



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

FIRST SECTION

CASE OF TADDEUCCI AND McCALL v. ITALY

(Application no. 51362/09)

JUDGMENT

STRASBOURG

30 June 2016

FINAL

This judgment became final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision

In the case of Taddeucci and McCall v. Italy,

The European Court of Human Rights (First Section), sitting as a Chamber composed of:

Mirjana Lazarova Trajkovska, *President*,

Ledi Bianku,

Guido Raimondi,

Kristina Pardalos,

Linos-Alexandre Sicilianos,

Robert Spano,

Pauliine Koskelo, *judges*,

and Abel Campos, *Section Registrar*,

Having deliberated in private on 31 May 2016,

Delivers the following judgment, which was adopted on that date:

PROCEDURE

1. The case originated in an application (no. 51362/09) against the Italian Republic lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by an Italian and a New-Zealand national, Mr Roberto Taddeucci and Mr Douglas McCall (“the applicants”), on 15 September 2009.

2. The applicants were represented before the Court by Mr R.W. Wintemute, a lawyer practising in London. The Italian Government (“the Government”) were represented by their Agent, Mrs E. Spatafora, and by their co-Agent, Mrs P. Accardo.

3. The applicants alleged that the refusal to grant a residence permit sought by the second applicant for family reasons had amounted to discrimination on grounds of sexual orientation.

4. On 10 January 2012 the application was communicated to the Government.

5. The applicants and the respondent Government each filed written observations. In addition, third-party comments were received from four non-governmental organisations (International Commission of Jurists (ICJ), International Lesbian, Gay, Bisexual Trans and Intersex Association (ILGA) Europe, Network of European LGBT Families (NELFA) and European Commission on Sexual Orientation Law (ECSOL)), which had been given leave by the President of the Chamber to intervene in the written procedure (Article 36 § 2 of the Convention and Rule 44 § 3 of the Rules of Court (“the Rules of Court”).

6. On 19 June 2014 the applicants requested the Court to hold a hearing on the admissibility and merits of the case. The Court considered that a hearing was unnecessary in the present case (Rules 54 § 5 and 59 § 3).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

7. Mr Tadeucci (“the first applicant”) was born in 1965. Mr McCall (“the second applicant”) was born in 1958. They live in Amsterdam.

A. Application by the second applicant for a residence permit for family reasons

8. The applicants have formed a same-sex couple since 1999. They lived in New Zealand, with the status of unmarried couple, until December 2003, when they decided to settle in Italy on grounds of the first applicant’s poor health.

9. During their first period of residence in Italy the second applicant had a student’s temporary residence permit. He subsequently applied for a residence permit for family reasons, under Legislative Decree no. 286 of 1998

10. On 18 October 2004 the chief of the Livorno police rejected his application on the ground that the statutory criteria were not satisfied.

B. First-instance civil proceedings

11. On 27 January 2005 the applicants appealed on the basis of Legislative Decree no. 286 of 1998, requesting that the second applicant be issued with a residence permit for family reasons.

12. In a judgment of 4 July 2005 the Florence Civil Court allowed the applicants’ appeal.

13. The court observed that the applicants were recognised as a couple in New Zealand, the first applicant having been issued with a residence permit in that country for family reasons in his capacity as an unmarried partner. The court found that the applicants’ status as an unmarried couple was not contrary to Italian public policy, as *de facto* couples received social and legal recognition in the Italian system. In the court’s view, Article 30 of Legislative Decree no. 286 of 1998 ... had to be interpreted in conformity with the principles established by the Constitution, which meant that a same-sex cohabiting partner should be regarded as a “member of the family” of the Italian national and thus entitled to obtain a residence permit.

14. The court found that the right asserted by the second applicant also derived from Articles 3 and 10 of Directive 2004/38/EC of 29 May 2004 of the European Parliament and of the Council ..., which recognised the right of the partner of a citizen of the European Union (EU) to obtain a residence permit where the existence of a durable relationship was duly attested.

C. Appeal by the Minister of Foreign Affairs

15. The Minister of Foreign Affairs appealed against the judgment of the Florence Civil Court.

16. In a judgment of 12 May 2006 the Florence Court of Appeal allowed the appeal. It observed that the New Zealand authorities had recognised that the applicants had the status of “unmarried cohabiting partners” and not that of “members of the same family”.

17. The Court of Appeal found, first, that the lower court’s recommended interpretation of Legislative Decree no. 286 of 1998, according to which the “cohabiting partner” was regarded as a “member of the family”, was not compatible with the Italian legal system, which, according to the court, ascribed a different scope and meaning to those two legal concepts. Secondly, the Court of Appeal pointed out that the Constitutional Court had repeatedly held that a relationship based on cohabitation alone, and lacking stability and legal certainty, could not in any circumstances be regarded as a legitimate family based on marriage.

18. The Court of Appeal found that New Zealand law was not compatible with Italian public policy on the grounds, firstly, that it regarded persons of the same sex as “cohabiting partners” and, furthermore, that it could be construed as conferring the status of “family members” on them for the purposes of granting them a residence permit. Lastly, it added that neither European law, particularly Directive No 2004/38/EC ..., nor the provisions of the European Convention on Human Rights, obliged the States to recognise same-sex relationships.

D. Appeal on points of law by the applicants

19. The applicants appealed on points of law.

20. In a judgment of 30 September 2008, the text of which was deposited with the registry on 17 March 2009, the Court of Cassation dismissed the applicants’ appeal.

21. The Court of Cassation observed first that, according to the terms of Article 29 of Legislative Decree no. 286 of 1998 ..., the concept of “family member” extended only to spouses, minor children, adult children who were not self-supporting for health reasons, and dependent relatives who lacked adequate support in their country of origin. It pointed out that as the Constitutional Court had, moreover, ruled out the possibility of extending to

cohabiting partners the protection granted to members of a legitimate family, the Constitution did not require an extensive interpretation of Article 29 cited above.

22. The Court of Cassation also considered that Articles 8 and 12 of the Convention did not require such an interpretation either. In its view, those provisions left a wide margin of appreciation to the States regarding the choice of means of exercising the rights they guaranteed, particularly in the area of immigration control. The Court of Cassation added that there had been no discrimination on grounds of the applicants' sexual orientation in the present case. It observed in that connection that the non-eligibility of unmarried partners for a residence permit for family reasons applied to opposite-sex couples as well as same-sex partners.

23. Lastly, it held that European Directive 2004/38/EC ..., which concerned the right of EU citizens to move freely within the territory of the Member States other than their State of origin, did not apply to the present case, which concerned family reunification with an Italian national resident in his own country.

E. The applicants' marriage

24. After being notified of the Court of Cassation's judgment, the applicants left Italy in July 2009. They moved to the Netherlands, where the second applicant was issued with a five-year residence permit on 25 August 2009 as a *de facto* partner in a long-term relationship with an EU national.

25. On 8 May 2010 the applicants married in Amsterdam. They stated that they had chosen to marry for personal reasons and not in order to obtain a residence permit, as the Netherlands authorities had already issued one to the second applicant. They added that the marriage contracted in the Netherlands did not allow them to live together in Italy. On 22 August 2014 the second applicant obtained a second five-year residence permit in the Netherlands, valid until 22 August 2019.

...

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 14 OF THE CONVENTION TAKEN IN CONJUNCTION WITH ARTICLE 8

35. The applicants complained that the refusal to grant the residence sought by the second applicant family reasons had amounted to discrimination on grounds of sexual orientation.

They relied on Article 14 of the Convention taken in conjunction with Article 8.

Those provisions read as follows:-

Article 14

“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.”

Article 8

“1. Everyone has the right to respect for his private and family life, his home and his correspondence.

2. 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.”

36. The Government contested the applicants’ submission.

...

