



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

SECOND SECTION

Application no. 26431/12
Francesca ORLANDI and others against Italy
and 3 other applications
(see list appended)

STATEMENT OF FACTS

THE FACTS

A list of the applicants is set out in the appendix.

A. The circumstances of the case

The facts of the case, as submitted by the applicants, may be summarised as follows.

1. Ms Francesca Orlandi and Ms Elisabetta Mortagna

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

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.

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 cohabited with Ms Orlandi.

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

On 9 September 2011 the two applicants requested 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.

On 8 November 2011 the relevant documents were transferred.

On 13 December 2011, the Commune of Ferrara informed the 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 different sex of the spouses 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.

These two applicants met in 2007 and entered into a stable and committed relationship with each other.

On 9 January 2008 they started cohabiting in G.P.'s apartment. Despite actually living in the latter apartment, in 2009 G.P. purchased a second property and for practical and fiscal reasons had formal residence in this property. 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.

On 16 August 2011 the two applicants got married in Toronto, Ontario, Canada. On 10 October they opened a joint bank account. On 12 January 2013, before a notary, the two applicants appointed each other reciprocally as guardians in the event of incapacitation (*amministratore di sostegno*).

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.

On 20 January 2012, the Commune of Peschiera Borromeo informed the 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.

3. Mr Mario Isita and Mr Grant Bray

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.

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 despite him maintaining formal residence in Italy.

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

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

On 25 November 2011, the Commune of Naples informed the 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.

4. *Mr Gianfranco Goretti and Mr Tommaso Giartosio*

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

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

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 their wills nominating each other as respective heirs.

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

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

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.

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 only has symbolic value (see Relevant domestic law and practice below).

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

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.

In 1997 the couple moved to Milan.

In 1998 Mr Rampinelli moved to Germany for employment purposes, maintaining a long distance relationship with Mr Dal Molin, meeting, however, every week.

In 1998 Mr Dal Molin purchased a property in Milan with the financial assistance of Mr Rampinelli.

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

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

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

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. The latter also supported financially the former's mother, a victim of Alzheimer's disease. The two applicants have been resident in the Netherlands since then. They are under a system of separation of estates; however, their accounts are under both names and their wills indicate each other as heirs.

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.

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.

6. Antonio Garullo and Mario Ottocento

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

On 12 March 2004 they requested the Civil Status Office to register their marriage contracted abroad.

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 to contract marriage, a matter contrary to the internal public order.

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).

By a decision of 10 June 2005 the Latina Tribunal rejected the applicants' claim. It noted that such registration 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, it having 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 countries had provided such legislation went to show that it was not in line with the common principles of international law.

The applicants' appeal 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 different sex of the spouses.

On 17 July 2007 the two applicants appealed to the Court of Cassation.

By a judgment of 15 March 2012 (no. 4184) 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, 24 June 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.

B. Relevant domestic law and practice

1. Private international law

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, the law according to other connecting criteria provided for in the same law shall apply. In absence of any such provision, 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 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 free status (*stato libero*) of any of the spouses, obtained as a result of an Italian judgment or 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 matrimonial life is most prevalent.”

2. *The Civil Code*

Title IV of the Civil Code deals with marriage, and is divided into six chapters. Chapter III deals with the celebration of a civil marriage, its Article 115 in so far as relevant reads as follows:

“A citizen is subject to the provisions of section one of this Chapter even when contracting marriage abroad according to the form therein established. (...)”

3. *Decree no. 396/2000*

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 marriage 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.”

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.

For the purposes of guidance in the application of DPR 396/2000 the Ministry of Internal Affairs issued various circulars. Circular no. 2/2001 of the Ministry of Internal Affairs expressly provided that a marriage between

two persons of the same sex, contracted abroad, cannot be registered into 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.

In the Italian legal order marriage registration does not produce any ulterior legal effects, it serves the purpose of acknowledgment in the public domain (*significato certificativo*) 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 done is also valid in the country where it is to be given effect).

4. the current state of jurisprudence

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.

Extracts from the relevant judgments read as follows:

Court of Cassation judgment no. 138/2010

“The discipline related to marriage contained in the civil code and in special legislation assumes the different sex of the spouses.”

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.”

However, this line of jurisprudence was put aside in the Court of Cassation judgment no. 4184/2012.

The Court of Cassation recalled its jurisprudence 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 together with the capacity to marry (according to the 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 be 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, jurisprudence 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 it was not stated anywhere explicitly in the relevant laws. Thus, the absence of such a requirement did not only put to question 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.

The Court of Cassation considered that the said refusal could be based on the ground that such a marriage ran counter to public order, but the refusal was simply a consequence of the fact that it could not be recognized as a marriage in the Italian legal order.

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 the Parliament. However, the Italian legal order was also made up of Article 12 of the European Convention on Fundamental Rights and Freedoms as interpreted by the European Court of Human Rights and in *Schalk and Kopf v. Austria* (no. 30141/04, 24 June 2010); the Court considered that the difference of sex of the 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 the Article 8 of the European 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 their inviolable status of couple, they could bring actions before the relevant courts to claim, in specific situations related to their fundamental rights, a uniform treatment to that afforded by law to married couples.

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.

COMPLAINTS

All the applicants complain that they are being discriminated against, in the enjoyment of their rights protected by the Convention, on the basis of their sexual orientation. They complain specifically about the authorities’ refusal to register their marriage contracted abroad and more generally about the impossibility of obtaining 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. They invoke Articles 8, 12 and 14.

QUESTIONS TO THE PARTIES

1. Was the interference with the applicants' right to respect for their private and family life, namely the refusal to register their marriage contracted abroad, in accordance with the law and necessary in terms of Article 8 § 2?
2. Has there been a violation of the applicants' right to respect for their private and family life contrary to Article 8 of the Convention, in particular in so far as they had no other possibility to have their relationship recognised by law?
3. In what specific ways are the applicants disadvantaged by the lack of any legal recognition of their relationship?
4. Have the applicants suffered discrimination in the enjoyment of their Convention rights on the ground of their sexual orientation, contrary to Article 14 of the Convention read in conjunction with Article 8 and/or 12 of the Convention, in respect of their inability to (i) register their marriage and (ii) enter into any other type of civil union recognising their relationship in Italy?

APPENDIX

No	Application No	Lodged on	Applicant Date of birth Place of residence Nationality	Represented by
1.	26431/12	20/04/2012	<p>Francesca ORLANDI 11/10/1980 Ferrara Italian</p> <p>Elisabetta MORTAGNA 27/04/1981 Ferrara Italian</p> <p>D.P. 1974 Peschiera Borromeo Italian</p> <p>G.P 1970 Peschiera Borromeo Italian</p>	Maria Elisa D'AMICO
2.	26742/12	20/04/2012	<p>Mario ISITA 11/03/1948 Saskatchewan Italian</p> <p>Grant Holland BRAY 13/11/1968 Saskatchewan Canada</p>	Maria Elisa D'AMICO
3.	44057/12	06/07/2012	<p>Gianfranco GORETTI 02/03/1965 Rome Italian</p> <p>Tommaso GIARTOSIO 23/10/1963 Rome</p>	Maria Elisa D'AMICO

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FACTS AND QUESTIONS

No	Application No	Lodged on	Applicant Date of birth Place of residence Nationality	Represented by
			Italian Fabrizio RAMPINELLI 12/05/1960 Utrecht Italian Alessandro DAL MOLIN 17/02/1964 Utrecht Italian	
4.	60088/12	11/09/2012	Antonio GARULLO 05/01/1965 Latina Italian Mario OTTOCENTO 29/05/1972 Latina Italian	Francesco BILOTTA