



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

SECOND SECTION

Applications nos. 18766/11 and 36030/11
Enrico OLIARI and Lorenzo LONGHI against Italy
and Gian Mario FELICETTI and others against Italy
lodged on 21 March 2011 and 10 June 2011 respectively

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. Mr Oliari and Mr Longhi

In July 2008 these two applicants, who were in a committed stable relationship with each other, declared their intention to marry and requested the Civil Status Office of the Trento Commune to issue the relevant marriage banns.

On 25 July 2008 their request was rejected.

The two applicants challenged the decision before the Trento Tribunal (in accordance with Article 98 of the Civil Code). They argued that Italian law did not explicitly prohibit marriage between persons of the same sex, and that, even if that were the case, such a position would be unconstitutional.

By a decision of 24 February 2009 the Trento Tribunal rejected their claim. It 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 were 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 the difference in sex of 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. Furthermore, it noted that European Union law left such rights to be regulated within the national order.

The applicants appealed to the Trento Court of Appeal. While the court reiterated the unanimous interpretation given to Italian law in the field, namely to the effect that ordinary law, particularly the Civil Code, did not allow marriage between people of the same sex, it considered it relevant to make a referral to the Constitutional Court in connection with the claims of unconstitutionality of the law in force.

The Italian Constitutional Court in its judgment no. 138 of 15 April 2010 declared inadmissible and ill-founded the applicants' constitutional challenge to Articles 93, 96, 98, 107, 108, 143, 143 *bis* and 231 of the Italian Civil Code.

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 non-derogable duties of political, economic and social solidarity. 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 provided for by law – a juridical recognition of the relevant rights and duties. However, this recognition 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. Nevertheless, the court clarified that without prejudice to Parliament's discretion, the Constitutional Court 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.

It went on to consider that it was true that the concepts of family and marriage could not be considered "crystalized" in reference to the period 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 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 in any way considered 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 till today, established that spouses had to be persons 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 meant to refer to marriage in its traditional sense.

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 as homogeneous with marriage. Even Article 12 of the European Convention on Human Rights and Article 9 of the Charter of Fundamental Rights did not require a 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.

In consequence, by a judgment filed in the relevant registry on 21 September 2010 the Court of Appeal rejected the applicants' claims in full.

2. Mr Felicetti and Mr Zappa

In 2003 these two applicants met and entered into a relationship with each other. In 2004 Mr Felicetti decided to undertake further studies (and thus stopped earning any remuneration), a possibility open to him thanks to the financial support of Mr Zappa.

On 1 July 2005 the couple moved in together. In 2005 and 2007 the applicants wrote to the President of the Republic highlighting difficulties encountered by same-sex couples and soliciting the enactment of legislation in favour of civil unions.

In 2008 the applicants' physical cohabitation was registered in the authorities' records. In 2009 they designated each other as guardians in the event of incapacitation (*amministratori di sostegno*).

On 19 February 2011 they requested their marriage banns to be issued. On 9 April 2011 their request was rejected on the basis of the law and jurisprudence pertaining to the subject matter (see Relevant domestic law below).

The two applicants did not pursue the remedy provided for under Article 98 of the Civil Code in so far as it could not be considered effective following the Constitutional Court pronouncement mentioned above.

3. Mr Perelli Cippo and Mr Zacheo

In 2002 these two applicants met and entered into a relationship with each other. In the same year they started cohabiting and since then they have been in a committed relationship.

In 2006 they joined bank accounts.

In 2007 the applicants' physical cohabitation was registered in the authorities' records.

On 3 November 2009 they requested their marriage banns to be issued. The person in charge at the office did not request them to fill in the relevant application, simply attaching their request to a number of analogous requests made by other couples.

On 5 November 2009 their request was rejected on the basis of the law and jurisprudence pertaining to the subject matter (see Relevant domestic law below).

Mr Perelli Cippo and Mr Zacheo appealed to the Milan Tribunal.

By a judgment of 9 June 2010 filed in the relevant registry on 1 July 2010 the Milan Tribunal rejected their claim, considering that it was legitimate for the Civil Status Office to refuse a request to have marriage bans issued for the purposes of a marriage between persons of the same sex, in line with the finding of the Constitutional Court judgment no. 138 of 15 April 2010.

The applicants did not lodge a further challenge (*reclamo*) under Article 739 of the Code of Civil Procedure in so far as it could not be considered effective following the Constitutional Court pronouncement.

B. Relevant domestic law and practice

1. *The Italian Constitution*

Articles 2, 3 and 29 of the Italian Constitution read as follows:

Article 2

“The Republic recognises and guarantees inviolable human rights, both as an individual and in social groups where personality is developed, and requires the fulfilment of non-derogable obligations of political, economic, social solidarity.