B. Merits

1. *Applicability of Article 14 of the Convention taken in conjunction with Article 8*

a) The parties’ arguments

i. *The Government*

42. The Government submitted that Article 14 was not applicable in the present case. In their view, in *S. v. the United Kingdom* (no. 11716/85, Commission decision of 14 May 1986, Decisions and Reports (DR) 47, p. 274) and *Rössli v. Germany* (no. 28318/95, Commission decision of 15 May 1996), the Commission had indicated that the protection of the family was a legitimate aim capable of justifying a difference in treatment and that a stable homosexual relationship between two men did not fall within the scope of the right to respect for family life guaranteed by Article 8 of the Convention. The Commission had also found that the deportation of an alien who was in a same-sex relationship with a person in the host State did not amount to an interference with the right guaranteed by that provision (see *X and Y v. the United Kingdom*, no. 9369/81, Commission decision of 3 May 1983, DR 32, p. 223; *W.J. and D.P. v. the United Kingdom*, no. 12513/86, Commission decision of 13 July 1987; and *C. and L.M. v. the United Kingdom*, no. 14753/89, Commission decision of 9 October 1989).

43. The Government then submitted that, while acknowledging that the States enjoyed a margin of appreciation regarding the protection of the traditional family, in 2010 the Court had started examining under Article 8 of the Convention forms of cohabitation between same-sex couples (see, *inter alia*, *Kozak v. Poland*, no. 13102/02, 2 March 2010). In the case of *Schalk and Kopf v. Austria* (no. 30141/04, ECHR 2010) the Court had acknowledged that same-sex couples could rely on their right to respect for family life, but pointed out that the Convention did not guarantee them the right to marry. It had also observed that where a State chose to provide same-sex couples with an alternative means of recognition, it enjoyed a certain margin of appreciation as regards the exact status conferred (see, *inter alia*, *Gas and Dubois v. France*, no. 25951/07, § 66, ECHR 2012).

44. The Government indicated that in the present case the applicants had requested a residence permit for family reasons. In the Government's submission, the discrimination of which they complained should be examined in the light of the relevant Italian legislation, namely, Articles 29 and 30 of Legislative Decree no. 286 of 1998 They argued that, under those provisions, the fact of being a *de facto* partner did not confer on the person concerned the status of "family member". They indicated, further, that Legislative Decree no. 30 of 6 February 2007 implemented European Directive 2004/38/EC ..., according to which a "family member" was, *inter alia*, "the partner with whom the [EU] citizen has contracted a registered partnership, on the basis of the legislation of a Member State, if the legislation of the host Member State treats registered partnerships as equivalent to marriage and in accordance with the conditions laid down in the relevant legislation of the host Member State". According to the Government, as the applicants had entered into their partnership in New Zealand, and thus outside the EU, it could not be recognised under that provision.

45. The Government submitted further that, under Article 3 § 1 of the above-mentioned directive, which had been transposed into Italian law by Law no. 97 of 6 August 2013 ..., the host Member State had to facilitate entry and residence for the following persons: "a) any other family members, irrespective of their nationality ... where serious health grounds strictly require the personal care of the family member by the Union citizen", and "b) the partner with whom the Union citizen has a durable relationship, duly attested". They observed that those provisions did not confer a right to the residence permit requested: firstly, the person with a serious illness was the first applicant, who was an Italian citizen; secondly, it fell to the States which, like Italy, did not guarantee same-sex couples a means of legal recognition, to decide whether the conditions for obtaining a residence permit were satisfied. The Government concluded on that point that the decisions made by the Italian authorities in the present case were compatible with EU law. In any event the second applicant had not lodged

an application under Law no. 97 of 2013 and had not registered in the population register for Cecina (Livorno) as a person cohabiting with the first applicant.

46. The Government also pointed out that, under Article 9 of the EU Charter of Fundamental Rights, “the right to marry and the right to found a family [were to] be guaranteed *in accordance with the national laws governing the exercise of these rights*” (italics added). In their view, that provision showed that the power to regulate those rights was vested in the Member States.

47. In the light of the foregoing, the Government submitted that Articles 8 and 14 of the Convention did not apply in the present case, either because the statutory conditions for recognising the second applicant as a “family member” were not satisfied, or because of the extent of the State’s margin of appreciation in social affairs. The State remained free, *inter alia*, to decide whether same-sex couples should or should not enjoy the same rights as those recognised as belonging to the traditional family.

ii. The applicants

48. The applicants disagreed with the Government’s submissions. They observed that, in *Schalk and Kopf* (cited above, § 94), the Court had clearly departed from the Commission’s earlier case-law in stating that the relationship of a cohabiting same-sex couple living in a stable *de facto* partnership fell within the notion of “family life”. In their submission, the refusal to issue the second applicant with a residence permit had deprived them of any possibility of living in Italy as a couple and had resulted in a legal obligation for the second applicant to leave the country. In their view, it followed that the facts of the present case fell within the scope of Article 8 of the Convention, thus Article 14 was also applicable.

49. The applicants also explained that, in 2003, when they had left New Zealand, the laws of that country had not yet allowed them to obtain a certificate of registration of their partnership, which, they argued, they could have sought to have registered in Italy. Accordingly, they had requested a residence permit for family reasons as cohabiting partners in a stable relationship. However, in their submission, Article 29 § 1 of Legislative Decree no. 286 of 1998 ... specified that only a married partner, and not a cohabiting partner, qualified as a “family member”. With regard to Legislative Decree no. 30 of 2007, which had transposed Directive 2004/38/EC into Italian law ..., the applicants submitted that it was only applicable to the case – irrelevant here – of EU citizens residing in Italy or Italian citizens who had returned to their country of origin after having lived in another EU State. They argued that the inapplicability of the directive in question to the “domestic” situation of the first applicant, an Italian citizen who had lived in Italy from 2003 to 2009 without having first lived in another EU State, had been confirmed by the CJEU and by the

Communication from the Commission to the European Parliament and the Council on guidance for better transposition and application of Directive 2004/38/EC (COM/2009/0313 final).

50. In the applicants' submission, whilst it was true that, under EU law, Italy was free to regulate "domestic situations" such as theirs, the fact remained that those same situations had to be dealt with in conformity with Articles 8 and 14 of the Convention. The emergence of an European consensus with regard to the immigration rights of same-sex partners was, moreover, clear from the terms of Article 3 § 2 b) of Directive 2004/38/EC ..., according to which "the host Member State shall, in accordance with its national legislation, facilitate entry and residence [of the] partner with whom the [EU] citizen has a durable relationship, duly attested". The applicants added that, in its Communication COM/2009/0313, cited above, the European Commission had specified that documentary evidence in that regard could be adduced by "any appropriate means".

51. In their submission, Law no. 97 of 2013 ... had indeed transposed Article 3 of Directive 2004/38/EC into Italian law. However, that provision did not clearly confer a right on the second applicant to obtain the residence permit in question. In any event, even supposing that the residence permit could have been issued from September 2013, the fact remained, they argued, that the second applicant had been refused leave to reside in Italy from 2004 onwards and had suffered the consequences of that refusal for many years.

52. The applicants submitted, further, that a residence permit for family reasons had been issued by the Reggio Emilia Court to a Uruguayan national who had married an Italian citizen in Spain. They added that, since that decision, thirty other identical residence permits had been issued to other non-EU nationals in same-sex couples with Italian citizens on the basis of marriage or a civil partnership contracted in EU countries other than Italy.

b) The Court's assessment

53. The Court reiterates that Article 14 of the Convention complements the other substantive provisions of the Convention and its Protocols. It has no independent existence since it has effect solely in relation to "the enjoyment of the rights and freedoms" safeguarded by those provisions. Although the application of Article 14 does not presuppose a breach of those provisions – and to this extent it is autonomous – there can be no room for its application unless the facts at issue fall within the ambit of one or more of the latter (see *E.B. v. France* [GC], no. 43546/02, § 47, 22 January 2008; *Vallianatos and Others v. Greece* [GC], nos. 29381/09 and 32684/09, § 72, ECHR 2013 (extracts); and *Hämäläinen v. Finland* [GC], no. 37359/09, § 107, ECHR 2014).

54. In the present case the applicants alleged that the refusal to grant the residence permit sought by the second applicant for family reasons had prevented them from continuing to live together in Italy. The Court must therefore determine whether the facts of the case fall within the scope of Article 8 of the Convention.

