive obligation of the State to ensure recognition of a legal framework for same-sex couples in absence of marriage, in light of article 8 of the Convention.

Despite the fact that the regulation of the specific content of such legal formats remains within the margin of appreciation of the States, it can be inferred from *Oliari* that they must guarantee something more than a mere private deed, since the Court attaches to same-sex unions core

rights and needs that go beyond the economic aspects of the relationship (§169).

Contrarily, the road towards the opening of the institution of marriage to same-sex couples appears long and rough, perhaps also in light of the fierce opposition of some States parties to the Council of Europe, when it comes to sexual minorities' rights.

Anyway, it is of notice that Strasbourg judges are sensible to new developments at the global level, as shown by their reference to the recent US Supreme Court's opening to same-sex marriage ([http://www.supremecourt.gov/opinions/14pdf/14-556\\_3204](http://www.supremecourt.gov/opinions/14pdf/14-556_3204)): inter-institutional dialogue can surely contribute to the consolidation of an international trend towards the recognition of same-sex relationships through marriage also in Europe.

*(\*) A longer version of this post appeared at [articolo29.it](http://www.articolo29.it) <http://www.articolo29.it/2015/victory-for-italian-same-sex-couples-victory-for-european-homosexuals-commentary-on-oliari-v-italy/> (<http://www.articolo29.it/2015/victory-for-italian-same-sex-couples-victory-for-european-homosexuals-commentary-on-oliari-v-italy/>)*

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