Article 3

“All citizens have equal social dignity and are equal before the law, without distinction of sex, race, language, religion, political opinions, personal and social conditions.

It is the duty of the Republic to remove those obstacles of an economic and social nature which, by limiting the freedom and equality of citizens, impede the full development of the human person and the effective participation of all workers in the political, economic and social organization of the country.”

Article 29

“The Republic recognises the rights of a family as a natural society founded on marriage.

The institution of marriage is based on the moral and juridical equality of the spouses within the limits prescribed by law for the purposes of family unity.”

2. *Marriage*

Under Italian domestic law, same-sex couples are not allowed to contract marriage as affirmed in the Constitutional Court judgment no. 138 (mentioned above). The same has been affirmed by the Italian Court of Cassation in a recent judgement no. 4184 of 15 March 2012 concerning two Italian citizens of the same sex who got married in the Netherlands and had challenged the refusal of Italian authorities to register their marriage in the civil status record on the ground of the “*non-configurability as a marriage*”. The Court of Cassation concluded that the claimants had no right to register their marriage not because it did not exist or was invalid but because of its inability to produce any legal effect in the Italian order. It further held 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 European

Convention; therefore, in the exercise of the right to freely live their inviolable status as a couple they may bring an action before a court to claim, in specific situations related to their fundamental rights, a uniform treatment to that afforded by law to married couples.

Indeed, the Italian supreme courts (Constitutional Court and Court of Cassation) have recognised that, in some specific circumstances, same-sex couples may have the same rights as heterosexual married couples.

3. Civil unions

Italian domestic law does not provide for any alternative union to marriage, either for homosexual couples or for heterosexual ones. The former have thus no means of recognition.

Nevertheless, some cities have established registers of “*civil unions*” between unmarried persons of the same sex or of different sex: 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 mere symbolic value.

4. Subsequent domestic case-law

Similarly the Italian Constitutional Court in its judgments no. 276 of 2010 and no. 4 of 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 findings 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, were reiterated on a number of occasions. Amongst others are decision no. 276/2010 of 7 July 2010 filed in the registry on 22 July 2010 and decision no. 4/2011 of 16 December 2010 filed in the registry on 5 January 2011.

5. Remedies in the domestic system

A decision of the Civil Status Office may be challenged (within 30 days) before the ordinary tribunal, in accordance with Article 98 of the Civil Code.

The decision of the ordinary tribunal can, in turn, be challenged before the Court of Appeal (within 10 days) according to Article 739 of the Code of Civil Procedure.

COMPLAINTS

The applicants in application no. 18766/11 complain that the Italian legislation did not allow them to get married or enter into any other type of civil union and thus they are being discriminated against as a result of their sexual orientation. They invoked Articles 8 and 12 of the Convention on their own and in conjunction with Article 14. For the same reasons, the applicants in application no. 36030/11 complain that they are being discriminated against in breach of Article 14 in conjunction with Articles 8 and 12 of the Convention.

QUESTIONS TO THE PARTIES

1. 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, should they be afforded a possibility to have their relationship recognised by law?
2. In what specific ways are the applicants disadvantaged by the lack of any legal recognition of their relationship?
3. 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 of the Convention, in respect of their inability to enter into any other type of civil union recognising their relationship in Italy?

APPENDIX

Application no. 18766/11

| N°. | Firstname Lastname | Birth date | Birth year | Nationality | Place of residence | Representative |
|-----|-----------------------|------------|---------------|-------------|-----------------------|----------------|
| 1. | Lorenzo LONGHI | 11/10/1976 | 1976 | Italian | Trento | A. SCHUSTER |
| 2. | Enrico OLIARI | 15/07/1970 | 1970 | Italian | Trento | A. SCHUSTER |

Application no. 36030/11

| N°. | Firstname Lastname | Birth date | Birth year | Nationality | Place of residence | Representative |
|-----|------------------------------|------------|---------------|-------------|-----------------------|-----------------|
| 1. | Gian Mario FELICETTI | 18/06/1972 | 1972 | Italian | Lissone | M.E. D'AMICO |
| 2. | Riccardo PERELLI CIPPO | 23/03/1959 | 1959 | Italian | Milan | M.E. D'AMICO |
| 3. | Roberto ZACHEO | 10/05/1960 | 1960 | Italian | Milan | M.E. D'AMICO |
| 4. | Riccardo ZAPPA | 29/10/1964 | 1964 | Italian | Lissone | M.E. D'AMICO |