55. In that connection it reiterates that a State is entitled, as a matter of well-established international law and subject to its treaty obligations, to control the entry of aliens into its territory and their residence there. The Convention does not guarantee the right of a foreign national to enter or to reside in a particular country (see, for example, *Nunez v. Norway*, no. 55597/09, § 66, 28 June 2011). The corollary of a State's right to control immigration is the duty of aliens – and thus the second applicant in the present case – to submit to immigration controls and procedures and leave the territory of the Contracting State when so ordered if they are lawfully denied entry or residence (see *Jeunesse v. the Netherlands* [GC], no. 12738/10, § 100, 3 October 2014).

56. The duty imposed by Article 8 cannot be considered as extending to a general obligation on the part of a Contracting State to respect the choice by a family of the country of their common residence and to accept non-national partners for settlement in that country (see *Abdulaziz, Cabales and Balkandali v. the United Kingdom*, 28 May 1985, § 68, Series A no. 94; *Bouhadev v. Switzerland* (dec.), no. 14022/02, 12 November 2002; *Kumar and Seewoosurn v. France* (dec.), nos. 1892/06 and 1908/06, 17 June 2008; and *Baltaji v. Bulgaria*, no. 12919/04, § 30, 12 July 2011). Nevertheless, the decisions taken by States in the immigration sphere can in some cases amount to interference with the right to respect for private and family life secured by Article 8 of the Convention, in particular where the persons concerned possess strong personal or family ties in the host country which are liable to be seriously affected by the measure in question (see, for example, *Moustaquim v. Belgium*, 18 February 1991, § 36, Series A no. 193; *Dalia v. France*, 19 February 1998, § 52, *Reports of Judgments and Decisions* 1998-I; and *Hamidovic v. Italy*, no. 31956/05, § 37, 4 December 2012).

57. In the instant case the Court notes that the applicants, who have formed a same-sex couple since 1999, settled in Italy in December 2003 (see paragraph 8 above). The second applicant was initially able to reside in Italy on the basis of a student's temporary residence permit (see paragraph 9 above). When, on 18 October 2004, the Livorno chief of police refused to grant the residence permit sought by him for family reasons (see paragraph 10 above), the applicants had already been living together in Italy for approximately ten months.

58. The Court observes that in *Schalk and Kopf* (cited above, § 94), it had held that it was artificial to maintain the view that, in contrast to a opposite-sex couple, a same-sex couple could not enjoy "family life" for the

purposes of Article 8. Consequently, the relationship of Mr Schalk and Mr Kopf, a cohabiting same-sex couple living in a stable *de facto* partnership, fell within the notion of “family life”, just as the relationship of an opposite-sex couple in the same situation would (see also *X and Others v. Austria* [GC], no. 19010/07, § 95, ECHR 2013). It sees no reason to reach different conclusions regarding the applicants in the present case.

59. It notes, further, that the Government did not dispute that the refusal to grant the second applicant a residence permit, a decision upheld by the Court of Cassation, meant that he was legally obliged to leave Italy (see paragraph 48 above). That decision accordingly prevented the applicants from continuing to live together in that country and thus amounted to an interference with one of the essential aspects of their “family life” as they had intended to organise it and thus with their right to respect for family life as guaranteed by Article 8 of the Convention.

60. With regard to the Government’s submission that Articles 8 and 14 of the Convention were inapplicable on account of non-fulfilment, both under Italian law and EU law, of the statutory conditions required for recognition of the second applicant as a “family member” (see paragraphs 44 to 47 above), the Court observes that the possible existence of a legal basis justifying the refusal to grant the residence permit does not necessarily mean that there has not been an interference with the right to respect for the applicants’ private and family life. Nor does that legal basis absolve the respondent State from responsibility under the Convention (see, for example and *mutatis mutandis*, *Thlimmenos v. Greece* [GC], no. 34369/97, § 48, ECHR 2000-IV).

61. With regard to the duration of the interference in question, the Court observes that it began on 18 October 2004, when the application for a residence permit was first rejected (see paragraph 10 above), and ended at the latest in July 2009, when, after the Court of Cassation’s final judgment dismissing the applicants’ appeal had been deposited with the registry on 17 March 2009, the applicants decided to leave Italy and move to the Netherlands (see paragraph 24 above). The interference therefore lasted about four years and nine months.

62. The Court having thus determined the period to be taken into consideration in the present case, any speculation as to whether circumstances arising after July 2009 would have made it possible for the second applicant to obtain the desired residence permit is therefore irrelevant. Accordingly, the Court does not consider it necessary to address the question whether, by virtue of the marriage contracted in Amsterdam on 8 May 2010 (see paragraph 25 above), the second applicant could benefit from the decisions of the Italian courts, referred to in paragraph 52 above, granting non-EU nationals in same-sex couples with Italian citizens on the basis of marriage concluded in EU countries other than Italy the right to a residence permit for family reasons, or whether that right could arise from

the transposition into Italian law, by Law no. 97 of 6 August 2013, of Article 3 § 1 of European Directive 2004/38/EC providing that the host State must facilitate the residence of, *inter alia*, the “partner with whom the Union citizen has a durable relationship, duly attested” (see paragraphs ... 45 and 51 above).

63. It follows that the facts of the case, as established between 18 October 2004 and July 2009, fall within the scope of Article 8 of the Convention and that Article 14, taken together with Article 8, is applicable.

2. Compliance with Article 14 taken in conjunction with Article 8

a) The parties' arguments

i. The Government

64. The Government submitted that the applicants had not been the subject of discrimination prohibited by the Convention. They referred first to judgment no. 138 of 15 April 2010, in which the Constitutional Court had stated that homosexual unions, namely, those in which persons of the same sex lived together as a couple, had to be regarded as a “social group” within the meaning of Article 2 of the Constitution. Accordingly, in the Government’s submission, in order to protect specific situations, homosexual couples had the right to request “equal treatment”, that is, treatment comparable to that of married couples (judgment no. 138 of 2010 is described in *Oliari and Others v. Italy*, nos. 18766/11 and 36030/11, §§ 15 to 18, 21 July 2015). Moreover, the civil rights of unmarried homosexual and heterosexual couples were the subject of debate in several European States and in the Italian Parliament, in the light, *inter alia*, of the Court’s case-law and of Council of Europe documents.

65. However, in the Government’s submission, the fact that a certain number of other States had enacted laws on civil partnerships did not in any way oblige Italy to do likewise, since the national parliament could always exercise its margin of appreciation. The Government pointed out that the Constitutional Court had recognised as much in its judgment no. 138 of 2010, delivered after the second applicant had submitted his application for a residence permit for family reasons.

66. The Government observed, further, that in judgment no. 4184 of 15 March 2012 the Court of Cassation had stated that homosexual couples could assert before the domestic courts rights recognised as belonging to heterosexual couples and, where applicable, plead unconstitutionality of the relevant laws. They added that, in the applicants’ case, the Court of Cassation had not based its decision on the applicant’s sexual orientation, but had only had regard to Italian immigration law as amended by the relevant European provisions.

67. Lastly, the Government sought to confirm their commitment to the protection of lesbian, gay, bisexual and transgender persons (LGBT) and against homophobia, which had led to the creation of the National Office against Racial Discrimination (*Ufficio Nazionale Antidiscriminazioni Razziali* – “the UNAR”). They added that the creation of the UNAR had been strongly welcomed by the European Commission against Racism and Intolerance (ECRI) – see the report on Italy published on 21 April 2012 (CRI(2012)2) – and by the Commissioner for Human Rights (see the report of 18 September 2012, CommDH(2012)26, following the Commissioner’s visit to Italy from 3 to 6 July 2012).

ii. The applicants

68. The applicants submitted that they had been discriminated against on the basis of their sexual orientation. Referring to *Schalk and Kopf* (cited above, § 103), in which the Court had considered it unnecessary to examine whether the lack of any means of legal recognition for same-sex couples in Austria prior to 1 January 2010 constituted a violation of Article 14 taken in conjunction with Article 8, they observed that in their joint dissenting opinion Judges Rozakis, Spielmann and Jebens had found that there had been such a violation. In the applicants’ submission, that opinion applied by definition to one of the rights deriving from a marriage, namely, the possibility for the cohabiting partner who was a national of a non-EU State to obtain a residence permit for family reasons.

