The ECtHR rules on the compatibility with the right to respect for private and family life of the refusal of registration of same-sex marriages contracted abroad

By a judgment *Orlandi and Others v. Italy* delivered on December 14 the ECtHR held that the lack of legal recognition of same sex unions in Italy violated the right to respect of private and family life of couples married abroad.

The case concerned the complaint of six same sex-couples married abroad (in Canada, California and the Netherlands). Italian authorities refused to register their marriages on the basis that registration would be contrary to public policy. They also refused to recognize them under any other form of union. The complaints were lodged prior to 2016, at a time when Italy did not have a legislation on same-sex unions.

The couples claimed under articles 8 (right to respect of private and family life) and 14 (prohibition of discrimination) of the Convention, taken in conjunction with article 8 and 12 (right to marry), that the refusal to register their marriages contracted abroad, and the fact that they could not marry or receive any other legal recognition of their family union in Italy, deprived them of any legal protection or associated rights. They also alleged that "*the situation was discriminatory and based solely on their sexual orientation*" (§137).

Recalling that States are still free to restrict access to marriage to different sex-couples, the Court indicated that nonetheless, since the *Oliari and others v. Italy* case, States have an obligation to grant same-sex couples "*a specific legal framework providing for the recognition and the protection of their same-sex unions*" (§192).

The Court noted that the "*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 recognized under the law of a foreign state – recognized and protected in Italy under any form" (§201).

It pointed out that although legal recognition of same-sex unions had continued to develop rapidly in Europe and beyond, notably in American countries and Australia, the same could not be said about registration of same-sex marriages celebrated abroad. Giving this lack of consensus, the Court considered that the State had "*a wide margin of appreciation regarding the decision as the whether to register, as marriage, such marriages contracted abroad*" (§204-205).

Thus, the Court admitted that it could "*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 recognize from a Convention perspective*" (§207).

However, the Court considered that the refusal to register the marriages under any form left the applicants in "*a legal vacuum*". The State has failed "*to take account of the social reality of the situation*" (§209). Thus, the Court considered that prior to 2016, applicants were deprived from any recognition or protection. It concluded that, "*in the present case, the Italian State could not reasonably disregard the situation of the applicants which correspond to a family life within the meaning of article 8 of the Convention, without offering the applicants a means to safeguard their relationship*". As a result, it ruled 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 the protection of their same-sex union*" (§ 210).

Thus, the Court considered that there had been a violation of article 8. It considered that, giving the findings under article 8, there was no need to examine the case on the ground of Article 14 in conjunction with article 8 or 12. (§212).