69. The applicants observed, secondly, that the Constitutional Court’s judgment no. 138 of 2010 (see paragraph 64 above) and the Court of Cassation’s judgment no. 4184 of 2012 (see paragraph 66 above) had established a right in favour of stable homosexual couples that was comparable to that of married couples. They complained that, despite those positive developments in the case-law, the Italian legislature had not intervened to make provision for that right in the context of “domestic situations” such as theirs.

70. Like the third-party interveners (see paragraphs 74-80 above), the applicants submitted that reserving certain rights, in countries where marriage was not available to homosexual couples, to married heterosexual couples amounted in principle to indirect discrimination on grounds of sexual orientation. In their submission, that conclusion had been confirmed by the report “Homophobia and Discrimination on Grounds of Sexual Orientation in the EU Member States, Part I – Legal Analysis”, published in June 2008 by the EU Agency for Fundamental Rights (FRA); according to that Agency, international human rights law recommended that same-sex couples either have access to an institution such as registered partnership which provided them with the same advantages as those that would be recognised if they had access to marriage or that the *de facto* durable relationships they entered into led to extending to them such advantages.

71. The applicants also referred to the judgment delivered on 14 December 2009 by the United Kingdom Judicial Committee of the Privy Council in the case of *Rodriguez v. Minister of Housing* ([2009] UKPC 52 – Privy Council Appeal No 0028 of 2009) finding that a policy excluding same-sex couples in a stable and long-term relationship from access to joint tenancies was discriminatory. They pointed out, further, that, in his opinion of 15 July 2010 in the case of *Römer v. Freie und Hansestadt Hamburg* (case C-147/08), the Advocate General of the CJEU had considered that disallowing any form of legally recognised union available to persons of the same sex could be regarded as practising discrimination on the basis of sexual orientation. They submitted that a consensus was emerging in democratic societies, which, in their view, was against a government being able to reserve a certain right or advantage to married couples while denying it to same-sex couples on the pretext that the persons in question were not married.

72. The applicants also stated that 24 member States of the Council of Europe had enacted laws allowing same-sex couples to register their partnership (a survey on this subject, which had been updated to 30 June 2015, appeared in *Oliari and Others*, cited above, §§ 53 to 55), and that the possibility of obtaining a residence permit, for a homosexual partner who was not an EU national, existed in at least 31 States. They considered that the European consensus on that point was therefore greater today than that which had been observed at the time of adoption of the judgments in *Schalk and Kopf* and *Gas and Dubois* (cited above).

73. The applicants pointed out, lastly, that the aim of their application was not to obtain a right to marry or access to a form of registered partnership. They explained that they were merely asking the Court to develop its decision in *Karner v. Austria* (no. 40016/98, ECHR 2003-IX) and state that excluding same-sex couples from the right to a residence permit for family reasons was discriminatory. They submitted that, with regard to other rights recognised as belonging to married couples, the Court could decide on a case-by-case basis, distinguishing, for example, the right to obtain a residence permit from the right to adopt. Accordingly, in their view, concluding that there had been a violation of Article 14 of the Convention in the present case was not incompatible with the conclusions reached by the Court in its judgment in *Gas and Dubois* (cited above).

iii. *The third-party interveners*

- α) International Commission of Jurists (ICJ), International Lesbian, Gay, Bisexual Trans and Intersex Association (ILGA) Europe, and Network of European LGBT Families (NELFA)

74. The ICJ, ILGA-Europe and NELFA produced material showing that a number of jurisdictions around the world recognised that a same-sex couple in a long-term, committed and established relationship was in fact a

“family member” regardless of whether the couple had been able to marry or otherwise obtain formal legal recognition for their relationship.

75. The third-party interveners stated that they had first examined the legislation and practice of a number of non-European States (South Africa, Australia, Brazil, Canada, Colombia, Israel and New Zealand) which allowed same-sex partners to emigrate to and reside in each other’s countries of origin, before addressing the concept of “functional families”. That concept, instead of focusing on the identity and attributes of the individuals within a relationship, sought to establish whether or not that relationship displayed certain essential characteristics (economic cooperation, participation in domestic responsibilities, affection between the parties). In their submission, on the basis of that concept the jurisdictions of a number of countries (South Africa, Australia, Canada, Colombia, United States, Israel and the United Kingdom) had recognised unmarried same-sex couples as “families” or “*de facto* spouses” for the purposes of certain (economic or other) benefits.

76. Lastly, the ICJ, ILGA-Europe and NELFA indicated that the difference in treatment between same-sex couples not having access to marriage and married couples had been considered by the South-African, Canadian and US courts as a form of indirect discrimination (that is, discrimination as a result of the negative effects of apparently neutral laws on a particular protected group). They pointed out that, in particular where same-sex couples could not marry, their situation should not be compared with that of unmarried opposite-sex couples but with that of married opposite-sex couples. That could also be seen in the practice of the United Nations Human Rights Committee, which had emphasized the point that heterosexual couples could freely decide to marry.

77. In the light of the foregoing, the ICJ, ILGA-Europe and NELFA considered that there was a “significant trend” around the world towards recognising the status of same-sex partners as “family members”, their right to live together and the other rights and benefits enjoyed by heterosexual couples.

β) European Commission on Sexual Orientation Law (ECSOL)

78. ECSOL pointed out from the outset that an analysis of EU law showed how important it was to prioritise family relationships and reunification because freedom of movement was to be exercised under objective conditions of freedom and dignity. Accordingly, in ESCOL’s view, the Member States must at least facilitate the right to enter and reside in the host country of the same-sex partner, while endeavouring to assess *in concreto* the impact of denying a residence permit on the private and family life of the individuals concerned.

79. ECSOL then presented a comparative-law survey of the possibility for same-gender partners to obtain a residence permit in the host country.

The survey covered the legislation of 32 member States of the Council of Europe (Germany, Austria, Belgium, Bosnia-Herzegovina, Bulgaria, Cyprus, Denmark, Spain, Estonia, Finland, France, Georgia, Greece, Hungary, Iceland, Ireland, Italy, Latvia, Liechtenstein, Luxembourg, Malta, Norway, the Netherlands, Poland, Portugal, Czech Republic, United Kingdom, Romania, Russia, Serbia, Sweden and Switzerland). The following findings were made:-

i) at least 24 States did not discriminate on the ground of sexual orientation with regard to residency rights and provided some mechanism permitting the grant of a residence permit to a same-gender partner (with some room for discretion on the part of the relevant domestic authority in some cases);

ii) 22 States extended, at least to a certain extent, the right to a residence permit to an unmarried and unregistered same-gender partner;

iii) certain jurisdictions acknowledged that, where a formalised union, especially marriage, could not be registered in the country of origin, an enduring relationship duly proven could lead to the award of a residence permit by the authorities;

iv) indirect discrimination could result from not treating different situations differently (for example, by not acknowledging that there were legal obstacles to marriage for same-gender couples);

v) the courts of certain States had found that, in the field of immigration rights to be granted to a *de facto* partner of the same gender, the Convention played a role in protecting the private and family life of the persons concerned;

vi) there was an emerging European consensus to recognise for the purpose of immigration rights same-gender relations as “family life”.

80. In ECSOL’s view, denying *ex ante* to a binational same-gender couple the right to live in the host country violated Article 8 of the Convention taken alone and in conjunction with Article 14. Moreover, in ESCOL’s view, same-gender couples were discriminated against on the ground of their sexual orientation because in many member States of the Council of Europe they could not contract a marriage.

b) The Court’s assessment

i. Whether there was a difference in treatment between persons in similar situations or equal treatment of persons in significantly different situations

81. According to the Court’s well-established case-law, in order for an issue to arise under Article 14 there must be a difference in treatment of persons in relevantly similar situations (see *Hämäläinen*, cited above, § 108), or an issue will arise when States fail to treat differently persons whose situations are significantly different (see *Thlimmenos*, cited above, § 44 *in fine*). On the latter point the Court reiterates that Article 14 does not

prohibit a member State from treating groups differently in order to correct “factual inequalities” between them; indeed in certain circumstances a failure to attempt to correct inequality through different treatment may in itself give rise to a breach of the Article (see *Case “relating to certain aspects of the laws on the use of languages in education in Belgium”* (merits), 23 July 1968, § 10, Series A no. 6; *Stec and Others v. the United Kingdom* [GC], nos. 65731/01 and 65900/01, § 51, ECHR 2006-VI; and *Muñoz Diaz v. Spain*, no. 49151/07, § 48, ECHR 2009). Furthermore, the Court has already accepted in previous cases that where a general policy or measure has disproportionately prejudicial effects on a particular group, it is not excluded that this may be considered as discriminatory notwithstanding that it is not specifically aimed or directed at that group and there is no discriminatory intent. Such a situation may amount to “indirect discrimination”. This is only the case, however, if such policy or measure has no “objective and reasonable” justification (see, among other authorities, *Baio v. Denmark* [GC], no. 38590/10, § 91, 26 May 2016; *S.A.S. v. France* [GC], no. 43835/11, § 161, ECHR 2014 (extracts); *D.H. and Others v. the Czech Republic* [GC], no. 57325/00, § 184, ECHR 2007-IV; and *Hugh Jordan v. the United Kingdom*, no. 24746/94, § 154, 4 May 2001).

82. The Court finds that in the instant case it does not appear that the applicants, an unmarried homosexual couple, were treated differently from an unmarried heterosexual couple. As domestic law recognises only a “spouse” as a “family member” and not a cohabitant ... it is reasonable to assume that, like the second applicant, a heterosexual partner who was not an EU national could also have been refused a residence permit sought for family reasons in Italy. Indeed, as pointed out by the Court of Cassation (see paragraph 22 above), the non-eligibility of unmarried partners for the residence permit in question concerned both same-sex couples and opposite-sex couples. That was, moreover, undisputed by the applicants.

83. That said, the applicants’ situation cannot, however, be regarded as analogous to that of an unmarried heterosexual couple. Unlike the latter, the applicants do not have the possibility of contracting marriage in Italy. They cannot therefore be regarded as “spouses” under Italian law. Accordingly, as a result of a restrictive interpretation of the concept of “family member” only homosexual couples faced an insurmountable obstacle to obtaining a residence permit for family reasons. Nor could they obtain a form of legal recognition other than marriage, given that at the material time the Italian legal system did not provide for the possibility for homosexual or heterosexual couples in a stable relationship to enter into a civil partnership or a registered partnership certifying their status and guaranteeing them certain essential rights. The Court refers, further, to its observation in *Oliari and Others* (cited above, § 170) that, despite developments in the relevant domestic case-law (set out by the parties in the present case in paragraphs

64, 66 and 69 above), the situation of same-sex couples in Italy remained uncertain in certain areas. In any event, the Court observes that the Government have not argued that the developments in question have gone as far as recognising, in the field of immigration, that members of a stable and long-term homosexual partnership have a status analogous to that of a “spouse”.

84. The Court also notes that the applicants had obtained the status of an unmarried couple in New Zealand (see paragraph 8 above) and that, once they had moved to a State recognising same-sex marriage (the Netherlands), they had decided to marry (see paragraph 25 above). Accordingly, their situation cannot be compared to that of a heterosexual couple who, for personal reasons, do not wish to contract a marriage or a civil partnership.

85. All the foregoing considerations lead the Court to conclude that, with regard to eligibility for a residence permit for family reasons, the applicants – a homosexual couple – were treated in the same way as persons in a significantly different situation from theirs, namely, heterosexual partners who had decided not to regularise their situation.

86. It remains to be determined whether the failure to apply different treatment in the instant case was justifiable under Article 14 of the Convention.

ii. Whether there was objective and reasonable justification

α) General principles

87. The Court reiterates that differences in treatment in analogous situations or comparable treatment in different situations are discriminatory if they are not based on objective and reasonable justification, that is, if they do not pursue a legitimate aim or if there is not a reasonable relationship of proportionality between the means employed and the aim sought to be realised (see, *mutatis mutandis*, *Hämäläinen*, cited above, § 108). Furthermore, the prohibition of discrimination enshrined in Article 14 of the Convention is meaningful only if, in each particular case, the applicant’s personal situation in relation to the criteria listed in that provision is taken into account exactly as it stands. To proceed otherwise would render Article 14 devoid of substance (see *Andrejeva v. Latvia* [GC], no. 55707/00, § 91, ECHR 2009).

88. The Contracting States enjoy a certain margin of appreciation in assessing whether and to what extent differences in treatment are justified (see, *mutatis mutandis*, *Burden v. the United Kingdom* [GC], no. 13378/05, § 60, ECHR 2008, and *Schalk and Kopf*, cited above, § 96). The scope of the margin of appreciation will vary according to the circumstances, the subject matter and its background; in this respect, one of the relevant factors may be the existence or non-existence of common ground between the laws

of the Contracting States (see *Petrovic v. Austria*, 27 March 1998, § 38, *Reports* 1998-II, and *Hämäläinen*, cited above, § 109).

89. The Court reiterates that sexual orientation is a concept covered by Article 14. It has repeatedly held that, just like differences based on sex, differences based on sexual orientation require particularly serious reasons by way of justification or, as is sometimes said, “particularly convincing and weighty reasons” (see *X and Others v. Austria*, cited above, § 99; see, for example, *Smith and Grady v. the United Kingdom*, nos. 33985/96 and 33986/96, § 90, ECHR 1999-VI; *Lustig-Prean and Beckett v. the United Kingdom*, nos. 31417/96 and 32377/96, § 82, 27 September 1999; *L. and V. v. Austria*, nos. 39392/98 and 39829/98, § 45, ECHR 2003-I; *E.B. v. France*, cited above, § 91; *Karner*, cited above § 37; and *Vallianatos and Others*, cited above, § 77), particularly where rights falling within the scope of Article 8 are concerned. Differences based solely on considerations of sexual orientation are unacceptable under the Convention (see *Salgueiro da Silva Mouta v. Portugal*, no. 33290/96, § 36, ECHR 1999-IX; *E.B. v. France*, cited above, §§ 93 and 96; and *X and Others v. Austria*, cited above, § 99).

90. Lastly, with regard to the burden of proof in this sphere under Article 14 of the Convention, the Court has established that once the applicant has shown the existence of comparable treatment in significantly different situations it is for the Government to show that such an approach was justified (see, *mutatis mutandis*, *D.H. and Others*, cited above, § 177).

β) Application of those principles to the present case

91. The Court must first determine whether, in the context of the proceedings regarding an application for a residence permit for family reasons, the fact that the applicants were not treated differently from heterosexual couples who had not regularised their situation pursued a legitimate aim. If it did the Court will examine whether there was a reasonable relationship of proportionality between the means employed and the aim sought to be realised (see, *mutatis mutandis*, *Thlimmenos*, cited above, § 46).

92. The Court observes that, in order to justify treating unmarried homosexual and heterosexual couples similarly in the context of granting a residence permit for family reasons, the Government relied, in substance, on the margin of appreciation enjoyed by the States in protecting the traditional family and deciding whether civil partnerships or registered partnerships should be available to homosexual couples, and in determining the exact nature of the status conferred (see paragraphs 43, 45, 46, 47 and 65 above).

93. Although protection of the traditional family may, in some circumstances, amount to a legitimate aim under Article 14, the Court considers that, regarding the matter in question here – granting a residence permit for family reasons to a homosexual foreign partner – it cannot

amount to a “particularly convincing and weighty” reason capable of justifying, in the circumstances of the present case, discrimination on grounds of sexual orientation (see, *mutatis mutandis*, *Vallianatos and Others*, cited above, § 92).

94. The Court observes that in the present case it is not required to examine *in abstracto* the question whether the Italian State was obliged to provide for a form of legal recognition for same-sex couples at the time when the second applicant was refused the residence permit by the Livorno chief of police (18 October 2004) or indeed when that decision was confirmed in the following judicial proceedings ending with the Court of Cassation’s judgment deposited with the registry on 17 March 2009 (see, *mutatis mutandis*, *Vallianatos and Others*, cited above, § 78). Having regard to the manner in which the applicants’ complaint was formulated, the Court will confine itself to assessing whether, in the specific context of the refusal to grant the second applicant a residence permit, there was objective and reasonable justification for the decisions of the Italian authorities given that the application of the provisions of Legislative Decree no. 286 of 1998 prevented the applicants from pursuing their family life and their stable and committed relationship in Italy. Admittedly, Italian law did not treat unmarried heterosexual couples differently from unmarried homosexual couples (see paragraph 82 above), and restricted the concept of “family members” to heterosexual married partners. However, applying the same restrictive rule under Legislative Decree no. 286 of 1998 to heterosexual couples who had not regularised their situation and to homosexual couples, with the sole aim of protecting the traditional family (see paragraph 93 above), subjected the applicants to discriminatory treatment. Without any objective and reasonable justification the Italian State failed to treat heterosexual couples differently and take account of their ability to obtain legal recognition of their relationship and thus satisfy the requirements of domestic law for the purposes of granting a residence permit for family reasons, an option that was not available to the applicants (see *Thlimmenos*, cited above, § 44).

95. The Court also observes that it is precisely the lack of any possibility for homosexual couples to enter into a form of legal recognition of their relationship which placed the applicants in a different situation from that of unmarried heterosexual couples (see paragraph 83 above). Even supposing that at the relevant time the Convention did not require the Government to make provision for same-sex persons in a stable and committed relationship to enter into a civil union or registered partnership certifying their status and guaranteeing them certain essential rights, that does not in any way affect the finding that, unlike a heterosexual couple, the second applicant had no legal means in Italy of obtaining recognition of his status as “family member” of the first applicant and accordingly obtaining a residence permit for family reasons.

96. The Court notes that the Government have not indicated any other legitimate aims capable of justifying the discrimination complained of by the applicants. Accordingly, it considers that, in the context of the proceedings that the applicants had brought with a view to obtaining a residence permit for family reasons, the fact that they were not treated differently from unmarried heterosexual couples, who alone had access to a form of regularisation of their partnership, had no objective and reasonable justification. In the Court's view, the restrictive interpretation applied to the second applicant of the concept of "family member" did not duly take account of the personal situation of the applicants and, in particular, of their inability to obtain a legal form of recognition of their relationship from the Italian authorities (see, in particular, the case-law cited in paragraph 87 above).

97. The Court also notes that the Government did not dispute the assertion by the ICJ or ILGA-Europe or NELFA that there was a "significant trend" around the world towards recognising the status of same-sex partners as "family members" and recognising their right to live together (see paragraph 77 above) or the comparative-law survey carried out by ECSOL concluding that there was an emerging European consensus recognising, for the purpose of immigration rights, same-sex relations as "family life" (see paragraph 79 above). In that connection it observes that the "relevant European documents" show ... that both the European Parliament and the Parliamentary Assembly of the Council of Europe have found a restrictive interpretation, by the member States, of the concept of "family member" in immigration matters to be problematical.

γ) Conclusion

98. In the light of the foregoing, the Court considers that, at the material time, by deciding to treat homosexual couples – for the purposes of granting a residence permit for family reasons – in the same way as heterosexual couples who had not regularised their situation the State infringed the applicants' right not to be discriminated against on grounds of sexual orientation in the enjoyment of their rights under Article 8 of the Convention.

99. There has accordingly been a violation of Article 14 of the Convention taken in conjunction with Article 8.

...

FOR THESE REASONS, THE COURT

...

2. *Holds*, by six votes to one, that there has been a violation of Article 14 of the Convention taken in conjunction with Article 8;

...

Done in French, and notified in writing on 30 June 2016, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Abel Campos
Registrar

Mirjana Lazarova Trajkovska
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the following separate opinions are annexed to this judgment:

- (a) concurring opinion of Judge Spano, joined by Judge Bianku;
- (b) partly dissenting opinion of Judge Sicilianos.

M.L.T.
A.C.

CONCURRING OPINION OF JUDGE SPANO,
JOINED BY JUDGE BIANKU

1. I will not express a view on the Court's current case-law granting deference to the Member States in deciding whether to legalise same-sex marriage. As things stand, that is the position of the Court, one by which I am bound on the basis of the principle of *stare decisis*. However, as recognised in *Schalk and Kopf v. Austria* (no. 30141/04, § 105, ECHR 2010), things may change.

2. I am writing separately to highlight the fact that although States are not under an obligation to afford same-sex couples access to the institution of marriage, that does not mean that these individuals are unable to find sanctuary in this Court when invoking the right to respect for their family lives in particular contexts. On the contrary, if States decide to exclude same-sex couples from being able to marry, such a decision may have consequences when this Court is called upon to examine a claim of unjustified discrimination within a specific context that falls within the ambit of the right to respect for family life under Article 8 taken in conjunction with Article 14 of the Convention.

3. As Italy decided to afford foreign nationals the ability to request residence permits if they were “family members” of citizens, the application of that system of domestic law could not be discriminatory (see *E.B. v. France* [GC], no. 43546/02, § 49, 22 January 2008). It follows that the impossibility in Italy at the material time for same-sex couples to acquire marital status or other legal recognition of their relationship could not, under any reasonable interpretation of Article 8 taken in conjunction with Article 14 of the Convention, have made their relationships any less worthy of being treated as constituting a family unit within the particular context of immigration proceedings. The judgment does nothing more than require Italy to take due account of the existence of a serious and stable same-sex relationship in this specific context. The Court thus firmly rejects the argument that States can legitimately invoke the concept of the “traditional family” as a basis for denying a request for a residence permit made by a foreign national who is in a relationship with a citizen of the same sex.

4. In conclusion, the fundamental principle of human dignity, which is one of the cornerstones of Article 8 of the Convention, guarantees to each and every individual the right to found a family with whomever they choose, irrespective of their sexual identity or sexual orientation.

I concur in the judgment.

PARTLY DISSENTING OPINION OF JUDGE SICILIANOS

1. Much to my regret, I cannot agree with the majority that there has been a violation of Article 8 taken together with Article 14 of the Convention. I do not think that the present case amounts to a case of discrimination prohibited by the Convention (I). In my view, we are rather dealing here with a possible violation of the right to respect for family life guaranteed by Article 8 of the Convention taken alone (II).

I. The present case does not involve discrimination

A. Admissibility

2. It should be observed, at the outset, that the judgment correctly establishes that “the facts of the case, as established between 18 October 2004 and July 2009, fall within the scope of Article 8 of the Convention and that Article 14, taken together with Article 8, is applicable” (see paragraph 63). In other words, I readily concur with the finding that Article 14 of the Convention taken together with Article 8 is applicable.

B. Merits

1. The two facets of the principle of non-discrimination

3. With regard to the merits of this question, the judgment reiterates the two facets of the principle of non-discrimination as established in the Court’s case-law. We know that an issue may arise under Article 14 where there is a) a difference in treatment of persons in relevantly similar situations or b) identical treatment of persons whose situations are different (see paragraph 81 of the judgment and the references cited therein). When applying those principles to the instant case, the judgment considers the case under the second aspect of the principle of non-discrimination, established for the first time in the judgment *Thlimmenos v. Greece* ([GC], no. 34369/97, § 44, ECHR 2000-IV) and reiterated several times since then.

2. According to the majority, the situation of unmarried homosexual couples is not comparable to that of unmarried heterosexual couples

4. The judgment states in paragraph 82 that “it does not appear that the applicants, an unmarried homosexual couple, were treated differently from an unmarried heterosexual couple ... the non-eligibility of unmarried partners for the residence permit in question concerned both same-sex couples and opposite-sex couples”. However, the judgment adds that the applicants’ situation was different from that of an unmarried heterosexual couple because the latter had the option of marrying – and

thus “regularising” their relationship – whereas a homosexual couple did not. The majority also point out that during the period in question (namely, between 2004 and 2009) neither heterosexual couples nor homosexual couples could enter into a civil partnership or a registered partnership (see paragraph 83 of the judgment). Moreover, the applicants, once they had moved to the Netherlands – a State which allows homosexual marriage – decided to marry. Indeed the marriage took place on 8 May 2010. In the circumstances the majority consider that the applicants’ situation “cannot be compared to that of a heterosexual couple who, for personal reasons, do not wish to contract a marriage or a civil partnership” (see paragraph 84 of the judgment).

3. The position of the majority is tantamount to accepting that the situation of unmarried homosexual couples is comparable to that of married heterosexual couples

5. Before attempting to comment on this issue it is important to note the applicants’ argument that “a consensus was emerging in democratic societies, which ... was against a government being able to reserve a certain right or advantage to married couples while denying it to same-sex couples on the pretext that the persons in question were not married” (see paragraph 71 of the judgment). In other words, in the applicants’ view, the situation of unmarried homosexual couples should be compared to that of (heterosexual or homosexual) married couples. Any difference of treatment between those two categories – unmarried homosexual couples and married couples – is allegedly discriminatory.

6. Whilst formulated differently, the majority’s approach is in substance the same as that of the applicants. To say that the situation of unmarried homosexual couples is not comparable to that of unmarried heterosexual couples on the grounds that the latter can marry is tantamount to accepting *a contrario* that, within the meaning of Article 14 of the Convention, the situation of unmarried homosexual couples is comparable to that of married couples. This perception appears to be corroborated by paragraph 91 of the judgment, where it is said that “[t]he Court must ... determine whether, in the context of the proceedings regarding an application for a residence permit for family reasons, the fact that the applicants were not treated differently from heterosexual couples who had not regularised their situation pursued a legitimate aim”. Given that, in Italy, the only means whereby heterosexual couples can “regularise their situation” is by marrying, the above-cited passage leads to the (re)affirmation that, in the proceedings in question, unmarried homosexual couples, such as the applicants, should be compared not with unmarried heterosexual couples but with married heterosexual couples.

7. In my view, a question arises as to whether this approach is consistent with the case-law hitherto established by the Court or whether it is a

departure from the precedent followed up until now both by the Chambers and the Grand Chamber.

4. Is this approach consistent with the Court’s case-law?

a) The situation of married couples is not comparable to that of unmarried couples

8. In order to attempt to answer this question, I will first reiterate the terms used by the Grand Chamber in *X and Others v. Austria* ([GC], no. 19010/07, §§ 105-10, ECHR 2013):

“(a) Comparison with a married couple in which one spouse wishes to adopt the other spouse’s child

105. The first issue to be addressed is whether the applicants, namely the first and third applicants, who are living together as a same-sex couple, and the third applicant’s son, are in a situation which is relevantly similar to that of a married different-sex couple in which one spouse wishes to adopt the other spouse’s biological child.

106. The Court has recently answered this question in the negative in *Gas and Dubois*. The Court finds it appropriate to repeat and confirm the relevant considerations here. It reiterates in the first place that Article 12 of the Convention does not impose an obligation on the Contracting States to grant same-sex couples access to marriage (see *Schalk and Kopf*, cited above, §§ 54-64). Nor can a right to same-sex marriage be derived from Article 14 taken in conjunction with Article 8 (ibid., § 101). Where a State chooses to provide same-sex couples with an alternative means of legal recognition, it enjoys a certain margin of appreciation as regards the exact status conferred (ibid., § 108; see also *Gas and Dubois*, cited above, § 66). Furthermore, the Court has repeatedly held that marriage confers a special status on those who enter into it. The exercise of the right to marry is protected by Article 12 of the Convention and gives rise to social, personal and legal consequences (see, among other authorities, *Gas and Dubois*, cited above, § 68, and *Burden*, cited above, § 63).

107. Austrian law indeed creates a special regime for married couples in respect of adoption. Under Article 179 § 2 of the Civil Code, joint adoption is open to married couples only. In turn, married couples may, as a rule, only adopt jointly. Second-parent adoption of the other spouse’s child is provided for in the above-mentioned Article as an exception to that rule.

108. The Government, relying on the Court’s *Gas and Dubois* judgment, argued that the applicants were not in a relevantly similar situation to a married couple. For their part, the applicants stressed that they did not wish to assert a right that was reserved to married couples. The Court does not see any reason to deviate from its case-law in this regard.

109. In the light of these considerations, the Court concludes that the first and third applicants are not in a relevantly similar situation to a married couple in respect of second-parent adoption.

110. Consequently, there has been no violation of Article 14 of the Convention taken in conjunction with Article 8 when the applicants’ situation is compared with that of a married couple in which one spouse wishes to adopt the other spouse’s child”.

9. It thus appears that the Grand Chamber distinguishes clearly – and unanimously (see point 2 of the operative provisions of *X and Others v. Austria*, cited above) – between the situation of a married couple and that of an unmarried homosexual couple. It may of course be argued that the distinction in question is valid only for that particular case, namely, the question of second-parent adoption. That is not so, however. As also appears in the cases referred to in the passage cited above, that distinction reflects a consistent interpretation in the Court’s case-law. The Court has repeatedly found, in cases concerning a wide range of personal, economic or social matters, that the institution of marriage creates a special regime in favour of the persons concerned. Marriage is characterised by a corpus of rights and obligations that differentiate it markedly from the situation of a stable couple who are cohabiting without being married. That established principle in the Court’s case-law was also summarised by the Grand Chamber in a case concerning welfare benefits, which raised a very different question from that of second-parent adoption. Thus, in the case of *Şerife Yiğit v. Turkey* [GC], no. 3976/05, 2 November 2010), the Court observed as follows:

“72. With regard to Article 12 of the Convention, the Court has already ruled that marriage is widely accepted as conferring a particular status and particular rights on those who enter it (see *Burden*, cited above, § 63, and *Shackell v. the United Kingdom* (dec.), no. [45851/99](#), 27 April 2000). The protection of marriage constitutes, in principle, an important and legitimate reason which may justify a difference in treatment between married and unmarried couples (see *Quintana Zapata v. Spain*, Commission decision of 4 March 1998, Decisions and Reports (DR) 92, p. 139). Marriage is characterised by a corpus of rights and obligations that differentiate it markedly from the situation of a man and woman who cohabit (see *Nylund v. Finland* (dec.), no. [27110/95](#), ECHR 1999-VI, and *Lindsay v. the United Kingdom* (dec.), no. [11089/84](#), 11 November 1986). Thus, States have a certain margin of appreciation to treat differently married and unmarried couples, particularly in matters falling within the realm of social and fiscal policy such as taxation, pensions and social security (see, *mutatis mutandis*, *Burden*, cited above, § 65).”

See also the judgment *Korosidou v. Greece* (no. 9957/08, 10 February 2011).

10. It would therefore appear that there is clear case-law authority, recurring like a leitmotiv, on cases covering a wide range of issues, whether this be under Article 8 or under Article 1 of Protocol No. 1 taken in conjunction with Article 14 of the Convention, and which consists in distinguishing between married couples, be they homosexual or heterosexual, and unmarried couples, be they homosexual or heterosexual. Accordingly, to accept, albeit implicitly or indirectly, that an unmarried stable couple is in a comparable situation to that of a married couple does not appear to be consistent with the Court’s case-law.

b) The situation of unmarried homosexual couples is comparable to that of unmarried heterosexual couples

11. It now remains to be determined whether what is explicitly stated by the majority in the present judgment – namely, that the applicants’ situation is *not* comparable to that of an unmarried stable heterosexual couple – is consistent with the Court’s case-law. In that connection reference should again be made to the above-cited judgment *X and Others v. Austria*. In that judgment the Grand Chamber adopted a position which appears to be completely at odds with the one adopted by the Court in the present judgment since it compares the situation of the applicants – an unmarried stable homosexual couple – to that of an unmarried stable heterosexual couple (see *X and Others v. Austria*, cited above, §§ 111-12):

“β) Comparison with an unmarried different-sex couple in which one partner wishes to adopt the other partner’s child

111. The Court notes that the applicants’ submissions concentrated on the comparison with an unmarried different-sex couple. They pointed out that under Austrian law second-parent adoption was open not only to married couples, but also to unmarried heterosexual couples, while it was legally impossible for same-sex couples.

– Relevantly similar situation

112. The Court observes that, in contrast to the comparison with a married couple, it has not been argued that a special legal status exists which would distinguish an unmarried heterosexual couple from a same-sex couple. Indeed, the Government did not dispute that the situations were comparable, conceding that, in personal terms, same-sex couples could in principle be as suitable or unsuitable for adoption, including second-parent adoption, as different-sex couples. The Court accepts that the applicants, who wished to create a legal relationship between the first and second applicants, were in a relevantly similar situation to a different-sex couple in which one partner wished to adopt the other partner’s child.”

12. Once again, it could be argued that these assertions concern only the matter of second-parent adoption and that a comparison between unmarried homosexual and heterosexual couples is not relevant in other contexts. I do not find such an approach convincing, however, for a number of reasons. The first is on grounds of pure logic. Both assertions contained in the two above-mentioned passages of the judgment *X and Others v. Austria* cited above are two sides of the same coin. To say, firstly, that the situation of married and unmarried couples is incomparable, and then to affirm that unmarried stable homosexual or heterosexual couples are in a similar situation seems perfectly consistent. Each assertion is the logical sequitur of the other and they are complementary. This perception is corroborated by another important and more recent judgment of the Grand Chamber, *Vallianatos and Others v. Greece* ([GC], nos. 29381/09 and 32684/09, ECHR 2013 (extracts)), concerning “civil unions” which, under Greek law in force at the time (and since amended), were reserved to heterosexual couples. Examining the dispute in its context, the Court again stated that the

situation of unmarried heterosexual couples was comparable to that of unmarried homosexual couples (see *Vallianatos and Others v. Greece*, cited above, § 72):

“a) Comparison of the applicants’ situation with that of different-sex couples and existence of a difference in treatment

78. The first question to be addressed by the Court is whether the applicants’ situation is comparable to that of different-sex couples wishing to enter into a civil union under Law no. 3719/2008. The Court reiterates that same-sex couples are just as capable as different-sex couples of entering into stable committed relationships (see *Schalk and Kopf*, cited above, § 99). It therefore considers that the applicants are in a comparable situation to different-sex couples as regards their need for legal recognition and protection of their relationship (ibid.)”

That position is the crux of the Court’s entire reasoning in that case.

13. Moreover, the arguments used by the majority to support their assertion – unprecedented in the Court’s case-law – that the situation of a stable homosexual couple is not comparable to that of a stable heterosexual couple appear unconvincing. The first argument consists in stating that the two situations are different from the point of view of obtaining a residence permit in Italy because heterosexual couples are able to marry and therefore “regularise” their situation under the relevant provisions of Italian law, whereas homosexual couples are not (see paragraph 83 of the judgment). That argument could be applicable *mutatis mutandis* in a number of other cases, thus seriously undermining, as we have seen, the special status of marriage under the Convention and the Court’s case-law (see above). Moreover, the argument in question is tantamount to asserting in substance that a heterosexual couple of which one member wishes to obtain a residence permit is obliged to marry *nolens volens*, which is not the case of a homosexual couple. If we accept that argument, however, it is likely that in the future an application will be brought before the Court by a heterosexual couple relying on that difference of treatment to support their submission that they have suffered discrimination. We therefore risk losing our way amongst syllogistic meanderings that lead to somewhat complex results that are difficult to follow.

14. The majority’s second argument, seeking to differentiate between unmarried heterosexual and homosexual couples, appears at first sight to be specific to the present case. They maintain that the applicants proved their intention to marry because they finally did so in the Netherlands and therefore their situation “cannot be compared to that of a heterosexual couple who, for personal reasons, do not wish to contract a marriage or a civil partnership” (see paragraph 84). It should be borne in mind, though, that the applicants married on 8 May 2010, that is, after the period under examination, when they were no longer in Italy. Can we therefore deduce from that event, which the national authorities could not even foresee, a

legal consequence of importance regarding the comparability of the resulting legal situations and obligations for a State party? Is it wise to rely on individual intentions to reach general conclusions?

5. Conclusion

15. The majority’s approach regarding comparable situations does not appear to me to be consistent with the Court’s case-law. More specifically, I do not subscribe to the majority’s view that the applicants’ situation was not comparable to that of an unmarried stable heterosexual couple. Consequently, it is not necessary to address the part of the judgment concerning the question whether or not there was objective and reasonable justification (see paragraphs 87 et seq. of the judgment). As the two above-mentioned situations are comparable, the fact that they were treated identically does not amount to discrimination under Article 14 taken in conjunction with Article 8 of the Convention.

II. The present case may raise an issue regarding Article 8 taken alone

16. We know that, since the famous case of *Marckx v. Belgium* (13 June 1979, Series A no. 31), the Court has gradually extended the concept of “family life”, explicitly defined as an autonomous concept (see L.-A. Sicilianos, “La ‘vie familiale’ en tant que notion autonome au regard de la CEDH”, in Casadevall, J., Raimondi, G. et al. (eds), *Mélanges en l’honneur de Dean Spielmann*, Oisterwijk: Wolf Legal Publishers, 2015, pp. 595-602), to include among others – beyond the traditional family – certain forms of *de facto* relationships between opposite-sex or same-sex couples (see, *inter alia*, *Schalk and Kopf v. Austria*, no. 30141/04, § 91 et seq., ECHR 2010, and *Vallianatos and Others v. Greece*, cited above, § 73).

17. On the other hand, as reiterated in the present judgment, “a State is entitled, as a matter of well-established international law and subject to its treaty obligations, to control the entry of aliens into its territory and their residence there” (see paragraph 55 of the judgment). Whilst it is true that the Convention does not guarantee the right of a foreign national to enter or to reside in a particular country (see, among other authorities, *Nunez v. Norway*, no. 55597/09, § 66, 28 June 2011, and *Jeunesse v. the Netherlands* [GC], no. 12738/10, § 100, 3 October 2014), the Court has acknowledged that, in certain circumstances, the removal of non-nationals may result in a violation of Article 8 of the Convention, and has provided a set of criteria in that regard (see, *inter alia*, *Üner v. the Netherlands* [GC], no. 46410/99, §§ 54-60, ECHR 2006-XII). Those criteria were recapitulated and applied recently in the judgment *Kolonja v. Greece* (no. 49441/12, § 48 et seq., 19 May 2016). It is noteworthy that the Court’s case-law on this subject was duly taken into account in the work of the International Law Commission (ILC) codifying the general international law on expulsion (see the draft

articles of the ILC on the expulsion of aliens, adopted at the 66th session of the ILC (2014), *Report of the ILC*, UN doc. A/69/10, and in particular Article 18, entitled “Obligation to respect the right to family life”, *ibid.*, p. 46 and the related commentary).

18. The question which arises at this stage is whether the logic underlying that case-law can be transposed *mutatis mutandis* to the sphere of family reunification. Having regard to the materials in the present case, it will be noted that ECSOL, as a third-party intervener, submitted a comparative-law survey of the possibility for same-gender partners to obtain a residence permit in the host country (see paragraph 79 of the judgment), showing that there was a significant trend in that direction. That survey also shows that at least 24 States do not discriminate in any way on grounds of sexual orientation when granting residence permits (*ibid.*). The applicants and the other third-party interveners also submitted comparative-law material supporting that conclusion (see paragraphs 72 and 75 *et seq.* of the judgment). It is also noteworthy that Directive 2004/38/EC ... gives a wide definition of the concept of “family member”, encompassing, in addition to spouses, the “partner” of EU citizens moving freely within the Union, with no distinction based on sexual orientation. A resolution of the European Parliament of 2 April 2009 ... recommended an extension of the scope of application of the directive in question, following, in particular, the judgments of the CJEU in the cases of *Metock*, *Jipa* and *Huber*. Similarly, the PACE Recommendation 1686 (2004) on human mobility and the right to family reunion ... recommends, among other things, that the Committee of Ministers “apply, where possible and appropriate, a broad interpretation of the concept of family and include in particular in that definition members of the natural family, non-married partners, including same-sex partners ...”. All those factors give force to the idea that there is an increasingly significant trend towards allowing family reunification and granting a residence permit not only to spouses but also to partners, with no distinction based on sexual orientation. Those concerned still have to show that they are in a duly attested durable relationship.

19. Those factors have some bearing in the case. It would have been worth studying and analysing them further to enable the Court to determine whether the trend in question is sufficiently strong at the present time at the pan-European level. If this is so, and in accordance with the methodology followed by the Court, the existence of such a trend would limit the margin of appreciation of the States in this sphere and would raise the question of compliance with Article 8 taken alone.